COMPILATION

OF

COURT-MARTIAL ORDERS

1916-1937



VOL. 1

1916-1927

NAVY DEPARTMENT

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NAVY DEPARTMENT

COMPILATION OF
COURT-MARTIAL ORDERS

FOR THE YEARS

1916-1937

IN TWO VOLUMES



VOLUME ONE—1916-1927

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ABBREVIATIONS

"C. M. O." means "Court Martial Order," and the numbers following refer, first, to the serial number of the order, and second, to the year in which it was issued. For example, "C. M. O. 1—1916" means "Court Martial Order No. 1 of the year 1916."

COMPILATION OF COURT-MARTIAL ORDERS, 1916–1937

C. M. O. 1—1916

[P. 1] Ensign Lawrence K. Forde, United States Navy, was tried by general court martial December 7, 1915, on board the U. S. S. *North Carolina*, at the Naval Aeronautic Station, Pensacola, Fla., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Conduct unbecoming an officer and a gentleman (two specifications).

Charge II.—Disobedience of a lawful order of the Secretary of the Navy (one specification).

Charge III.—Drunkenness (one specification).

Charge IV.—Scandalous conduct tending to the destruction of good morals (three specifications).

He was acquitted of the following charge:

Charge V.—Falsehood (one specification).

Sentence

"The court, therefore, sentences him, Ensign Lawrence K. Forde, United States Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following recommendation to clemency signed by six of the seven members of the court was spread upon the record:

> "In consideration of the unfortunate marital difficulties of the accused in which he was only in part at fault and the probability that much of his misconduct was due to a mental condition brought about by those difficulties, we recommend Ensign Lawrence K. Forde, United States Navy, to the clemency of the revising power."

Action of Secretary of the Navy

The record in this case was referred to the Bureau of Navigation and returned with the recommendation that the proceedings, findings, and sentence in the foregoing case be approved.

In view of the serious nature of the offenses of which this officer has been found guilty, the department feels that he is unworthy of retention as a commissioned officer in the United States Navy. In accordance with the recommendation of the Bureau of Navigation, the proceedings, findings, and sentence in the foregoing case of Ensign Lawrence K. Forde, United States Navy, are approved.

[P. 2] Action of the President

In conformity with the provisions of article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record on January 7, 1916, was respectfully submitted to the President of the United States who, on January 11, 1916, confirmed the sentence of the court.

C. M. O. 2—1916

[P. 1] NONPAYMENT OF DEBTS: COMMISSIONED WARRANT OFFICER TRIED BY GENERAL COURT MARTIAL AND DISMISSED FOR FAILURE TO PAY DEBTS AFTER OFFICIALLY PROMISING TO PAY SAME.

Chief Gunner Thomas Smith, United States Navy, was tried by general court martial on January 24, 1916, at the navy yard, Boston, Mass., by order of the Secretary of the Navy, and found guilty of the following charge, the specifications of which were "proved by plea."

Charge.—Conduct unbecoming an officer and a gentleman (10 specifications alleging neglect and failure to pay debts admitted officially in writing to be just; neglect and failure to pay such debts after repeatedly promising officially in writing to do so).

SENTENCE

"The court, therefore, sentences him, Thomas Smith, Chief Gunner, United States Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency signed by four of the eight members of the court was spread upon the record:

> "In view of his length of service, we recommend Chief Gunner Thomas Smith, United States Navy, to the clemency of the revising power."

ACTION OF SECRETARY OF THE NAVY

In view of the fact that the past record of this officer shows numerous similar offenses and the specifications to which he pleaded "guilty" set forth the fact that he has repeatedly violated his written promises concerning his just indebtedness, the Department concurs in the recommendation of the Bureau of Navigation, and accordingly the proceedings, findings, and sentence in the foregoing case of Chief Gunner Thomas Smith, United States Navy, are approved.

ACTION OF THE PRESIDENT

In conformity with the provisions of article 53, Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, who, on January 26, 1916, confirmed the sentence of the court.

C. M. O. 3—1916

[P. 6] CONFESSIONS: REASON BEHIND THE RULE AS TO ADMISSIBILITY.

George R. Macnamara, hospital apprentice, United States Navy, was tried by order of the commandant, United States naval station, Guam, on November 18, 1915, and found guilty of "Neglect of duty" and "Scandalous conduct tending to the destruction of good morals."

Macnamara was sentenced to be confined at hard labor for a period of 1 year and to be dishonorably discharged from the naval service, etc., but the period of confinement was reduced to 3 months by the convening authority.

In reviewing this case it is noted that the prosecution introduced a confession of the accused to the commanding officer of the naval hospital, said confession having been made in the presence of several witnesses at the time the offense was investigated.

The prosecution established the fact that this confession was voluntary, and subsequent examination of the witnesses by the counsel for the accused failed to establish that it was involuntary.

The counsel for the accused asked a witness the following question:

> "18. Q. Did you give the accused to understand at this time that he was at liberty to decline to answer?
> "A. No, sir" (Rec., p. 3).

The counsel for the accused thereupon addressed the court as follows:

> "I would like to move that testimony of this witness regarding statements made to him by the accused be struck out, as they were not voluntary admissions, and were made in reply to questions given by one in authority, and practically amounted to obedience to his authority, and the person propounding the questions did not warn the accused that he was at liberty not to answer the same" (Rec., p. 3).

The court very properly overruled this motion to strike out this testimony, since the Department's precedents establish beyond a question that a confession made under the above circumstances is admissible in evidence.

Forms of Procedure, 1910, page 138, states that "it must be clearly shown that the confession was voluntary, and anything that will tend to show that a confession was extorted by threats or promises, or by use of force, especially by one in authority, will destroy its value as evidence." (See also C. M. O. 224, 1902; 32, 1908, p. 2; 47, 1910, p. 6; 17, 1910, p. 4; 26, 1910, p. 9; 31, 1911, pp. 5–6; 5, 1913, p. 9; 10, 1915, p. 5; Index-Digest, 1914, p. 10.)

"The court is allowed to take testimony to ascertain the absolute conditions under which a confession was made in order to decide whether it was a voluntary act of the accused." (Forms of Procedure, 1910, p. 138. See also C. M. O. 5, 1913, p. 9.) That is, it is proper for the court to allow a preliminary examination of witnesses, before the contents of the confession are divulged, to decide whether or not the confession was voluntary and thus admissible (C. M. O. 10, 1915, p. 4). Where the facts shown by this preliminary examination [P. 7] are conflicting the question as to whether the confession was voluntary is to be determined by the court, whose decision in general will not be disturbed (C. M. O. 10, 1915, p. 5; Index-Digest, 1914, p. 10).

It is a rule of evidence that in order for a confession to be admissible it must have been voluntary. The phrase "voluntary" is so "indefinite that it is of little service in inself" (1 Greenleaf, p. 355, sec. 219).

The reason behind the doctrine "and the controlling inquiry is, whether the inducement held out to the prisoner was calculated to make his confession an *untrue one*" (1 Greenleaf, p. 354, sec. 219).

Rice on Evidence (vol. 3, p. 489) states that the "confessions of the prisoner are receivable in evidence, upon the presumption that a person will not make an *untrue* statement against his own interest."

The underlying principle is that the confession "shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is *not true*, and the supposed confession cannot be safely acted on" (1 Greenleaf, p. 354, sec. 219).

"The reason for excluding the confession is, to repeat, not that the law affirmatively presumes it to be *untrue*, but that its *truthfulness* is so uncertain as to render it unsafe for the jury. Therefore, as often said, the real reason in every case is, whether or not the confessing mind was influenced in a way to create doubt of the *truth* of the confession" (2 Bishop's New Crim. Proc., p. 1049).

"The doctrine in its essence and divested of its technicalities is that a defendant's confession is admissible in evidence against him if made freely and without hope of benefit to his cause; otherwise it is rejected, since its purpose may have been to secure such benefit rather than to disclose the *truth*" (2 Bishop's New Crim. Proc., p. 1043).

The fact that Macnamara confessed to his commanding officer who was investigating this case does not of itself throw doubt upon the truthfulness of his confession and thus render it inadmissible (C. M. O. 7, 1914, pp. 13–15; Index-Digest, 1914, p. 10). Nor does the fact that he was not warned that any statement he might make during such investigation present grounds for an objection to the introduction of his voluntary statements to his commanding officer as a confession (C. M. O. 12, 1904, p. 4; 31, 1911, p. 6; Index-Digest, 1914, p. 10; File 26262–2478, Sec. Navy, Jan. 31, 1916; G. C. M. Rec. No. 31605).

[C. M. O. 4—1916]

MISSING SHIP: SHOULD BE CHARGED UNDER "CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE" AND NOT "MISSING SHIP."

Charles Gilso, ordinary seaman, United States Navy, was tried by general court martial on January 7, 1916, on board the U. S. S. *Wyoming*, by order of the commander in chief, United States Atlantic Fleet, and found guilty of "Absence from station and duty without leave," and "Missing ship," the specifications of which were proved by plea.

[P. 8] Index-Digest, 1914, page 2, provides that it is proper to charge an accused with both "Absence from station and duty without leave" and "Conduct to the prejudice of good order and discipline," where the unauthorized absence was with the manifest intention of evading some particular duty (as coaling ship or a landing party) or of service on some particular ship (as by missing ship).

From this it will be seen that the accused in this case should have been charged with "Conduct to the prejudice of good order and discipline" rather than "Missing ship" (G. C. M. Rec. No. 31600).

COMPTROLLER OF THE TREASURY: REQUEST FOR RECONSIDERATION OF DECISIONS—POLICY OF DEPARTMENT.

It is not the policy of the Department to request the Comptroller of the Treasury to reconsider his decisions in individual cases unless such decisions tend to disturb the practice of the service, based on naval regulations or instructions issued pursuant to law (File 26254–1947, Sec. Navy, Jan. 19, 1916).

PAY: ENLISTED MAN ON BAIL.

An enlisted man of the naval service, released from the custody of the civil authorities on bail, who reports at his regular station for duty, is not to be deprived of his pay after so reporting simply because, due solely to the fact that he was on bail, no naval duty was assigned him (22 Comp. Dec. 374; see also File 9663–31).

C. M. O. 4—1916

[P. 1] 1. SETTING ASIDE: PROCEEDINGS, FINDINGS, AND SENTENCE ILLEGAL—SPECIFICATION FAILING TO ALLEGE AN OFFENSE.
2. CONVENING AUTHORITY: ACTION OF, IN REVISION.
3. CHARGES AND SPECIFICATIONS: MIDDLE NAMES MAY BE INDICATED BY INITIAL LETTERS.

Lt. (j. g.) Joseph S. Hulings, United States Navy, was tried by general court martial on November 18, 1915, on board the U. S. S. *Maryland* at San Francisco, Calif., by order of the Commander in Chief, United States Pacific Fleet, upon the following charge:

Charge.—Fraud, in violation of article 14 of the Articles for the Government of the Navy.

Specification.—In that Joseph Simpson Hulings, a lieutenant of the junior grade in the United States Navy, attached to and serving on board the U. S. S. *Cleveland*, then at the Navy Yard, Mare Island, Vallejo, Calif., did on or about the first day of October 1915, address to and issue upon Passed Assistant Paymaster Spencer E. Dickinson, United States Navy, attached to and serving on board the said ship *Cleveland* as pay officer, an order or draft payable to one F. L. Richmond of San Francisco, Calif., in words and figures substantially as follows, to wit:

"SAN FRANCISCO, CALIFORNIA, *October 1, 1915.*

"From: Lt. J. S. Hulings,
"To: Paymaster S. E. Dickinson, U. S. S. *Cleveland.*

"Please forward to Mr. F. L. Richmond, No. 434 Phelan Building, San Francisco, a salary pay check for ninety (90) dollars immediately.

J. S. HULINGS."

[C. M. O. 4—1916]

he, the said Joseph Simpson Hulings, a lieutenant of the junior grade in the United States Navy, well knowing that said order or draft was false and fraudulent and in violation of article 14, of the Articles for the Government of the Navy, to wit: "Fine and imprisonment, or such other punishment as a court martial may adjudge, shall be inflicted upon any person in the naval service of the United States—who presents or causes to be presented to any person in the civil, military, or naval service thereof, for approval or payment, any claim against the United States or [P. 2] any officer thereof, knowing such claim to be false or fraudulent"; for upon the date of issue of said order or draft he was in debt to the Government of the United States to the extent of $220.80; said amount being remainder of advance pay drawn in accordance with article 4458, paragraph 1, of the United States Navy Regulations, to wit: "All officers of the Navy and Marine Corps, when ordered to duty at sea, or to shore duty outside the continental limits of the United States, or to Alaska, shall be entitled to an advance of not over 3 months' pay, provided they are not in debt to the Government for an advance previously paid them. All such officers returning from duty at sea, or on shore outside the continental limits of the United States, or in Alaska, shall be entitled, at the time of detachment, to an advance of not over 2 months' pay at the discretion of the senior officer present, afloat." And furthermore, that he, the said Joseph Simpson Hulings, a lieutenant of the junior grade in the United States Navy, well knew that said order or draft was irregular and unlawful, and not in accordance with United States Navy Regulations.

Findings

The court found the specification "proved in part" and the accused "Guilty in a less degree than charged, guilty of 'Irregularity and carelessness in regard to discharge of pecuniary obligations.'"

Sentence

"The court, therefore, sentences him, Lt. (j. g.) Joseph Simpson Hulings, United States Navy, to lose two (2) numbers in his grade."

Returned for Revision

The convening authority, the Commander in Chief, United States Pacific Fleet, on November 23, 1915, returned the record of proceedings of the general court martial in this case with the direction that the court reconvene for the purpose of reconsidering its findings and sentence.

Findings in Revision, Former Sentence Adhered to

The court in revision revoked its former findings in this case and found the specifications "proved in part" and that the accused, Lt. (j. g.) Joseph Simpson Hulings, [P. 3] United States Navy, is of the charge "Guilty in a less degree than charged, guilty of 'Conduct unbecoming an officer and a gentleman.'"

The court decided respectfully to adhere to its former sentence.

Action of Convening Authority

The convening authority, the Commander in Chief, United States Pacific Fleet, on December 31, 1915, approved the proceedings in revision in this case, but disapproved the finding and sentence in revision, for the reasons that the sentence was wholly inadequate for the offense of "Conduct unbecoming an officer and a gentleman," and directed that Lt. (j. g.) Joseph S. Hulings, United States Navy, be released from arrest and restored to duty.

Action of Secretary of the Navy

(1) The Department, on February 1, 1916, pronounced the proceedings, findings, and sentence in this case illegal, and set aside the same with the following remarks:

The specification in this case is not in due form and technically correct, because it quotes therein both a public statute and a Navy regulation. Forms

[C. M. O. 4—1916]

of Procedure, 1910 (p. 137), provides that courts take judicial notice of "public statutes" and "the Navy Regulations," and that such "are not required either to be charged or proved." Also in the same publication (p. 83) it is provided that "in drawing up the charges and specifications, all extraneous matter is to be carefuly avoided." The specification in this case is not in accordance with the above provisions of Forms of Procedure and is also contrary to the Navy Regulations, 1913, R–712 (3).

Aside from the irregular form of the specification, it does not allege an offense supporting the charge under which it appears nor any other charge cognizable by court martial.

There are two broad classes of fraud, viz, fraud against the United States and fraud not against the United States. The first class is punishable under article 14, Articles for the Government of the Navy, and the other under article 8, Articles for the Government of the Navy.

The accused certainly was not guilty of any fraud against the United States. Having no money to his credit, the pay officer could not have honored Hulings' draft without himself being guilty of embezzlement and being required to reimburse the Government under his bond. Furthermore, even had the accused money on the books, the pay officer would not have been authorized to pay such money to another on Hulings' order, as the law provides that assignment of claims against the United States shall be void, except under specified conditions (see sec. 3477, R. S.), and in certain cases of which [P. 4] this is not one. The "false" and "fraudulent" claims against the United States referred to in article 14, Articles for the Government of the Navy, evidently contemplate claims false or fraudulent in matters of fact and not such as on their face are null and void under the law.

Furthermore, the specification in this case does not aver that the accused actually presented or caused to be presented the above-mentioned order or draft to the Navy pay officer. (See C. M. O. 160, 1901; 15, 1902.)

If an offense was committed by the accused in this case, it must therefore have been in violation of article 8, Articles for the Government of the Navy; that is, fraud against a private person. To constitute such fraud, however, it would be necessary in the present case for the specification to have shown affirmatively that the accused had (1) made a false representation of some existing or past fact to the person concerned (one F. L. Richmond, of San Francisco), with intent to defraud; (2) that the accused knew such representation to be false; (3) that said Richmond had believed and relied upon such false representation; and (4) that said Richmond had actually been defrauded by, and parted with something of value in consequence of, such false representation.

If the accused had actually not defrauded Richmond, the specification might have supported a charge of attempt to commit fraud, provided it averred that the accused had made the necessary false representation with intent to defraud.

In the present case, however, the specification merely alleges that the accused issued an order or draft on the pay officer, which order appears on its face, as set forth in the specification, to be null and void under the law. It does not allege that the accused did this with any intent to defraud, that he made any false representations as to matters of fact, that he received anything of value, nor that he deceived or actually defrauded the aforesaid Richmond or any other person.

The specification, therefore, does not in any aspect support the charge under which it appears, nor any other charge cognizable by court martial.

It is proper to add that the uncontradicted evidence in this case established that the accused made no attempt to deceive or defraud anyone. That when he applied to Mr. Richmond for a loan he was asked by the latter to sign an order on the pay officer for the amount in question. That the accused informed Richmond that such an order would be wholly without value, and that said Richmond was already aware of the fact, and would not have believed the accused had he represented that the order would be good; but that the said Richmond wanted the order or draft merely for the purpose of using same, if necessary, as a means of bringing the matter to the attention of the naval authorities if Hulings should default in payment. [P. 5] Incidentally, the evidence shows that Hulings actually repaid the loan, after a brief delay, which was satisfactorily explained.

[C. M. O. 5—1916]

REMARKS

(2) By the wording of the action of the convening authority he approved only the proceedings *in revision*, and disapproved the finding and sentence *in revision*. The words "in revision" should be omitted, thus making the action cover the whole of the proceedings, both original and in revision. The appropriate action in this case would read: "The proceedings of the general court martial in the foregoing case of Lt. (j. g.) Joseph S. Hulings, United States Navy, are approved; the findings and sentence are disapproved for the following reasons: * * *. He will be released from arrest and restored to duty" (Forms of Procedure, 1910, p. 52; C. M. O. 23, 1910, p. 3).

(3) It was noted that the middle name of the accused was spelled in full in the charges and specifications. Christian names, other than the first, may be indicated by initial letters (Navy Regulations, 1913, R–712 (5); Forms of Procedure, 1910, p. 83; Index-Digest, 1914, pp. 3, 28; C. M. O. 36, 1914, 6, 7).

C. M. O. 5—1916

[P. 5] DEPOSITIONS: PARTY SECURING MAY DECLINE TO INTRODUCE AS EVIDENCE.

Nolen B. Robinson, ordinary seaman, United States Navy, was tried by general court martial, at the navy yard, Mare Island, Calif., by order of the Secretary of the Navy on the charges of "Theft," "Breaking arrest," and "Conduct to the prejudice of good order and discipline." The court acquitted the accused of the first charge and found him guilty of the remaining two.

At the request of the accused the Department had directed that the deposition of a certain enlisted man be taken. After this deposition was taken the accused discovered that its contents were against his interests and at the trial declined to introduce it in evidence.

Thereupon the judge advocate attempted to introduce the deposition in evidence and upon objection being made by the accused the court sustained the objection.

The Department held that the action of the court was proper. The law gives an accused the right to cross-examine a witness testifying against him and of this right he should not be deprived. If the [P. 6] judge advocate desired the testimony of the witness in question to be introduced for the prosecution, the proper procedure would have been for him to secure an entirely new deposition, in which case the accused would prepare the cross-interrogatories instead of the judge advocate.

In cases like the above where the party taking the deposition has been taken by surprise, the court should allow the opposite party, if he desires, time to procure another deposition from the deponent (File 26251–11382, Sec. Navy, Feb. 25, 1916; G. C. M. Rec. No. 31728).

SENTENCE: "RESTRICTION TO THE LIMITS OF THE SHIP"—SUMMARY COURT MARTIAL.

Harry Muller, fireman first class, United States Navy, was tried by summary court martial on board the U. S. S. *Sonoma* and sentenced among other things "to be restricted to the limits of the ship for a period of thirty (30) days."

In view of the fact that "restriction to the limits of the ship" is not one of the punishments which a summary court martial is authorized to adjudge, that part of the sentence involving restriction was set aside by the Department. (See A. G. N. 30; C. M. O. 21, 1910, p. 17; 1, 1911, p. 3; 33, 1914, pp. 4–6; Index-Digest, 1914, p. 38; File 26287–3315, Sec. Navy, Feb. 15, 1916.)

SUMMARY COURT MARTIAL: MULTIPLICITY OF TRIALS.

The Department noted that John E. Glasson, quartermaster second class, United States Navy, was tried by summary court martial three separate and distinct times on the same date for offenses which might have been disposed of at one trial. Upon a careful review of these records, no irregularity was

[C. M. O. 6—1916]

found which would invalidate the proceedings. One trial should have been held, the accused having three specifications preferred against him as is provided for in Forms of Procedure, 1910 (p. 156), thereby saving the time of the accused and the members of the court and avoiding the clerical work involved in preparing a multiplicity of records (File 26287-3303, J. A. G., Feb. 12, 1916).

[P. 7] ENLISTMENT: CONVICTS SHOULD NOT BE ENLISTED—ENLISTED MEN CONVICTED BY CIVIL COURTS SHOULD NOT BE RETAINED IN NAVAL SERVICE.

It is a long-established policy of the Navy not to enlist men who have been convicted by civil courts. For similar reasons the Department invariably refuses to retain in the naval service enlisted men who are convicted by civil courts of offenses which render them unfit for the service. (See C. M. O. 42, 1915, p. 6; 35, 1915, p. 8; File 26524-222: 3, Sec. Navy, Feb. 9, 1916.)

OATHS: RECRUITING OFFICERS, BY—TO PERSONS WHO DESIRE TO MAKE AFFIDAVITS AS TO DATES AND PLACES OF BIRTH OF APPLICANTS.

The act of March 3, 1901 (31 Stat. 1086), Navy Regulations, 1913, R–1536 (1), provides: "That judge advocates of naval general courts martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy and the adjutant and inspector, assistant adjutant and inspector, commanding officers, and recruiting officers of the Marine Corps, be, and the same are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration."

In view of the provisions of Navy Regulations, 1913, R–1536, and the act above-quoted it is held that the administering of an oath by a recruiting officer of the Navy "to a person not in the naval service who desires to make an affidavit as to the date and place of birth of an applicant for enlistment in the United States Navy," is authorized under the clause "and for other purposes of naval administration." (See File 7751–03, J. A. G., Sept. 9, 1903; 19037–38, J. A. G., Sept. 25, 1913; 19037–45, J. A. G., May 26, 1914; File 26806–138, J. A. G., Feb. 1, 1916.)

C. M. O. 6—1916

[P. 1] 1. REVISION: SENTENCE SHOULD BE IN HANDWRITING OF JUDGE ADVOCATE, EVEN THOUGH FORMER SENTENCE ADHERED TO.

2. SENTENCE: INADEQUATE—APPROVED ONLY THAT ACCUSED MIGHT NOT WHOLLY ESCAPE PUNISHMENT.

3. COURT: PRESIDENT AND MEMBERS INFORMED BY LETTER THAT SENTENCE WAS INADEQUATE.

4. RECORD: LETTER TRANSMITTING COPY OF CHARGES AND SPECIFICATIONS TO COMMANDING OFFICER FOR DELIVERY TO ACCUSED, NOT TO BE READ IN COURT OR APPENDED TO RECORD.

5. RECORD: EXHIBITS SHOULD BE COMPLETED BEFORE BEING APPENDED TO RECORD.

6. FINDING: JUDGE ADVOCATE SHALL BE CALLED BEFORE THE COURT TO RECORD ITS FINDINGS BEFORE DELIBERATING UPON THE SENTENCE.

7. FINDING: ALTERATIONS—FINDING SHALL BE FREE FROM ALL ALTERATIONS.

8. SENTENCE: ALTERATIONS—SENTENCE SHALL BE FREE FROM ALL ALTERATIONS.

9. SENTENCE: PHRASEOLOGY OUTLINED IN FORMS OF PROCEDURE SHOULD BE FOLLOWED.

10. RECORD OF PROCEEDINGS: MEMBERS AND JUDGE ADVOCATE ARE RESPONSIBLE FOR ERRORS IN.

11. CONVENING AUTHORITY: ACTION OF, IN REVISION—PROPER PHRASEOLOGY.

[C. M. O. 6—1916]

Pay Clerk Thomas J. Bolan, United States Navy, was tried by general court martial January 26, 1916, on board the U. S. S. *Delaware*, at sea, by order of the Commander in Chief, United States Atlantic Fleet, and found guilty of the following charge, the specification of which was "proved by plea."

Charge.—Drunkenness on duty (one specification).

SENTENCE

"The court does therefore sentence him, the said Pay Clerk Thomas J. Bolan, U. S. Navy, to lose twenty-five dollars ($25) per month of his pay for a period of six (6) months."

RETURNED FOR REVISION

The convening authority on February 11, 1916, returned the record of proceedings to the general court martial in this case, with the direction that the court reconvene for the purpose of correcting clerical errors in the record and reconsidering the sentence since in his opinion the sentence was inadequate. The convening authority stated in part: "The accused pleaded guilty to the offense of 'Drunkenness on duty' and offered no evidence in extenuation thereof. The convening authority is of the opinion, under the circumstances, that the sentence is insufficient."

[P. 2] FORMER SENTENCE ADHERED TO

The court in revision complied with the directions of the convening authority with regard to correction of clerical errors but "decided respectfully to adhere to its former sentence."

ACTION OF CONVENING AUTHORITY

The convening authority, on February 16, 1916, placed the following action on the record of proceedings:

(1) "It is noted in the record of proceedings in revision of the general court martial in the foregoing case of Pay Clerk Thomas J. Bolan, United States Navy, that the record of the action of the court in adhering to its former sentence is typewritten. This should have been in the handwriting of the judge advocate (Forms of Procedure, 1910, p. 51, changes dated July 10, 1914; see also Index-Digest, 1914, pp. 34, 38).

"It is also noted that the court did not follow the procedure prescribed in articles 804 (3) and 809, Navy Regulations, 1913, in that the judge advocate was not recalled to record the findings separately. (See also Index-Digest, 1914, pp. 20, 26.)

"These errors of procedure, while irregular, do not invalidate the sentence.

(2) "Subject to these remarks, the proceedings, proceedings in revision, and the findings are approved. The sentence is considered to be inadequate, but in order that the accused may not entirely escape punishment, it is approved. Pay Clerk Bolan will be released from arrest and restored to duty." (See Index-Digest, 1914, p. 11; C. M. O. 14, 1915; 17, 1915; 43, 1915.)

RECOMMENDATION OF CHIEF OF BUREAU OF NAVIGATION

The Chief of the Bureau of Navigation placed on the record the following indorsement:

"Returned. This Bureau concurs in the opinion of the convening authority and the Judge Advocate General relative to the inadequacy of the sentence, and recommends that the president and members of the court be informed that their action in this case has resulted in a miscarriage of justice."

ACTION OF SECRETARY OF THE NAVY

(3) The Secretary of the Navy concurred in the opinion of the convening authority relative to the inadequacy of the sentence adjudged in this case, and in accordance with the recommendation of the Bureau of Navigation so informed the president and members of the court by letter.

[C. M. O. 6—1916]

[P. 3] Remarks

The convening authority in returning the record for revision called the attention of the court to the following irregularities:

(4) The letter from the convening authority to the commanding officer of the accused, transmitting to him for delivery to the accused a copy of the charges and specifications was appended to the record marked "B," and had been read to the court. This letter has no place in the record, should not be read to the court, and should not even come into the possession of the judge advocate (Forms of Procedure, 1910, p. 56; Index-Digest, 1914, pp. 27, 33). The letter of transmittal (transmitting the charges and specifications to the judge advocate) in this case was on the same sheet of paper as the charges and specifications. Accordingly, the entry given on page 22 of the Forms of Procedure, 1910, should have been slightly modified to fit the circumstances, being changed to read, "The judge advocate read the letter of transmittal, and the charge and specification, original prefixed, marked 'B,' and arraigned the accused," etc.

(5) That an exhibit marked "E" was incomplete, not having the proper signature thereon, and therefore not a true copy. (See C. M. O. 17, 1910, p. 3; 23, 1910, p. 3; 27, 1913, p. 12.)

(6) That the procedure prescribed in Forms of Procedure, 1910, page 41, and Navy Regulations, 1913, R–804 (3), was not followed, in that it is not shown in the record of the original proceedings that the court was cleared while voting upon the sentence. The record of proceedings in revision divulges that the judge advocate was not called before the court and directed to record its findings before the court deliberated upon the sentence. By such a course of procedure the judge advocate is precluded, if occasion arises, from advising the court upon any possible irregularity in the findings before the court proceeds to sentence the accused (Index-Digest, 1914, pp. 20, 26).

In reviewing the record of proceedings the Department observed the following additional errors:

(7) The judge advocate in recording the findings made an error in writing a word and attempted to correct the mistake by writing the word "by" over what he had first written. While this is neither an "erasure" nor an "interlineation" it is as objectionable an alteration as either. If the judge advocate makes a mistake in recording the finding he should rewrite the whole page. (See Forms of Procedure, 1910, p. 40; C. M. O. 55, 1910, p. 8.)

(8) The judge advocate having made a mistake in writing a word in the sentence, attempted to correct his error by writing the word "dollars" over what he had first written there. If the judge advocate makes a mistake in recording the sentence [P. 4] he should rewrite the whole page. (See Forms of Procedure, 1910, p. 43; C. M. O. 35, 1915, p. 7; G. C. M. Rec. No. 23760.)

(9) The sentence was not expressed in the phraseology outlined in the Forms of Procedure, 1910, p. 42. The members of the court, as well as the judge advocate, should always remember that "while the phraseology used [in the Forms of Procedure] need not be absolutely adhered to" (Forms of Procedure, 1910, p. 3) it should not be departed from unless there is a very good reason for doing so.

(10) These errors in procedure seem to indicate negligence and carelessness on the part of the court and of the judge advocate, are most reprehensible, and go far to defeat the objects for which naval courts martial are intended (C. M. O. 36, 1905, p. 3).

As heretofore remarked in court martial orders, the members of the court, as well as the judge advocate, are responsible for errors of the above character appearing in the records of proceedings (C. M. O. 55, 1910, pp. 9–10; 14, 1913, p. 5; 27, 1913, p. 12; 17, 1915, p. 2).

(11) It was noted that the action of the convening authority contained the words "in revision." In this case the words "proceedings in revision" should have been omitted thus making the action cover the whole of the proceedings, both original and in revision and conforming to the established phraseology (Forms of Procedure, 1910, p. 52; C. M. O. 23, 1910, p. 3; 4, 1916, p. 5).

C. M. O. 7—1916

[P. 1] CONFIDENTIAL PUBLICATION: OFFICER TRIED BY GENERAL COURT MARTIAL FOR LOSS OF.

Lieutenant (junior grade) Herbert A. Jones, United States Navy, was tried by general court martial February 11, 1916, on board the U. S. S. *Oregon*, at San Francisco, Calif., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Culpable negligence and inefficiency in the performance of duty (one specification alleging loss of a confidential publication).

SENTENCE

"The court, therefore, sentences him, Herbert A. Jones, lieutenant (junior grade), United States Navy, to lose one hundred (100) numbers in his grade."

ACTION OF SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Herbert A. Jones, U. S. Navy, are approved.

The Department, after mature consideration and having in mind the gravity of the offense of which this officer was found guilty, does not consider the sentence adjudged by the court to be excessive. The necessity of enjoining upon officers the greatest care in safeguarding confidential publications of this nature is one which must be manifest to all officers. In the execution of such an important military trust the Department cannot accept a general intention as sufficient but must require an extreme degree of actual care. Owing to the failure of Lieutenant Jones to exercise such care it becomes necessary for the Department to undergo the labor and expense of issuing to the service a new battle signal book. The negligence of this officer makes the present book no longer useful in serving the purpose for which it is intended and has the same consequential result as the destruction of the entire edition of this book. The court has properly found Lieutenant Jones guilty of culpable negligence and inefficiency in performing his duty of safeguarding this most important confidential publication. Lieutenant [P. 2] Jones was in command of a vessel of the Navy and was intrusted with this publication as a necessary instrument in the exercise of his command. It is needless to comment further upon the department's position in considering that it is entitled to expect from commanding officers more diligence than that shown by Lieutenant Jones in the protection of the confidential character of a book so vital to the welfare of the service. (See C. M. O. 20, 1909; 12, 1910.)

Lieutenant Jones will be released from arrest and restored to duty.

C. M. O. 8—1916

[P. 1] CONFIDENTIAL PUBLICATION: OFFICER TRIED BY GENERAL COURT MARTIAL FOR LOSS OF.

Ensign Robert D. Kirkpatrick, United States Navy, was tried by general court martial February 11, 1916, on board the U. S. S. *Oregon*, at San Francisco, Calif., and found guilty of the following charge, the specification of which was proved by plea:

Charge.—Culpable negligence and inefficiency in the performance of duty (one specification alleging loss of a confidential publication).

SENTENCE

"The court, therefore, sentences him, Robert D. Kirkpatrick, ensign, United States Navy, to lose one hundred (100) numbers in his grade."

ACTION OF SECRETARY OF THE NAVY

The proceedings, findings, and sentence, of the general court martial in the foregoing case of Ensign Robert D. Kirkpatrick, U. S. Navy, are approved.

[C. M. O. 9—1916]

The Department after mature consideration and having in mind the gravity of the offense of which this officer was found guilty does not consider the sentence adjudged by the court to be excessive. The necessity of enjoining upon officers the greatest care in safeguarding confidential publications of this nature is one which must be manifest to all officers. In the execution of such an important military trust the department cannot accept a general intention as sufficient but must require an extreme degree of actual care. Owing to the failure of Ensign Kirkpatrick to exercise such care it becomes necessary for the Department to undergo the labor and expense of issuing to the service a new battle signal book. The negligence of this officer makes the present book no longer useful in serving the purpose for which it is intended and has the same consequential result as the destruction of the entire edition of this book. The court has properly found Ensign Kirkpatrick guilty of culpable negligence and inefficiency in performing his duty of safeguarding this most important confidential publication. Ensign Kirkpatrick found it necessary to take possession of the publication in question in the scope of his official duties. That upon taking such possession he assumed a responsibility to properly care for same is not open to question. Nor is it considered necessary to comment further upon the Department's position in exacting from officers using battle signal books more diligence [P. 2] than that shown by Ensign Kirkpatrick in the protection of the confidential character of a book so vital to the welfare of the service. (See C. M. O. 20, 1909; 12, 1910; 7, 1916.)

Ensign Kirkpatrick will be released from arrest and restored to duty.

C. M. O. 9—1916

[P. 5] FINDINGS AND SENTENCE: ERRORS IN—ALIAS NOT RECORDED.

In reviewing the record in the general court-martial case of John M. Casey, fireman second class, U. S. Navy, alias Edward Sheehan, formerly private, U. S. Army, who was tried at the Navy Yard, New York, by order of the Secretary of the Navy, it was noted that in the findings and sentence the alias of the accused was omitted.

The court, in revision, properly made the above correction of its findings and sentence (G. C. M. Rec. No. 31812).

JURISDICTION: NAVAL COURT MARTIAL MAY TRY PERSON SUBJECT TO ITS JURISDICTION FOR ANY OFFENSE COMMITTED IN THE SCOPE OF LEGALLY ASSIGNED DUTIES.

The record of the general court martial in the case of Sergeant John D. Lockburner, U. S. Marine Corps, who was tried by order of the Commandant of the Naval Station, Guam, shows that the accused, when arraigned, entered a plea to the jurisdiction of the court based, inter alia, upon the grounds that the offenses alleged against him were not military charges but were founded upon an alleged viola [P. 6] tion of the laws of Guam; and that any crime for which he could be tried must be a military offense. The court sustained the plea to the jurisdiction and submitted the record to the convening authority, who directed the trial to proceed.

The plea of the accused to the jurisdiction in this case was without foundation. The decisions of courts show that the essential features, in addition to being legally constituted, to give a general court-martial jurisdiction in a case similar to that of Lockburner's are (*a*) that an accused shall belong to an organization whose members are subject to trial by a naval court martial, and (*b*) that the offense alleged against him must be one recognized by either the laws regulating civil society or the laws for the government of military forces. (*Ex parte Mason*, 105 U. S. 700; *Smith* v. *Whitney*, 116 U. S. 183; *Ex parte Milligan*, 4 Wall. 123.) In this case the accused was charged with having aided in the violation of the liquor laws of Guam, which laws it was his duty, as acting chief of police of that island, to enforce. There can be no question as to the jurisdiction over the person of the accused, nor did the accused contend that the act committed by him was not in violation of the duly authorized laws of the island of Guam. Inasmuch as the offense with which the accused was charged was committed in the scope of his duties as acting chief of police of Guam, and as this duty was

[C. M. O. 9—1916]

assigned by competent authority and was a duty which could legally be assigned to the accused, there can be no doubt but that his misconduct in the execution of such duty constituted a military delinquency and as such came under the cognizance of a naval court martial the same as would an offense committed by the accused in the course of duties ordinarily prescribed. (See 6 Op. Atty. Gen. 415; G. C. M. Rec. No. 31819.)

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1. WITNESSES: CREDIBILITY OF—APPEARANCE AND MANNER OF TESTIFYING.
2. PLEA OF "GUILTY": EVIDENCE INCONSISTENT WITH—PROCEDURE.

(1) In the general-court-martial case of Harry A. Hardy, private, U. S. Marine Corps, who was tried by order of the Commander of Cruiser Squadron and Commander in Chief, Detached Squadron, U. S. Atlantic Fleet, the accused pleaded "not guilty" to the charge of "robbery." The testimony of one witness for the prosecution, if worthy of belief, was sufficient to establish a prima facie case for the prosecution, which, if not rebutted by the accused, would sustain a conviction. The testimony of this witness was not rebutted by the defense, but the court found the accused "not guilty" of this charge. The only ground on which the court's finding can be sustained, therefore, is that the court did not believe the testimony of the witness for the prosecution, notwithstanding the fact that her testimony was not contradicted by the defense and that no attempt was made to impeach her character for truth and veracity. On this matter of the credibility of a witness there is a decision of [P. 7] the Supreme Court, which has been applied by the Federal courts to evidence in criminal cases to the effect that, in the absence of direct evidence contradicting the testimony of particular witnesses, nevertheless it is for the jury to determine their credibility by considering the reasonableness of their statements and the manner in which they gave their testimony. It has been held that the reasonableness of testimony may be considered by a court of appeals, but that the manner in which it was given cannot be, of course, correctly portrayed (*Quock Ting* v. *U. S.*, 140 U. S. 417, 420, 421; *Norton* v. *U. S.*, 205 Fed. Rep. 593, 601).

In the case of Hardy, so far as the record discloses, the testimony given by the witness for the prosecution was reasonable. However, inasmuch as the Department is not aware of the manner in which the testimony was given nor of the appearance of the witness on the stand, and it is possible that the court did not believe the testimony of this witness and there were no other witnesses for the prosecution, the Department did not set aside the court's finding on this charge. It is, however, to be emphasized that as a general rule the uncontradicted testimony of a witness who is not impeached should be accepted as establishing the point concerning which such testimony is given, where it is not in itself improbable, and that only in exceptional cases should such testimony be rejected. In other words, the court is not warranted in rejecting the testimony of a witness under such circumstances merely upon fanciful grounds, but there must be very substantial reasons which impel the court to disbelieve the witness who is purporting to testify concerning matters of personal knowledge and of which the court is presumably ignorant, except as disclosed by the evidence.

(2) Upon the second charge, namely, "drunkenness," Hardy pleaded "guilty." During the trial a witness, called by the accused with reference to the charge of "robbery," was asked the question, "when the accused was up before you on the night in question, was he drunk, disorderly, or creating a disturbance," to which the witness answered "no." The judge advocate did not cross-examine this witness, and the record shows that the court did not desire to question him. The witness for the defense did not state at what hour the accused was brought before him, and his testimony was, therefore, not necessarily contradictory of the plea of the accused that he was guilty of "drunkenness" at the time specified. Nevertheless, this testimony, received without any attempt being made to reconcile it with the plea of the accused, was on its face sufficiently inconsistent with that plea to make it the duty of the court immediately to instruct the accused that he might withdraw his plea of "guilty" and substitute therefor the plea of "not guilty," and if he persisted in his plea of "guilty" to direct the entering of a plea of "not guilty" to the charge of "drunkenness," and the proceeding with the trial by the introduction of evidence, which the judge advocate was informed existed, [P. 8] to prove the allegations set forth in the speci-

[C. M. O. 9—1916]

fication under that charge (C. M. O. 30, 1910, p. 4; see also Index-Digest, 1914, p. 40).

Inasmuch as the finding of "guilty" on the charge of "drunkenness" was disapproved by the convening authority because of the above irregularity and the ends of justice were thereby defeated through the failure of the court and judge advocate to properly conduct the trial, and without reference to the question of whether or not the above irregularity was properly regarded as a fatal defect, attention is directed in this connection to the special care which the members and judge advocate of a court should give to matters in which either the testimony or the statement of an accused may appear at variance with his plea (G. C. M. Rec. No. 31776).

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1. WITNESSES: REFRESHING MEMORY.
2. COURT: COMPOSITION—PRINCIPAL WITNESSES FOR THE PROSECUTION AS MEMBERS.

In the record of the case of Leo F. Byrne, coxswain, U. S. Navy, who was tried by general court martial by order of the Commander in Chief, U. S. Atlantic Fleet, on board the U. S. S. *Connecticut*, the following irregularities were noted:

(1) The court improperly allowed a witness to refresh his memory by holding a telephone conversation and obtaining testimony from another person, which conversation the witness was then allowed to repeat in order to verify a name previously given as that of a person by whom some jewelry had been pawned. (See Index-Digest, 1914, p. 43.)

(2) While not illegal, it is considered inadvisable to have among the members constituting a court martial, officers who appear as principal witnesses for the prosecution, as was done in this case. Whenever the exigencies of the service will permit, a court should as far as possible be composed of officers who are not cognizant of detailed circumstances attendant upon offenses for which an accused may be brought to trial. (See Navy Regulations, 1913, R–702 (2); G. C. M. Rec. No. 25157.)

Inasmuch as the irregularities noted were deemed of minor importance, and as the evidence for the prosecution, when the general test for evidence is applied, supports the findings of the court beyond a reasonable doubt, the proceedings except as to certain minor irregularities not adversely affecting the interests of the accused, the findings, and sentence were approved (G. C. M. Rec. No. 31874).

[P. 9] DISCRIMINATION—AGAINST UNIFORM: PROHIBITED BY STATUTE IN STATE OF VIRGINIA.

As a result of representations made by the Department to the officials of the State of Virginia in connection with various complaints of discrimination against enlisted men of the Navy in public places of amusement in the vicinity of Norfolk, Va., there has been recently passed by the legislature of that State an act, which will be effective after June 18, 1916, providing:

> "(1) That it shall be unlawful for any common carrier, innkeeper, or proprietor or lessee of any place of public amusement or entertainment, or any agent, servant, or representative of any such common carrier, innkeeper, proprietor, or lessee as aforesaid, to debar from the full and equal enjoyment of the accommodations, advantages, facilities, or privileges of any public conveyance on land or water or any inn or of any place of public amusement or entertainment, any person, in the Army, Navy, Marine Corps or revenue cutter service of the United States, or of the National Guard or naval service of this State, or otherwise in the military or naval service of the United States, or of this State, wearing the uniform prescribed for him at that time or place by law, regulation of the service, or custom, on account of his wearing such uniform or of his being in such service.
>
> "(2) Any person who is debarred from such enjoyment contrary to the provisions of section one of this act shall be entitled to recover in an action on the case from any corporation, association, or person guilty of such violation, his actual damages and one hundred dollars in addition thereto;

and evidence that such person debarred was at the time sober, orderly, and willing to pay for such enjoyment in accordance with rates fixed therefor for civilians, shall be prima facie evidence that he was debarred on account of his wearing such uniform or of his being in such service.

"(3) Any person violating any provision of this act shall be guilty of a misdemeanor."

(See File 23243–77: 5; see also File 23243–50 for copy of laws of United States, Massachusetts, New Hampshire, Minnesota, New Jersey, New York, Pennsylvania, and Rhode Island on this subject.)

GENERAL ORDER NO. 121, SEPTEMBER 17, 1914: PHILIPPINE ISLANDS.

With regard to General Order No. 121, September 17, 1914, it is directed that in cases arising in the Philippine Islands the Secretary of the Navy be communicated with in advance of the delivery [P. 10] of persons to the civil authorities only when the circumstances are such as, in the judgment of the commanding officer, make such action desirable. (See C. M. O. 16, 1915, p. 5, as to Samoa; C. M. O. 31, 1915, p. 6, as to Panama; C. M. O. 42, 1915, p. 10, as to Hawaii; see also File 26524–274.)

PAY: OF ENLISTED MEN UNDER CHARGES AND AWAITING SENTENCES OF COURTS MARTIAL.

It has been brought to the Department's attention that in several cases commanding officers, in pursuance of Navy Regulations, 1913, R–3669(3), have issued special money requisitions to enlisted men against whom charges have been preferred; also that prompt notification has not been given to pay officers of amounts to be deducted pursuant to the sentences of courts martial in certain cases of enlisted men in order that proper deductions might be made in lieu of such men being allowed to draw their money.

Loss has resulted to the Government by virtue of the above, for cases of late have gone to the Comptroller of the Treasury on appeal by pay officers from auditor's disallowance and have been allowed by reason of lack of notice to said pay officers. (See Compt. Dec. of Feb. 24, 1916, appeal B. Mayer.) Commanding officers should make every effort to safeguard the Government from any further losses from similar causes (File 26806–131: 35, J. A. G., Mar. 22, 1916).

C. M. O. 10—1916

[P. 1] 1. SENTENCE: INADEQUATE FOR OFFENSE FOUND PROVED.
2. CLEMENCY: DENIED, DESPITE UNANIMOUS RECOMMENDATION OF MEMBERS, IN VIEW OF INADEQUATE SENTENCE AND ABSENCE OF EXTENUATING CIRCUMSTANCES.
3. SENTENCE: CLERICAL ERRORS AND ALTERATIONS—SENTENCE SHOULD BE FREE FROM SAME.

Paymaster's Clerk Robert H. Rudolph, United States Marine Corps, was tried by general court martial on March 28, 1916, at the Navy Yard, Philadelphia, Pa., and found guilty on the following charge, the specifications of which were "proved by plea."

Charge.—Knowingly and willfully misappropriating and applying to his own use and benefit, money of the United States intended for the naval service thereof (seven specifications).

SENTENCE

"The court, therefore, sentences him, Robert H. Rudolph, paymaster's clerk, U. S. M. C., to be dismissed from the United States Marine Corps, and from the naval service, and to be imprisoned in such prison or penitentiary as the Convening Authority may designate for a period of one (1) year."

[C. M. O. 10—1916]

Recommendation for Clemency

The following recommendation for clemency signed by all the members of the court was spread upon the record:

"In consideration of his long, continuous, and excellent record; his previous excellent character, as shown by evidence; the fact that six years out of the last seven years' service have been on tropical duty, and in consideration of his statement showing his readiness to reimburse the Government when called upon to do so for the amounts outstanding, we recommend Robert H. Rudolph, paymaster's clerk, U. S. Marine Corps to the clemency of the revising power."

Recommendation of Commandant of Marine Corps

The Commandant of the Marine Corps placed the following indorsement on the record:

(1) "The acts of misappropriation of Government funds by Paymaster's Clerk Robert H. Rudolph, M. C., were deliberate breaches of trust and in themselves were without extenuating [P. 2] circumstances. In the opinion of the undersigned the sentence adjudged is inadequate to the crime of which the accused was found guilty.

"The unanimous recommendation of the court to clemency would be entitled to favorable consideration if a sentence adequate to the nature and degree of the offenses had been adjudged, but under the circumstances the undersigned recommends that it be disregarded."

Returned for Revision

The Department concurred in this indorsement and on April 6, 1916, returned the record to the court for revision. The letter from the Department to the court read in substance as follows:

The sentence adjudged is grossly inadequate for the offense found proved, and aside from being unable to exercise clemency in accordance with the expressed views of the court, set forth in their recommendation for clemency, the Department feels that should it approve the sentence as adjudged, a precedent would be established which in future would affect adversely the interests of justice and discipline.

The attention of the court is invited to the fact that the limitation of punishment prescribed by the President of the United States covering such offenses is dismissal and imprisonment for five years, and, in accordance with article 51 of the Articles for the Government of the Navy, members of a court martial are bound by law to adjudge adequate sentences for offenses committed in a particular case.

While in the past there have been cases in which sentences for offenses involving embezzlement and misappropriation of Government funds have been approved by the Department, which did not call for periods of confinement, still in such cases the circumstances attendant upon the loss of such money did not extend to misappropriation for personal benefit. In cases as in the present, where funds belonging to the Government have been misappropriated for personal use, the Department has insisted upon adequate sentences being imposed in each and every case, and the attention of the court is invited to C. M. O.'s Nos. 27 and 29, 1911; and No. 26, 1912; wherein sentences of confinement at hard labor of periods of seven, two, and two and one-half years, respectively, were adjudged. In these cases the amount of money unlawfully appropriated to the personal use of the accused in no case extended to the amount involved in the present case.

Sentence in Revision

The court in revision "decided to respectfully adhere to its former sentence."

[P. 3] Action of the Secretary of the Navy

(2) In view of the serious nature of the offenses, the absence of any extenuating circumstances connected with their commission, and the inadequacy of

[C. M. O. 11—1916]

the sentence adjudged by the court, the Department considered that the exercise of clemency was not warranted and accordingly, on April 11, 1916, approved the proceedings, findings, and sentence in the foregoing case of Paymaster's Clerk Robert H. Rudolph, U. S. Marine Corps, and designated the Eastern State Penitentiary at Philadelphia, Pa., as the place for the execution of so much of the sentence as relates to imprisonment.

Remarks

(3) The judge advocate in recording the sentence in revision made a clerical error in the phraseology and also, having made a mistake in writing a word, attempted to correct his error by writing the word "adhere" over it. It has previously been pointed out that if the judge advocate makes a mistake in recording the sentence he should rewrite the whole page. (See Forms of Procedure, 1910, p. 43; C. M. O. 6, 1916, pp. 3–4.) It has also repeatedly been remarked that the members of the court, as well as the judge advocate, are responsible for errors of the above character appearing in the record. (See C. M. O. 55, 1910, pp. 9–10; 14, 1913, p. 5; 27, 1913, p. 12; 17, 1915, p. 2; 35, 1915, p. 7; 6, 1916, p. 4.)

C. M. O. 11—1916

[P. 1] 1. DEPOSITION: USED BY PROSECUTION TO AID IN SECURING CONVICTION IN CASE OF AN OFFICER—SENTENCE OF DISMISSAL NOT APPROVED AS A MATTER OF POLICY.

2. SENTENCE: OFFICER WHO ABSENTS HIMSELF FROM HIS COMMAND WITHOUT LEAVE MAY BE REDUCED TO THE RATING OF AN ORDINARY SEAMAN.

3. PRESIDENT OF THE UNITED STATES: CONFIRMED SENTENCE REDUCING A WARRANT OFFICER TO THE RATING OF AN ORDINARY SEAMAN AS A MATTER OF POLICY.

4. FINDINGS: WHEN THE ACCUSED HAS PLEADED "GUILTY" PROPER FINDING FOR SPECIFICATION IS "PROVED BY PLEA."

Boatswain Andrew N. Anderson, United States Navy, was tried by general court martial on February 14, 1916, at the United States Naval Training Station, San Francisco, Calif., by order of the Secretary of Navy, and was found guilty of the following charges:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (two specifications).

Sentence

"The court, therefore, sentences him, Andrew N. Anderson, Boatswain, United States Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The members of the court spread upon the record the following unanimous recommendation to clemency:

> "In consideration of the good efficiency record of the accused and his valuable services in handling the U. S. S. *Fortune* in a heavy storm on the trip from Puget Sound to San Francisco, we recommend Boatswain Andrew N. Anderson, U. S. Navy, to the clemency of the revising power."

Returned for Revision

The Department on March 13, 1916, returned the record in this case to the court with the direction that it reconvene for a reconsideration of the sentence. The Department in returning the record to the court stated in substance that:

(1) As it became necessary for the judge advocate, in order to prove the offenses alleged in the charges and specifications in [P. 2] this case, to introduce, in behalf of the prosecution, a deposition obtained from a witness for the prosecution whose presence before the court the exigencies of the service rendered it impracticable to obtain, the Department does not consider it desirable

[C. M. O. 12—1916]

as a matter of policy to approve a sentence calling for the dismissal of an officer in a case where a deposition has been thus used in securing his conviction.

(2) In this connection the attention of the court was invited to the fact that it might adjudge a sentence involving a substantial loss of pay, but if, in its opinion, such punishment were not adequate, attention was invited to article 9 of the Articles for the Government of the Navy, which provides that, "Any officer who absents himself from his command without leave, may, by the sentence of a court martial, be reduced to the rating of an ordinary seaman."

SENTENCE IN REVISION

The court in revision decided to revoke its former sentence in this case and substituted therefor the following sentence:

"The court, therefore, sentences him, Boatswain Andrew N. Anderson, United States Navy, to be reduced to the rating of ordinary seaman."

ACTION OF THE SECRETARY OF THE NAVY

In view of the very serious nature of the offenses committed by this officer, and the fact that his record showed a conviction for a similar offense within a period of two years, and in accordance with the recommendation of the Bureau of Navigation, the proceedings, findings, and sentence in the case of Boatswain Andrew N. Anderson, U. S. Navy, were approved on March 30, 1916.

ACTION OF THE PRESIDENT

(3) Inasmuch as the sentence adjudged in the case of this officer provided that he be reduced to an ordinary seaman, which deprives him of his position as a warrant officer in the United States Navy, and as article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) provides that no sentence extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President, it was deemed advisable as a matter of policy, although not specifically required by the statute, to submit the record of the general court martial in this case to the President of the United States, who, on April 3, 1916, confirmed the sentence of the court.

[P. 2] REMARKS

(4) The finding of the specification of the first charge was incorrectly recorded as follows: "The specification of the first charge, proved." When the accused has pleaded "guilty" the proper finding for the specification is "proved by plea" (Navy Regulations, 1913, R–802 (5); Forms of Procedure, 1910, p. 40; Index-Digest 1914, p. 20).

C. M. O. 12—1916

[P. 1] 1. SENTENCE: INADEQUATE FOR OFFENSE FOUND PROVED.
2. PUBLIC REPRIMAND: ADJUDGMENT OF AS A PART OF SENTENCE DISAPPROVED.
3. SENTENCE: APPROVED ONLY THAT ACCUSED MIGHT NOT ESCAPE PUNISHMENT.

Ensign Hervey A. Ward, United States Navy, was tried by general court martial on April 3, 1916, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Conduct unbecoming an officer and a gentleman (ten specifications alleging neglect and failure to pay debts, officially admitted to be just, after repeated official promises to do so).

SENTENCE

"The court therefore sentences him, Ensign Hervey A. Ward, United States Navy, to lose one hundred and fifty (150) numbers in his grade and to be publicly reprimanded by the Secretary of the Navy."

[C. M. O. 12—1916]

RECOMMENDATION OF CHIEF OF BUREAU OF NAVIGATION

(1) The Chief of the Bureau of Navigation placed on the record the following indorsement:

"Returned, recommending that the court be reconvened, as this Bureau is of the opinion that the sentence awarded is inadequate for the offense found proved."

RETURNED FOR REVISION

The Department accordingly on April 11, 1916, returned the record in this case to the court for reconsideration of the sentence. The Department's letter read in part:

"The court's attention is invited to the fact that Congress, by law, provided that any officer of the Army convicted of 'Conduct unbecoming an officer and a gentleman,' shall be dismissed from the service (article 61, section 1342, Revised Statutes), thus making a sentence of dismissal mandatory upon conviction of the offense named in Army cases. Thus in the Army Digest of Opinions of the Judge Advocate General (1912) paragraph 9b, page 142, it is stated with reference to article 61 of the Articles of War relating to 'Conduct unbecoming an officer and gentleman':

"'An indifference on the part of an officer to his pecuniary obligations of so marked and inexcusable a character as to induce repeated [P. 2] just complaints to his military commander or the Secretary of War by his creditors, and to bring discredit and scandal upon the military service, held to constitute an offense within the purview of this article.'

"While there is no statutory enactment with reference to the Navy, the foregoing is sufficient evidence of how seriously this particular offense has been regarded by Congress."

SENTENCE IN REVISION

The court in revision "decided respectfully to adhere to its former sentence."

RECOMMENDATION OF CHIEF OF BUREAU OF NAVIGATION

The Chief of the Bureau of Navigation indorsed upon the record that:

"The Bureau cannot understand how a court composed of officers of experience and judgment could fail to appreciate the seriousness of this offense, and it is recommended that the president and members of the court be informed that their action in this case has resulted in a miscarriage of justice."

ACTION OF THE SECRETARY OF THE NAVY

The Department approved the foregoing recommendation of the Chief of the Bureau of Navigation. The records of the Department show that this officer was previously convicted by general court martial of "absence from station and duty after leave had expired," and "disobedience of a lawful order of the Chief of the Bureau of Navigation," and sentenced:

"To be dismissed from the United States Naval Service."

The Department mitigated the sentence to the loss of fifty numbers. The subsequent conduct of Ensign Ward convinces the Department that the clemency extended in the previous case has been misplaced.

(2) The publication of the findings in this case following so closely upon a previous conviction by general court martial should constitute in itself a sufficient reprimand to any one who may have been desirous of maintaining an untarnished record in the naval service, but it is evident from the conduct of Ensign Ward that the publication of a reprimand in his case would be of no value and that part of the sentence adjudging a reprimand is disapproved. In this connection attention is again invited to the fact that it has been repeatedly published in court-martial orders that sentences involving public reprimand are

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not regarded with favor by the Department (Index-Digest, 1914, p. 32; Index-Digest, 1915, p. 41).

[P. 3] (3) Subject to the foregoing remarks, the proceedings and findings in this case were on April 22, 1916, approved; that portion of the sentence involving a loss of numbers was approved only in order that the accused might not entirely escape punishment and Ensign Ward was released from arrest and restored to duty.

C. M. O. 13—1916

[P. 5] JOINDER, TRIAL IN: NOT A PROPER PROCEDURE WHERE SEPARATE SPECIFICATIONS ARE PREFERRED.

George M. Eichinger, fireman first class, U. S. Navy, John F. McDay, fireman second class, U. S. Navy, and James W. Loughery, fireman second class, U. S. Navy, were tried in joinder by a summary court martial on board the U. S. S. *Birmingham*. The record in the case shows that the convening authority preferred separate specifications against each of the above-named men, which specifications nowhere allege that the offenses were committed in collusion or concert, and that the court tried these men in joinder notwithstanding the fact that the convening authority had indicated, by preferring separate specifications, that they were to be tried separately. The record further discloses that at the trial each of the accused was represented by counsel, and that, not only was no objection made to the trial in joinder, but that the accused stated that they desired to be so tried. The senior officer present in acting upon the case called attention to the above-mentioned irregularity in the procedure but, in view of the fact that it did not appear that the accused were prejudiced by the trial in joinder but that on the contrary such procedure was in accordance with their own requests, approved the proceedings.

In respect to the above irregularity in procedure it has previously been published in court-martial orders that when the convening authority does not join the accused but prefers separate charges and specifications, with separate letters of transmittal, courts martial should not try them in joinder, for if the convening authority desires to try men in joinder the proper procedure is to prefer only one set of charges and specifications and write only one letter of transmittal (C. M. O. 37, 1909, p 7; 10, 1911, pp. 3–5; Index-Digest, 1914, p. 25). There can, therefore, be no doubt that the action of the court was irregular and constituted a usurpation by the court of the prerogative of the convening authority.

However, the senior officer present properly considered that, in the absence of objection by the accused at the trial and as it appeared from the request of the accused that they be tried in joinder that they regarded such procedure to be to their advantage, the above irregularity did not invalidate the proceedings. In this connection it is to be noted that the Supreme Court of the United States in *Logan* v. *United States* (144 U. S. 263, 296). held that where objection was not made at the time of trial to the consolidation of indictments in a case similar to this, the question of whether such [P. 6] consolidation was or was not legal would not be considered in review. Also the Attorney General has stated in an opinion (4 Op. Atty. Gen. 171):

> "It is a vain conceit, that because the proceedings are irregular, and fatally irregular (*if the exception be taken in proper time*), therefore the judgment once suffered to be entered up is void. Thus there are many things * * * in the conduct of a trial, that make the verdict void; yet, if advantage be not taken of them by motion in arrest of judgment, no writ of error lies, even where there is a competent court of errors (Rob. Abr.: 783; 4 Cro. Eliz. 616), and it is very proper it should be so * * * and the repose of society and the putting an end to controversy and litigation, are more desirable than mere accuracy of procedure, or even the justice of a particular case—*not to mention that acquiescence implies consent, and consent cures error.*"

And, furthermore, the Department has previously held in a case similar to the present one that under such circumstances the action of the court, while certainly irregular, was not illegal. (G. C. M. Rec. No. 23743; File 26287–3381).

[C. M. O. 13—1916]

MILITARY COMMISSIONS AND OTHER EXCEPTIONAL MILITARY COURTS: CONDUCT OF SAME WHEN HELD BY NAVAL AUTHORITY.

When exceptional military trials, whether by military commissions or provost courts, are held by naval authority, the commission or court conducting such trials shall be constituted and organized, and shall conduct its proceedings in the manner provided for naval courts martial or deck courts, so far as the exigencies of the service may permit. Similarly, records shall be kept of the proceedings, which upon completion shall be transmitted to the Judge Advocate General of the Navy to be revised and recorded. No sentence of death shall be carried into execution until confirmed by the Secretary of the Navy; all other sentences may be executed upon approval of the convening authority.

The jurisdiction of every such commission or provost court, in the matter of the punishments which it may adjudge, shall be limited in the discretion of the convening authority and shall be expressly stated in his order convening such commission or provost court (File 5526–39).

FINDING OF NAVAL EXAMINING BOARD: MUST, UNDER THE LAW, EXPRESS THE OPINION WHICH THE MEMBERS THEMSELVES ENTERTAIN AFTER AN INVESTIGATION OF ALL THE EVIDENCE BEFORE THE BOARD.

A naval examining board in a recent case found, in effect, that, "no matter what its [the board's] personal feelings may be," a certain candidate was morally qualified for promotion because the [P. 7] members of a court martial had acquitted him of serious offenses with which he had been charged, and the board "has not the power to question the findings of said court."

The finding of the naval examining board in this case was not satisfactory and was not accepted by the Department for the reason that it withheld the very opinion which the board was ordered to express—that of the board itself—and relied instead upon the finding of a general court martial, which finding in point of fact was disapproved by the convening authority. It is well settled that the fact that a case has been acted upon, or that no action has been taken in certain premises, does not close that portion of an officer's record to which it relates in such a manner as to relieve an examining board from the responsibility of scrutinizing it; and, even in the event of an acquittal by a court martial, an examining board still has the duty cast upon it by express provisions of law to examine into the facts and outcome of such trial in order to determine for itself the effect, if any, that should be given thereto with reference to the officer's qualifications for promotion (File 5878–97; 26260–697; 26260–1392).

Moreover the finding of a court martial, even if approved, would not be conclusive upon an examining board for the reason that a court martial cannot properly arrive at a finding of "guilty" unless the evidence establishes the guilt of the accused beyond a reasonable doubt; while, on the other hand, members of an examining board are not required to be satisfied beyond a reasonable doubt that a candidate is not qualified for promotion, but instead are forbidden to recommend any officer for promotion "as to whose fitness a doubt exists." In other words, before a court martial every doubt must be resolved in favor of an accused, while before an examining board any doubts must be resolved against the candidate, and the existence of even a doubt as to his fitness requires that he be not recommended for promotion (File 26260–3342: 1, Sec. Navy, April 7, 1916).

"LINE OF DUTY" AND "MISCONDUCT"—CONSTRUED.

Line of duty and not misconduct

The following cases have been held to be line of duty and not due to misconduct:

Drowning.—Deceased, a member of an organized funeral party returning to station, jumped from a cutter which had collided with a tug. While evidence showed that jumping from the cutter was an error of judgment on the part of the deceased, still such error did not extend to culpability (File 26835–553, Sec. Navy, April 12, 1916).

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Drowning.—Deceased, late auxiliary officer, while on board the *Solace* disappeared. Several days later his body was found and disclosed that he had met death by drowning. No evidence of self-destruction or suicidal intent (File 26250–774, Sec. Navy, April 27, 1916).

Drowning.—Deceased, while acting as stern man on a cutter, fell overboard as a result of a fainting spell. Autopsy revealed weak heart (File 26250–779, Sec. Navy, April 20, 1916).

[P. 8] *Drowning.*—Deceased, members of a cutter's crew at a training station, attempted to turn a boat in a breaking sea. Error of judgment on part of coxswain who was drowned with other members of crew (File 26250–763, Sec. Navy, April 1, 1916).

Heart failure.—Deceased, while seated in band room, his regular station, dropped dead. Although there was evidence to show that during the preceding 24 hours the deceased had slightly indulged in the use of intoxicating liquor, an autopsy revealed that death was due to acute dilation of the heart resulting from pneumonia contracted in line of duty (File 26250–780, Sec. Navy, April 14, 1916).

Strangulation.—Deceased, while engaged in duty on board ship, fell into a drum room in such a position that he was unable to release himself. As a result and in the absence of timely aid the deceased was strangled to death. Evidence showed falling to be accidental (File 26250–778, Sec. Navy, April 21, 1916).

Not line of duty but not misconduct

The following case has been held to be not line of duty but not due to misconduct:

Concussion of brain.—Deceased, while on authorized liberty and riding a motorcycle for his own pleasure, was thrown therefrom and sustained injuries which resulted in death. There was no evidence of negligence on the part of the deceased (File 26250–783, Sec. Navy, April 20, 1916).

Not line of duty and misconduct

The following case has been held to be not line of duty and due to misconduct:

Drowning.—Deceased, returning from unauthorized absence, intoxicated, attempted to go aboard ship over unauthorized gangway, fell overboard, and was drowned (File 26250–758, Sec. Navy, April 19, 1916).

GENERAL ORDER 110: TERM "REENLISTED MARINE" NOT INCLUSIVE OF SOLDIER ENLISTING IN MARINE CORPS AFTER TERMINATION OF AN ENLISTMENT IN THE ARMY

Held, that, in view of the unambiguous phraseology of General Order 110 in which the words "reenlisted marine" are used, a soldier who enlists in the Marine Corps for the first time, upon the termination of an enlistment in the army, is not to be regarded as a reenlisted man within the purview of said General Order (File 26516–144: 53, Sec. Navy, April 12, 1916).

C. M. O. 14—1916

[P. 1] 1. CHARGES AND SPECIFICATIONS: MIDDLE NAMES MAY BE INDICATED BY INITIAL LETTERS.

2. RECORDS OF OFFICERS: NOT NECESSARY FOR JUDGE ADVOCATE TO APPEND CERTIFIED COPIES TO RECORD WHEN INTRODUCED IN EVIDENCE.

Lieutenant William C. Barker, junior, United States Navy, was tried by general court martial on April 8, 1916, on board the United States Ship *San Diego*, at San Diego, Calif., by order of the Commander in Chief, United States Pacific Fleet, and found guilty of the following charges, the specifications of which were "proved by plea."

Charge I.—Absence from station and duty after leave had expired (one specification).

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Charge II.—Conduct to the prejudice of good order and discipline (one specification alleging that he was absent from his station and duty after leave had expired, and did thereby miss his ship upon departure).

SENTENCE

"The court, therefore sentences him, Lieut. William Cyrus Barker, Jr., U. S. Navy, to lose one hundred (100) numbers in his grade."

ACTION OF CONVENING AUTHORITY

The convening authority approved the proceedings, findings, and sentence, on April 20, 1916.

ACTION OF THE SECRETARY OF THE NAVY

"As it does not appear on the record of the general court martial in the foregoing case of Lieutenant William C. Barker, Jr., U. S. Navy, that he has been ordered to be released from arrest, such action will be taken to restore him to duty as may be necessary."

REMARKS

(1) It was noted that the middle name of the accused was spelled in full in the charges and specifications. As heretofore remarked in court-martial orders, christian names, other than the first, may be indicated by initial letters (Navy Regulations, 1913, R–712 (5); Forms of Procedure, 1910, p. 83; Index-Digest, 1914, pp. 3, 28; C. M. O. 36, 1914, p. 7; 4, 1916, p. 5).

(2) It was further noted that the judge advocate introduced the official record of the accused in this case in rebuttal of certain testimony offered by the defense, and that he appended certified copies of [P. 2] efficiency reports to the record of the case. It has been held by the Department that it is not necessary for the court to append the originals or certified copies of efficiency reports to the record of proceedings when introduced in evidence before a general court martial, but that a simple notation in the record that they were submitted in evidence is sufficient; the originals forming a part of the officer's official record on file at the Department may readily be examined at any time in connection with court-martial proceedings (File 26251–7777, Sec. Navy, July 2, 1913; C. M. O. 1, 1914, p. 7; 19, 1915, p. 9).

C. M. O. 15—1916

[P. 1] DOCUMENTARY EVIDENCE: PROPER PROCEDURE IN INTRODUCING.

Assistant Surgeon Dana C. Post, United States Navy, was tried by general court martial on April 24, 1916, at the Navy Yard, Washington, D. C., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Conduct unbecoming an officer and a gentleman (twelve specifications alleging neglect and failure to pay debts, officially admitted to be just, after repeated official promises to do so).

SENTENCE

"The court, therefore, sentences him, Assistant Surgeon Dana C. Post, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the apparent inexperience of the accused in managing financial matters—the fact that his relatively heavy indebtedness was largely incurred in connection with obtaining his education; his expenses incident to the beginning of his career in the U. S. Naval Service and his subsequent marriage, together with the circumstances of his domestic life; his further

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absence on a distant station removed from personal contact with his creditors, and the further fact that he apparently suffered from his misplaced confidence in his financial agent to whom he had remitted sufficient funds to cover a considerable portion of his indebtedness, and who according to her own statement misappropriated the major portion of these funds to her own use, without his knowledge or consent, instead of applying them to the liquidation of the various items of indebtedness set forth in the specifications—we recommend Assistant Surgeon Dana C. Post, U. S. Navy, to the clemency of the revising power."

ACTION OF THE SECRETARY OF THE NAVY

The Department's records show that subsequent to the entry of Assistant Surgeon Post into the naval service on September 23, 1912, he has contracted an indebtedness of several thousand dollars, [P. 2] several items of which were not necessary for the proper maintenance of his position, but, on the contrary, appear to have been extravagant expenditures, and that the major portion of such indebtedness remains unpaid. These apparently unnecessary expenditures were incurred with full knowledge on the part of the accused that he was still indebted to his brother for funds borrowed to defray the expenses of his education; other extravagances were apparently entered into without any realization or regard for the financial obligations involved.

The court has spread upon the record a unanimous recommendation for clemency based upon certain domestic difficulties, and the fact that the accused had been on a foreign station during the greater part of the period covered by his indebtedness. The records of the Department show, however, that Dr. Post requested an extension of his tour of duty on the Asiatic Station in order that he might live more economically and thereby be enabled to discharge his indebtedness. Such a circumstance, therefore, cannot be held to justify the exercise of clemency.

The reports of fitness of Dr. Post show several unfavorable entries thereon, among which is an entry to the effect that this officer, on December 29, 1915, left his station and duty, when he should have remained on board, and went ashore. For this offense he was suspended from duty for a period of five days and restricted to the limits of the ship to which he was attached.

The record in this case shows that the indebtedness alleged in the specifications and admitted by the accused extended over several years; that during this period, notwithstanding repeated demands from his creditors, the accused discharged but a small portion of this indebtedness; that as a result of the accused's disregard of his obligations the debts in question were referred to the Navy Department; and that the accused, notwithstanding his repeated written promises, in response to the official inquiries of the Department, to the effect that he would liquidate said debts, did, nevertheless, fail to do so. In view of all the circumstances, therefore, the Department is of the opinion that the further retention of the accused in the service as a commissioned officer would be undesirable, and, in accordance with the recommendation of the Bureau of Navigation, the proceedings, findings, and sentence in the foregoing case of Dana C. Post, assistant surgeon, United States Navy, are approved.

ACTION OF PRESIDENT

In conformity with the provisions of article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States who, on May 31, 1916, confirmed the sentence of the court.

[P. 3] In a review of the record in this case it was noted that the counsel for the accused irregularly introduced documentary evidence in the form of a letter addressed to the agent of the accused and also photographic copies of certain checks. The record does not show that either the court or the judge advocate was afforded an opportunity to object to the introduction of these documents, or even that the same were received in evidence by the court (Rec. pp. 9–10). Also the judge advocate irregularly introduced documentary evidence in the form of a letter written by the Army and Navy Club to the Navy Department (Rec. p. 17).

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The proper procedure in introducing documentary evidence is to have the proper custodian take the stand as a witness to identify such document, presenting it to the party against whom it is to be offered for inspection and opportunity to object to its admission, and also to the court; then if no reasonable objection is made, to ask witness to read therefrom such extract as may be pertinent to the issue; and finally either the original or certified copy of the extract read should be appended to the record (Forms of Procedure 1910, p. 31; Index-Digest, 1914, p. 19).

In the present case the record does not positively show, as should be the case, that the above-mentioned documents were properly identified before being introduced; that they were submitted to both the court and the accused, or to the court and the judge advocate, depending upon the use to be made of this evidence; and whether or not objection was made to its receipt in evidence and the court's action thereon. Also, in consequence of the irregular manner of their introduction, the court did not pass upon the question of the competency or relevancy of these documents as evidence to be used in the trial of this case, and the court thereby and to that extent failed to fully perform its function as a court.

C. M. O. 16—1916

[P. 6] SPECIFICATIONS: A SINGLE SPECIFICATION SHOULD SET FORTH ONLY ONE OFFENSE.

James B. Egan, seaman, U. S. Navy, was tried by summary court martial on board the U. S. S. *Wheeling* on May 22, 1916, under one specification which alleged "his return to said ship from special liberty, drunk and disorderly"; and that he did "while being placed in confinement * * * forcibly resist arrest." Thus two distinct offenses were set forth in a single specification, whereas "each offense of a different kind shall be the subject of a distinct charge and specification" (Forms of Procedure, 1910, p. 83).

It has been noted during the past month in the review of summary court-martial cases that in a number of cases several offenses have been set forth in the same specification. This error is most commonly [P. 7] committed in joining "absence overleave" with such offenses as "drunk and disorderly," "returning on board drunk and unfit for duty," and "breaking arrest." Each of the latter offenses is distinct in itself, notwithstanding its causal connection with the offense of "absence overleave," and should be set forth in a separate specification (Navy Regulations, 1913, R–712 (2)).

WITNESS: CREDIBILITY OF—MAY BE AFFECTED BY ADMISSION UPON CROSS-EXAMINATION OF A CONVICTION OF AN OFFENSE INVOLVING MORAL TURPITUDE.

Hugh M. Nicholson, hospital steward, United States Navy, was tried by general court martial on March 31, 1916, at the navy yard, Charleston, S. C., by order of the Secretary of the Navy. During the trial a witness for the prosecution was questioned in cross-examination by counsel for the accused as follows:

> "28. Q. Do you remember ever having been punished for having another man's clothing in your possession?"
>
> This question was objected to by the judge advocate on the ground that it was irrelevant and covered ground that had nothing to do with this case.
>
> COUNSEL. "I have the right to test his credibility."
>
> JUDGE ADVOCATE. "The witness should be instructed that the question he has been asked involves a matter of criminality."
>
> The court then asked the counsel if he wished to attack the credibility of the witness.
>
> COUNSEL. "Yes, sir. Not as to his reputation but as to his credibility as a witness in this case. I want to prove by his own mouth what he has been punished for. I have a right to do that. That rule holds good in a court of law when a witness gets on the stand. 'Did you not serve three months for larceny or housebreaking' is a perfectly competent question in a court of law."

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The judge advocate did not reply. The court instructed the witness that he did not have to answer questions that would tend to incriminate or degrade him.

WITNESS. "Yes, sir. I don't remember having another man's clothes. I remember having one man's jumper in my possession and was found guilty by the court; but after the court my division officer made it his business to look it up and I was found not guilty. I did five days bread and water which was a very serious offense in the Navy, and I would have gotten more, if I was really guilty, by a summary court martial." (Rec., pp. 29, 30).

In regard to the above the judge advocate, on the one hand, contended, "I do not believe the offense of 'having clothing of another in his possession' is such an offense as to affect his credibility as a witness. It is not an infamous crime, not a capital crime." Furthermore he made the point, "It is a rule of common law that the records of a former trial are the proper evidence of the trial or conviction."

Counsel for the accused, on the other hand, although he did not move to strike out the testimony of this witness, in his oral argument stated, "Now we come to ———, the man convicted for having [P. 8] another man's clothes in his possession. In a civil court his testimony would not be admitted," and, in effect, questioned the competency of this witness.

The foregoing brings into issue the following: (1) The nature of an offense, the conviction of which may serve as a basis for an attempt to impeach a witness; (2) the manner in which such a conviction may be introduced in evidence; and (3) the weight to be given testimony of this character; that is, does evidence, if properly introduced, of a conviction of an offense of such a nature as to be admissible for the purpose of impeaching a witness attack the competency or merely the credibility of such witness?

As to (1) it may be stated as the weight of modern authority that, "the fact that a witness has been convicted of crime may be brought out as bearing on his credibility, where the crime amounts to a felony, or is infamous in its nature, and involves moral turpitude. But it is usually held that a witness is not to be discredited by showing his conviction of a mere misdemeanor, or minor offense not involving moral turpitude, or infamous in its nature" (40 Cyc. 2607). In the application of this principle the Department has no hesitancy in stating that it does not consider that a conviction of a strictly military offense, such as "having clothing in lucky bag," could be introduced in evidence for the purpose of discrediting a witness; but it cannot accept the contention of the judge advocate in this case that the offense of "having unlawful possession of the clothing of another" is a strictly military offense in the same category as the example given above, but, on the contrary, considers that this latter offense is not essentially military in its character, and that it does involve a certain degree of moral turpitude.

As to (2), the manner in which evidence of the conviction was introduced, "a conviction of crime is properly proved by the record or a properly authenticated copy thereof, and in the absence of any controlling statute on the subject, the record is the only competent evidence of the conviction, and parol evidence is not competent for that purpose if objected to. But modern statutes very generally allow the witness to be cross-examined as to conviction of crime; and, if he admits his conviction, this is sufficient and the production of the record is not necessary" (40 Cyc. 2640). The admission of this witness, therefore, could properly be accepted by the court as evidence of his conviction of the offense in question.

In regard to (3), the question as to whether conviction of an infamous crime affects the competency or credibility of a witness, the distinction between competency and credibility is clearly laid down in Forms of Procedure, 1910, pp. 135, 136, where it is stated that "at present there are few persons except idiots, the insane, intoxicated persons, very young children, and the wives of accused persons that by law are not competent to testify * * * it may be stated as a general rule that all witnesses capable of so doing are entitled to testify, and that it rests with the court in its capacity as a jury to decide how much weight is to be given their testimony."

[P. 9] It may be seen, therefore, from a consideration of the foregoing that such credence as the court may have given to the admissions of this witness

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regarding his conviction of the offense in question, might operate to affect his credibility, but not his competency as a witness (G. C. M. Rec. No. 31998).

DEATH GRATUITY: PAYMENT TO BE MADE IMMEDIATELY UPON THE AUTHORIZATION OF THE PAYMASTER GENERAL OF THE NAVY.

In death gratuity cases, when the right of a beneficiary has been established to the satisfaction of the Paymaster General of the Navy, and he has authorized payment by the proper disbursing officer, such payment will be made by said officer *immediately*, as required by law, unless the authorization is for any reason revoked by the Paymaster General of the Navy before payment can be accomplished (File 26543–148: 5, Sec. Navy, May 29, 1916).

TYPHOID PROPHYLACTIC: NAVAL INSTRUCTIONS, 1913, I–3212, PRESCRIBING THE ADMINISTRATION OF SAME TO ALL PERSONS OF THE NAVY AND MARINE CORPS WHO ARE UNDER 45 YEARS OF AGE, OR HAVE NOT HAD A WELL-DEFINED CASE OF TYPHOID FEVER, IS MANDATORY AND DOES NOT ADMIT OF EXCEPTIONS.

The Department has received several requests from officers to be excused from receiving typhoid prophylactic on account of various assigned reasons. In a recent request of this kind an adherence to a certain religious belief was stated as the basis of this request.

The Department has been obliged to deny this request as well as others of a similar nature for the reason that Naval Instructions, 1913, I–3212, prescribing the administration of typhoid prophylactic on all persons of the Navy and Marine Corps who are under 45 years of age, or have not had a well-defined case of typhoid fever, is both explicit in phraseology and mandatory in character and admits neither of doubt as to its intentions nor of exception.

In commenting upon this request the Bureau of Medicine and Surgery made the following remarks:

> "Typhoid fever is a communicable disease and its prevention by prophylactic measures is a well known procedure, employed in foreign armies and navies as well as in our own. Its value to the service can only be evident if universally employed * * *. This Bureau has never regarded this measure as one for the benefit of the individual solely, but as a measure of prophylaxis for the benefit of the whole service, and for the suppression of a communicable and at the same time a preventable disease. With this end in view the [P. 10] Bureau believes it has a right to expect the loyal support of all officers, their religious beliefs notwithstanding, as the end sought is military efficiency, and on broad principles is not incompatible with the primary precepts of humanitarianism."

(See File 26181–36; for cases in which enlisted men have refused to take this treatment see G. C. M. Rec. Nos. 24756, 24881, 21477, and 31931.)

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[P. 5] FRAUDULENT ENLISTMENT: SPECIFICATION UNDER THIS CHARGE MUST ALLEGE THE RECEIPT OF PAY AND ALLOWANCES IN CASES IN WHICH THE ACCUSED WAS NOT IN THE SERVICE AT THE TIME OF FRAUDULENTLY ENLISTING.

Harry McKay, apprentice seaman, alias Harry P. McKay, coal passer, U. S. Navy, was tried by general court martial on board the U. S. S. *Kansas*, by order of the Commander in Chief, U. S. Atlantic Fleet, and found guilty of "fraudulent enlistment." The specification under the charge alleged that McKay fraudulently enlisted on September 20, 1915, having procured such enlistment by concealing from the recruiting officer that he had, on October 22, 1906, deserted from the U. S. Navy. The specification did not allege that McKay had, since said fraudulent enlistment, received pay or allowances thereunder.

The gist of the offense, therefore, with which McKay was charged, was that on September 20, 1915, he procured his enlistment by means of false representations. In other words, the gravamen of the offense [P. 6] charged was an

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act committed before the accused, on September 20, 1915, had completed a contract—voidable on the part of the Government by reason of the fraud of the accused, but none the less binding upon the accused—whereby he submitted himself to naval jurisdiction. The question now arises as to what was the status of the accused at the time of making the false representations, which were preliminary to this voidable contract and made before the same had become effective. Was he at that time subject to naval jurisdiction, and was an offense then committed one of which a naval general court martial could later take cognizance?

It appears that the accused in this case first enlisted in the Navy on August 30, 1906, and that this enlistment expired on August 29, 1910. On October 22, 1906, the accused deserted from the naval service and remained absent until September 20, 1915, when he fraudulently enlisted by concealing his desertion. Upon these facts it may be seen that while the enlistment of the accused expired on August 29, 1910, yet he had never been discharged from the naval service. So the specific question to be decided is whether on September 20, 1915, the time of the fraudulent act of the accused, he was still in the naval service by virtue of his previous enlistment and the fact that he had never been discharged therefrom, or whether he ceased to be in the naval service after August 29, 1910, by virtue of the expiration of his contract of enlistment on that date.

In an opinion of the Attorney General, discussing the limitation of the offense of desertion, it is stated:

"This engagement (contract of enlistment) binds the soldier for a specific term of service, beginning at a certain time and running thence continuously day after day until the end is reached, the last day of the term being as much fixed by the contract as the first. * * * Thus it seems that in our military service the contract of enlistment must in all cases, even in that of desertion, be regarded as having expired when the last day of the term of enlistment therein fixed has elapsed. And since the obligation to serve depends upon the contract, and necessarily ceases therewith, the offense of desertion, on grounds already set forth, must be deemed to terminate at the same time. In short, that offense may be viewed as continuing up to the end of the term of his engagement, but not beyond" (15 Op. Atty. Gen., 161, 162).

While it is to be remarked in connection with the foregoing opinion of the Attorney General that there are legal ways in which an enlisted man may be held to service after the expiration of his enlistment, a discussion of the same is not pertinent to the present issue for the purpose of which it is sufficient to accept the above opinion as controlling on the point that the offense of desertion is completed upon the expiration of the offender's enlistment. This, however, does not mean that the offender can no longer be punished for desertion—for the statutes specifically provide that he remains amenable therefor for a period of two years after the expiration of his enlistment [P. 7] but merely establishes the date when the offense of desertion has been completed. In other words, subsequent to the expiration of his enlistment a deserter remains none the less a deserter, but does not continue in desertion.

Applying then this conclusion to the facts in the present case, it follows that McKay's desertion came to a termination upon the expiration of his enlistment on August 29, 1910, and upon that date his connection with the naval service came to an end, except that a statutory provision permitted of his trial for desertion for two years thereafter. The status of McKay, therefore, on September 20, 1915, when he presented himself for enlistment, was that of a civilian—a civilian, it is true, with a mark of desertion against him, but none the less a civilian. Having thus established McKay's status, it is now apparent that at the time of committing the offense with which he is here charged, that of inducing the Government by means of fraudulent representations to enter into a contract with him, the Navy had no jurisdiction over his person and could, therefore, not assume jurisdiction over an offense then committed by the accused. The Department accordingly held the specification charging McKay with fraudulent enlistment to be fatally defective and set aside the findings and sentence thereunder (G. C. M. Rec. No. 32175).

In connection with the above case it is to be remarked that the failure to bring the accused to justice for fraudulently enlisting was due entirely to faulty pleading. A statute is in force which was specifically intended to remedy a

situation similar to that which existed in the present case. The act of March 3, 1893 (27 Stat., 716), provides that:

> "Fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court martial under article 22 of the Articles for the Government of the Navy."

Up to the time of the passage of this act there were in existence no legal means of trying by court martial for this offense one who was not at the time fraudulently enlisting subject to naval jurisdiction. Since the passage of the above act the legal means exist for trying such an offender but in order to make use of the same it is necessary that they be properly pleaded.

Now, having in mind the conditions which were to be remedied by the act of March 3, 1893, and considering the language of this statute, it may be seen that the gist of the offense of fraudulent enlistment, when committed by persons not in the service at the time of procuring such enlistment, is not the false representations made prior to their acceptance, but is the receipt of pay and allowances under a fraudulent enlistment, which act is committed after the offender has completed a contract—binding as to him even though voidable by the Government—whereby he has submitted himself to naval jurisdiction. In order, then, to have preferred a valid specification against McKay, it would only have been necessary to have [P. 8] added to the specification the further and material allegation that he had received pay and allowances under his fraudulent enlistment.

The foregoing, of course, applies only to the case of persons who are not in the naval service at the time of fraudulently enlisting. In the cases of men who are actually in desertion as explained above, the allegation of receipt of pay and allowances is not essential to the validity of a specification in support of a charge of fraudulent enlistment. In the latter cases the offenders are subject to naval jurisdiction at the time of making the false representations whereby the fraudulent enlistments are obtained and the statutory provision need not be utilized in order to complete the offense. In fact, the insertion of the allegation of the receipt of pay and allowances in these cases merely makes necessary an attempt to prove more than would otherwise be required to sustain the charge. However, inasmuch as in such cases, even in the event of failure to prove the receipt of pay and allowances, the charge would be sustained by the proof of having procured enlistment by fraudulent representations, while, in the cases of persons enlisting fraudulently while not subject to naval jurisdiction, the allegation of the receipt of pay and allowances is vital to the specification, it is a good rule, in all cases of fraudulent enlistment about which there may be any doubt, to set forth this allegation in the specification. (See C. M. O. 23, 1910, 7–13.)

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1. SPECIFIC INTENT: WHEN AN ESSENTIAL INGREDIENT OF AN OFFENSE, MUST BE ALLEGED AND PROVED.
2. WITNESSES: SHOULD TESTIFY ONLY AS TO FACTS.

(1) Franklin Dempsey, coal passer, U. S. Navy, was tried by summary court martial on board the U. S. S. *Memphis* upon a specification alleging that, when testifying before a board of investigation, he made a statement which "was knowingly false and intended to deceive."

The evidence adduced at the trial showed clearly that the statement in question was false, but there was no evidence introduced indicating that the statement was knowingly false and intended to deceive. An analysis of the offense charged shows that there are two elements essential to its completion, namely (1) falsity of the testimony in question and (2) knowledge of such falsity together with an intention to deceive. Inasmuch as only (1) of the above elements constituting this offense was established by evidence, proof was, therefore, lacking of the completion of the offense and the court properly acquitted the accused thereof.

(2) During the course of the trial of this case one witness was asked:

> "10. Q. Do you think that the statement made by the accused at the investigation of which you were recorder, was false and intended to deceive? [P. 9] "11. Q. Do you think that he was knowingly mistaken?"

[C. M. O. 17—1916]

Another witness was asked:

"8. Q. Was it knowingly false or intended to deceive?"

The above questions called for expressions of opinions from witnesses and not for statements of facts. It is well settled, as a general rule of evidence, to which the circumstances in this case offer no ground for exception, that the testimony of witnesses should be confined to the facts in a case and that it is the exclusive function of the court to draw the inferences which may be predicated upon the facts established by the testimony. The above questions, therefore, should have been excluded by the court as improper. (See Index-Digest, 1914, 20; C. M. O. 49, 1915, 15.)

SPECIFICATIONS: THE SAME OFFENSE SHOULD BE MADE THE SUBJECT OF BUT ONE SPECIFICATION.

August Saari, private, U. S. Marine Corps, was tried by general court martial at the Marine Barracks, American Legation, Peking, China, by order of the Commander in Chief, U. S. Asiatic Fleet, upon charges among which was one of "drunkenness." Under this charge there were three specifications, the first one alleging that the accused was under the influence of intoxicating liquor at or about 5:20 p. m. February 15, 1916; the second specification alleging that he was under such influence at 5:45 p. m. on the same date; and the third alleging that he was under such influence at about 6:00 p. m. on the same date.

Since it seems impossible that a man could become three times intoxicated and twice sober during so short a period as forty minutes, it would appear that the facts alleged in the three specifications all relate to the original state of intoxication continuing during this forty-minute period, and that there had been but one act of becoming intoxicated and but one resulting state of intoxication. The mere fact that the location of the accused may have changed while intoxicated does not in itself constitute a distinct offense. Also, when one has become intoxicated, his continuance in this state until sufficient time has elapsed to permit of his becoming sobered is to be presumed, and such a continuance forms a necessary part of each single offense of "drunkenness" and should not be separately alleged. To hold otherwise would be, in effect, to allow a different specification for every second a man's intoxication might continue (G. C. M. Rec. No. 32124).

[P. 10] DEPOSITS: ENLISTED MAN, HAVING BEEN GIVEN AN ACTING APPOINTMENT AS WARRANT OFFICER, IS ENTITLED TO MAKE DEPOSITS AND DRAW INTEREST THEREON UNTIL THE DATE THAT HE IS GIVEN A WARRANT.

Held, in the case of an enlisted man, having been given an acting appointment as warrant officer, the status of such man pending the issuance of a warrant continues that of an enlisted man, although at the same time acting at a warrant officer, and he is therefore entitled to draw interest on deposits or to make additional deposits in accordance with the act of February 9, 1889 (25 Stat. 657) providing that deposits may be made by "any enlisted man or appointed petty officer of the Navy." The deposit, therefore, of an enlisted man, having been given an acting appointment as a warrant officer, should be settled on the date that he is given a warrant, and interest allowed to that date, unless previously discharged (File 26254–2020, Sec. Navy, June 6, 1916).

"LINE OF DUTY" AND "MISCONDUCT": CONSTRUED.

Drowning.—Deceased fell overboard from a shore boat while returning to his ship from authorized liberty. Deceased was sober at the time and his death was found due to accidental drowning. *Held*, not line of duty and not misconduct (File 26250–789, Sec. Navy, May 5, 1916).

Drowning.—Deceased, an acting ship's cook, went to ship's side to dump egg shells, fell overboard, and was drowned. Evidence showed that life line had been left down. *Held*, line of duty and not misconduct (File 26250–796, Sec. Navy, May 26, 1916).

Struck by train.—Deceased was struck by train while a trespasser on railroad tracks in violation of definite law and signboards. *Held*, not in line of duty and misconduct (File 26250–788, June 6, 1916).

C. M. O. 19—1916

[P. 1] Lieutenant (junior grade) Guy C. Barnes, United States Navy, was tried by general court martial on June 10, 1916, at the Navy Yard, Norfolk, Virginia, on the following charge:

Charge.—Culpable negligence and inefficiency in the performance of duty (one specification alleging that the accused, while in command of the *Roe* and when the vessel was approaching her moorings under circumstances which were well known to him as involving a risk of a collision with the *Monaghan*, did "neglect and fail properly and in due time to slacken and retard the speed of the said ship *Roe*, as it was his duty to do, by reason of which neglect and failure the said ship *Roe* did then and there strike and collide with the said ship *Monaghan*, and thereby damage the said ship *Monaghan* and the said ship *Roe*, and he, the said Barnes, was therein and thereby culpably negligent and inefficient in the performance of his duties").

Findings

"The specification of the charge, 'not proved.'

"And that the accused, Guy C. Barnes, lieutenant (junior grade), U. S. Navy, is of the charge, 'not guilty' and the court does, therefore, acquit him, the said Guy C. Barnes, lieutenant (junior grade), U. S. Navy, of the charge."

Returned for Revision

The Department on June 26, 1916, returned the record in this case to the court with the direction that it reconvene for the purpose of reconsidering its findings and acquittal. The Department's letter returning the record to the court read in part as follows:

> "The attention of the court is invited to Navy Regulations, 1913, R–2081 (4) and (5) and of which the court must take judicial notice.
>
> "The above regulations make the commanding officer responsible that all necessary precautions are taken and he is, furthermore, chargeable with knowledge of what those precautions are which should be taken under various circumstances; his responsibility for professional knowledge and foresight in avoiding collision applies at all times, but is particularly obligatory in a case similar to this where the *Monaghan* was in such [P. 2] a position as to invite collision unless unusual care and precautions were employed in making the landing.
>
> "If the court considers that the accident was due to a failure of the engines to back properly then the fact still remains that the accused is guilty of negligence either in depending entirely on the engines to make the landing safely, or in failing to recognize that other precautions were necessary to ensure a safe landing being made.
>
> "The responsibility was his to recognize that this occasion required special precautions; the responsibility was his to know the special and unusual precautions which were necessary on this occasion to insure a safe landing and responsibility was his to see that these precautions were taken. In brief, the position of Lieutenant Barnes as commanding officer imposed upon him the responsibility to land safely under unusual conditions. If he failed to recognize that unusual conditions presented themselves or to know what special precautions were required, or through lack of foresight he failed to take them, then the accused is guilty."

Finding in Revision

"The court decided to revoke its former finding and acquittal in the case of Lieutenant (junior grade) Guy C. Barnes, U. S. Navy, and to substitute therefor the following:

"The specification of the charge 'Proved, except the words "and inefficiency," in the last line, which words are not proved,'

"And that the accused, Lieutenant (junior grade) Guy C. Barnes, U. S. Navy, is of the charge, 'guilty in less degree than charged, guilty of culpable negligence in the performance of duty.'"

[C. M. O. 20—1916]

SENTENCE IN REVISION

"The court, therefore, sentences him, Lieutenant (junior grade) Guy C. Barnes, U. S. Navy, to lose three (3) numbers in his grade."

RECOMMENDATION FOR CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his previous excellent record, we recommend Lieutenant (junior grade) Guy C. Barnes, U. S. Navy, to the clemency of the revising power."

RECOMMENDATION OF CHIEF OF BUREAU OF NAVIGATION

The Chief of the Bureau of Navigation placed upon the record the following indorsement:

"Returned. This Bureau considers the sentence awarded by the court inadequate to the offense found proved and recommends [P. 3] approval of the findings and sentence in order that this officer may not escape punishment entirely."

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence, in the foregoing case of Lieutenant (junior grade) Guy C. Barnes, U. S. Navy, are approved.

In accordance with the recommendation of the Bureau of Navigation, the recommendation to clemency is disapproved, and Lieutenant Barnes will be released from arrest and restored to duty.

C. M. O. 20—1916

[P. 1] Gunner John K. Thompson, United States Navy, was tried by general court martial on June 14, 1916, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy and found guilty of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (one specification alleging that the accused, while undergoing a written professional examination, knowingly, willfully, corruptly, fraudulently, secretly, and without the knowledge or permission of the examining board, did take into the examining room four blotters, having written and copied upon them facts in answer to questions that might be asked him).

Charge II.—Conduct unbecoming an officer and a gentleman (one specification alleging that the accused, having been given a certain question while undergoing examination did, willfully, corruptly, etc., surreptitiously aid himself in answering said question by means of certain facts he had written and copied upon a blotter, which he had introduced into the examining room without the knowledge of the examining officer).

SENTENCE

"The court therefore sentences him, John K. Thompson, a gunner in the United States Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of the accused's previous long and honorable service, we recommend Gunner John K. Thompson, United States Navy, to the clemency of the revising power."

ACTION OF THE SECRETARY OF THE NAVY

The Bureau of Navigation, after a careful consideration of the record in this case, recommends the approval of the findings and sentence. Careful considera-

tion has been given to the past record and the recommendation to clemency spread upon the record by the members of the court. However, in view of the nature of the offense in this case, the Department is of the opinion that the retention of an officer convicted of such an [P. 2] offense is not desirable, and in accordance with the recommendation of the Bureau of Navigation, the proceedings, findings, and sentence in the foregoing case of Gunner John K. Thompson, U. S. Navy, are approved.

ACTION OF PRESIDENT

In conformity with the provisions of article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, who, on July 8, 1916, confirmed the sentence of the court.

C. M. O. 21—1916

[P. 1] Chief Boatswain Herman M. Anderson, United States Navy, was tried by general court martial on May 29, 1916, on board the U. S. S. *Brooklyn* at Shanghai, China, by order of the Commander in Chief, United States Asiatic Fleet, and found guilty of the following charge, the specification of which was "proved by plea."

Charge.—Drunkenness (one specification).

SENTENCE

"The court, therefore, sentences him, Chief Boatswain Herman M. Anderson, United States Navy, to be restricted to his ship or station for a period of three (3) months and to lose one-half (½) of sea-duty for a period of one (1) year."

RETURNED FOR REVISION

The convening authority on May 31, 1916, returned the record of proceedings to the court and ordered the general court martial to reconvene for the purpose of reconsidering its sentence, as, in the opinion of the commander in chief, the sentence was inadequate to the offense found proved.

SENTENCE IN REVISION

The court in revision decided to revoke its former sentence in the case of Chief Boatswain Herman M. Anderson, United States Navy, and to substitute therefor the following:

> "To be restricted to his ship or station for a period of three (3) months and to lose one hundred dollars ($100) per month of his pay for a period of twelve (12) months."

AGAIN RETURNED FOR REVISION

The convening authority, after reviewing the record in revision, on June 7, 1916, again returned the record to the court, inviting attention to the fact that the sea-duty pay of the accused [P. 2] was $2,618 per year and that the sentence adjudged by the court in revision was less than that originally adjudged and previously stated to be inadequate, and directing the court to reconvene for a reconsideration of its sentence in revision.

SENTENCE IN REVISION

The court in revision decided to revoke its former sentence in the case of Chief Boatswain Herman M. Anderson, United States Navy, and to substitute therefor the following:

> "To be restricted to his ship or station for a period of three (3) months and to lose one hundred and nine dollars and nine cents ($109.09) per month of his pay for a period of twelve (12) months."

[C. M. O. 22—1916]

ACTION OF CONVENING AUTHORITY

The convening authority on June 15, 1916, noted that in awarding its final sentence the court changed the form but not the substance of its original sentence, and that, attention having twice been called to the inadequacy of the sentence, the court entirely failed to realize its responsibilities to the naval service, and, subject to these remarks, approved the proceedings and findings and, in order that the accused might not entirely escape punishment, the sentence in the foregoing case of Chief Boatswain Herman M. Anderson, United States Navy, and directed that he be released from arrest and restored to duty.

ACTION OF THE SECRETARY OF THE NAVY

The Department concurs in the remarks of the convening authority relative to the inadequacy of the sentence adjudged in this case. The record of the accused, which was before the court, shows that he has been tried and convicted by general court martial on two previous occasions for similar offenses involving drunkenness. The Department therefore feels that to permit Chief Boatswain Anderson to continue in the service as a commissioned officer is adverse to the interests of justice and discipline, and that the action of the court in this case has resulted in a miscarriage of justice.

C. M. O. 22—1916

[P. 6] FORMER JEOPARDY: NOT A VALID PLEA IN BAR WHEN BASED ON PROCEEDINGS HELD UPON A FATALLY DEFECTIVE SPECIFICATION.

Paul H. Jones, corporal, U. S. Marine Corps, was brought before a summary court martial upon a specification preferred by the Commandant, Marine Barracks, Naval Academy, Annapolis, Md., June 5, 1916. When called upon to plead, the accused, through counsel, objected to the specifications as "fatally defective." The court sustained the objection of the accused and notified the convening authority that the accused submitted a plea in bar of trial which the court decided was a valid one. Thereupon the convening authority withdrew the specification and directed that prosecution thereon be discontinued.

Thereafter the accused was brought before the same summary court martial upon two specifications preferred by the same convening authority on June 10, 1916, and setting forth in proper form the same offenses charged in the specification in the previous case. The accused, through the same counsel, now entered a plea of former jeopardy, in support of which counsel contended that the accused had already been tried for the same offenses, stating in part:

> "The accused contends the former specification was a valid indictment under the law and under the provisions of the Forms of Procedure."

The court properly overruled this plea of former jeopardy. That the original proceedings against Jones did not advance to the necessary stage to operate as a bar of trial—that is, to a *final conviction* or *acquittal*—can readily be seen by a reference to C. M. O. 7, 1914, pp. 5–6, and requires no further discussion here. However, aside from this fact, it may be stated as sufficiently established that proceedings upon a "fatally defective" specification do not constitute former jeopardy. In *United States* v. *Rogoff*, 163 Fed. Rep. 311, it was said by the court:

> "It is difficult to see how the dismissal of an indictment before the case goes to the jury, when this dismissal is had upon the ground that no charge sufficient in law has ever been made against the defendant, can be said to have placed him in jeopardy. The entire transaction, from the finding of the indictment to the dismissal, is made a nullity, and the defendant comes before the court upon the second indictment as if the first charge had never been made. * * *
>
> "The court, having jurisdiction of the defendant, nevertheless had no jurisdiction over the offense which was attempted to be charged, inasmuch as no offense was charged and the defendant was, therefore, never in a position of jeopardy before a jury which was called to pass upon any suffi-

cient criminal charge. The matter was disposed of as a question of law, with the same effect as if it had been argued upon demurrer to the indictment."

[P. 7] Having in mind the foregoing, it seems sufficiently clear that, inasmuch as the court accepted the first contention of the accused to the effect that the original specification was fatally defective, the accused was not placed in jeopardy upon that specification. However, the point which is particularly worthy of notice in this connection is the fact, as shown above, that we here have the same accused, before the same court, and represented by the same counsel, first contending that the original specification against him was "fatally defective," and then, when he had secured a favorable ruling upon this point, wholly changing front and contending that the aforesaid specification was a "valid indictment."

The evils that would result, were accused persons permitted to assume inconsistent positions in court as their interests might happen to change in the course of criminal proceedings, are so obvious as to require little comment. The opportunity thus presented for the guilty to escape punishment would result in placing a premium upon the ability of ingenious attorneys to confuse and mislead the court in order to obtain decisions in their favor, only to insist upon the incorrectness of such decisions when, after conviction, it should become to the interests of their clients to do so. In *People* v. *Meakin*, 61 Hun. (N. Y.) 327, the court held:

> "But the principle is well settled that, in criminal as well as in civil cases, a defendant must be held to the position which he assumes and upon which he requests and secures a favorable judgment or other personal advantage."

In the case cited, the court, upon a former trial, had directed an acquittal upon the ground of a variance between the proof and the facts charged in the indictment. A second indictment was found for the same offense, upon the trial of which the defendants urged that in fact there was no material variance between the proof upon the former trial and the allegations of the first indictment; that, therefore, the defendants had been once put in jeopardy, and consequently the second indictment was within the constitutional prohibition.

The court, however, declined to consider the question thus attempted to be raised, holding that "whether the variance referred to was or was not material, we think the defendants cannot now be permitted to question the position which they took upon that head on the former trial. The record of that trial distinctly shows that the defendants there claimed that the variance was material; * * * having requested the court to rule in their favor in these particulars, and the court having thereupon directed an acquittal upon these very grounds, they cannot now be heard to say that there was no material variance. * * * In other words, they must, under such circumstances, take the acquittal as it was directed and recorded, and they cannot now be permitted to go behind the record as it was thus made up."

[P. 8] The principle has been stated in accordance with this case by Bishop in his work on Criminal Law (7th ed., sec. 1000) and has been applied in numerous reported decisions. However, without further citation of authorities, it is considered sufficiently clear that the original specification preferred against Corporal Jones must now be taken as "fatally defective" in accordance with counsel's contention which was sustained by the court. This being so, there is an end to the matter, the plea of former jeopardy based upon proceedings which, at the instance of the accused, were declared a nullity, having no support in law wholly aside from the fact that said proceedings did not advance to the stage required under the citations given above to operate as a bar of trial (File 26287–3475).

WITNESS: INCOMPETENCY OF COMMON-LAW WIFE TO TESTIFY FOR OR AGAINST HUSBAND.

In the case of Harry C. Farmer, coal passer, U. S. Navy, tried by general court martial at the Navy Yard, Philadelphia, Pa., there was called by the prosecution a witness whose competency the defense challenged on the ground that

[C. M. O. 23—1922]

she was the common-law wife of the accused. The defense introduced testimony to show the relation existing between the accused and the witness, and that such relation created a common-law marriage relation between them. Counsel for the defense also presented a brief to the court, setting forth the laws of Pennsylvania governing such status, which laws supported counsel's contention. The court properly sustained the objection of the defense and declared the witness incompetent on the ground that she was the common-law wife of the accused (G. C. M. Rec. No. 32186).

C. M. O. 23—1916

[P. 1] Commander Henry B. Price, United States Navy, was tried by general court martial on July 18, 1916, on board the U. S. S. *Minnesota* at Newport, R. I., by order of the Commander in Chief, United States Atlantic Fleet, upon the following charges:

Charge I.—Culpable negligence and inefficiency in the performance of duty (two specifications).

Charge II.—Through negligence suffering a vessel of the Navy to be stranded (two specifications).

Findings

The court found the first specification of the first charge "proved," the second specification of the first charge "not proved," and that the accused was of the first charge "guilty"; the first specification of the second charge "not proved" and the second specification of the second charged "proved in part," and that the accused was of the second charge "guilty."

Sentence

"The court, therefore, sentences him, Commander Henry B. Price, U. S. Navy, to lose five (5) numbers in his grade."

Recommendation to Clemency

The following recommendation to clemency signed by six of the seven members of the court was spread upon the record:

> "In view of the previous excellent record of the accused and of his well known careful and painstaking qualities, and to the fact that the stranding was due as much to an error of judgment as to negligence and inefficiency, we recommend Commander Henry B. Price, U. S. Navy, to the clemency of the revising power."

[P. 2] The convening authority (Commander in Chief, Atlantic Fleet) on July 25, 1916, approved the proceedings, the finding on the first charge and first specification thereunder, the finding on the second charge and second specification thereunder, and the sentence in the foregoing case of Commander Henry B. Price, U. S. Navy. The findings on the second specification of the first charge and on the first specification of the second charge were disapproved as, in the opinion of the convening authority, these findings were not in accordance with the evidence. The convening authority, in taking the above action, made the following comments:

> (1) "The following irregularities were noted in the record. The entire findings were not entered in the handwriting of the judge advocate. Forms of Procedure, 1910, page 40, states, 'The judge advocate was recalled and directed to record the following findings:' Everything which follows this statement is a part of the finding and therefore must be recorded in the handwriting of the judge advocate (C. M. O. 42, 1914, p. 5 and citations therein).
>
> (2) "The receipt of the accused for a copy of the proceedings was not appended to the record as required by Forms of Procedure, 1910, p. 74. While this procedure is irregular the convening authority does not consider it sufficient to invalidate.
>
> "Six of the seven members of the court signed a recommendation for clemency (as set forth above). The accused in this case is an officer holding

[C. M. O. 24—1916]

a commission as commander and performing the duty of his rank. An officer assigned duty of importance in command of a vessel of the Navy must be held to a strict responsibility for the efficient performance of that duty. In this case a vessel of the Navy has been damaged to the extent of many thousands of dollars, and her services will be lost to the fleet during the time required for her repairs. In view of the very lenient sentence adjudged in this case, it is not felt that a reduction of the sentence is warranted. The recommendation for clemency is accordingly denied. Commander Henry B. Price, U. S. Navy, is hereby released from arrest and restored to duty."

C. M. O. 24—1916

[P. 1] Lieutenant (junior grade) Conrad Ridgely, United States Navy, was tried by general court martial July 24, 1916, at the Naval Training Station, Newport, R. I., by order of the Secretary of the Navy, on the following charges:

Charge I.—Culpable inefficiency in the performance of duty (one specification alleging that the accused, as navigator of the *San Francisco*, in plotting his course by dead reckoning from 9 p. m. to 12 p. m. an May 16, 1916, failed to make use of the information furnished by official publications in regard to the currents, in consequence of which the *San Francisco* was stranded upon a shoal at about 12:41 a. m. May 17, 1916, in about Latitude 41°21′30″ N. Longitude 69°48′40″ W.)

Charge II.—Culpable negligence and inefficiency in the performance of duty (four specifications alleging a failure to utilize in navigating the *San Francisco* certain well known and generally accepted methods of fixing the position of a ship, and that he failed to notify and warn the captain when, in his opinion, the ship was standing in danger, as the result of which the *San Francisco* ran upon a shoal at the time and place set forth under charge I).

Findings

The specification of the first charge, "not proved."

And that the accused, Lieutenant (junior grade) Conrad Ridgely, U. S. Navy, is of the first charge "not guilty" and the court does therefore acquit the said Lieutenant (junior grade) Conrad Ridgely, U. S. Navy, of the first charge.

The first specification of the second charge, "not proved."

The second specification of the second charge "not proved."

The third specification of the second charge, "not proved."

The fourth specification of the second charge, "not proved."

And that the accused, Lieutenant (junior grade) Conrad Ridgely, U. S. Navy, is of the second charge "not guilty" and the court does therefore acquit the said Lieutenant (junior grade) Conrad Ridgely, U. S. Navy, of the second charge.

[P. 2] Action of the Secretary of the Navy

In reviewing this case several questions arise, and it is uncertain upon what ground the court arrived at an acquittal. These questions may be considered as follows:

(1) The responsibility of the navigator under the circumstances.

(2) Whether or not he was negligent and inefficient in the actual navigation of the ship. This in turn divides itself into (*a*) Navigation of the ship before 12:07 a. m., and (*b*) that subsequent to 12:07 a. m.

(3) Whether or not, as a consequence of such neglect and failure, the *San Francisco* stranded.

Responsibility of the navigator.—The Navy Regulations, R–2401, state that "the navigating officer is the officer detailed by the Department to perform the navigation duties and is the head of the navigation department of the ship." It also states that "the navigating officer shall be senior to all watch and division officers." It was shown by the evidence that Lieutenant Ridgely was not detailed by the Department but was detailed at his own request, by the captain of the ship as navigator, and that he was not the officer upon whom by rank the navigation duties would have automatically devolved. Certain evidence was also introduced showing that upon graduation he stood low in his class and low

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in the subject of navigation, and that he had not received instruction in navigation since his graduation.

The question of his standing in the subject of navigation and the absence of instruction since he became a commissioned officer is believed to be irrelevant. An officer bearing a commission must be accepted as a responsible person and must be held accountable for the proper and efficient performance of duties commensurate with his grade as recognized by Navy Regulations. The only question remaining under this heading is whether or not the court considered that he was legally assigned to the duties of navigator in the sense of being responsible for the efficient performance of those duties. The duties of navigator of a vessel such as the *San Francisco* are commensurate with the grade of junior lieutenant, and despite the provision of the Navy Regulations above quoted, Lieutenant Ridgely was responsible for the proper performance of these duties after they were assigned him by the commanding officer; it is not believed that the court acquitted him on this ground.

Methods of navigation of the ship—(a) Before 12: 07.—Without reviewing in detail all of the evidence concerning the navigation of the ship, the evidence shows that the *San Francisco* was navigated from the last fix to 12: 07 without the use of the very important current charts supplied for the waters in question and as a consequence arrived at the entrance to Great [P. 3] Round Shoal Channel at approximately 11: 54, instead of 12: 07. The evidence shows that working forward from the last fix and applying the current, the track of the *San Francisco* was almost identical with the track obtained by working back from the position of grounding; and working forward it was shown that she would have arrived off the entrance to the channel at 11: 53, while working back from the position of grounding showed that she must have arrived off the entrance at 11: 54; in other words, the evidence shows that had the current chart which was supplied to the ship for that purpose been utilized in the run subsequent to the last fix, her position would at all times have been accurately known, and at 11: 53 or 11: 54, either the entrance bouys would have been sighted or else a course to the eastward would have been laid at that time.

(*b*) *After 12 : 07.*—The evidence shows that at 12: 14, on sighting a light to the southward and westward, toward which, under orders of the division commander, the ship was steered, with the exception of the soundings by the hand lead, ordinary methods of navigating and safeguarding the ship were neglected, and though the navigator realized the uncertainty of his position, he failed to advise and warn the captain as to his opinion concerning the danger of the course then being pursued, as is required by Navy Regulations. Article 2404 (3) requires that "If the commanding officer is conning and the navigator thinks the ship is running into danger, he shall so inform the commanding officer and advise him as to a safe course to be steered." It is believed that the full purport and value of this regulation is frequently overlooked. This warning which is required by regulations is as important a portion of the duties of navigator as are the ordinary methods of piloting; this regulation is not intended to be permissive, it is mandatory. The keeping afloat of a vessel of war is a duty so important that the Government, in order to safeguard itself and insure a check against those unaccountable lapses which sometimes occur in any individual, however proficient he may be, has prescribed a concurrent responsibility in regard to the navigation thereof.

The Department considers that in cases of danger, or in cases where the navigator feels uncertain of his position, the requirement above quoted of article 2404 is an additional safeguard intended to bring forcibly to the attention of the captain the fact that the position of the ship is not known to the navigator. Though the evidence shows that both the division commander and the commanding officer were cognizant of the conditions subsequent to 12: 07, this knowledge is not construed as relieving the navigator of responsibility for affirmatively informing the captain of his opinion concerning the course then being steered; and aside from all other navigational features subsequent to 12: 07, the Department considers that the failure of [P. 4] the navigator to make this protest was in itself negligence and inefficiency in the performance of his duties.

Effect of navigational methods upon stranding of the ship.—If it is considered that Lieutenant Ridgely was inefficient in the navigation of the ship; that the methods used by him were not such that the Government has a right to demand of officers charged with this duty, then it may be stated, as a matter of law,

that the final clause in each specification to the effect that "in consequence of which neglect and failure the *San Francisco* was stranded," is surplusage and is not an essential part of the specification. It is a portion of the specification which might have been omitted in framing the charges, or it might have been affirmatively omitted in the findings of the court; the question of whether or not the methods of navigation directly resulted in the stranding of the vessel is important only insofar as the quantum of punishment is involved. If it is considered that Lieutenant Ridgely was negligent and inefficient in his performance of duty as navigator, the culpability, insofar as the specification is concerned, is fully established entirely without the concluding clause. A navigator may be culpable and negligent and inefficient without involving the ship, even in danger of grounding. The fact of grounding therefore merely affects the gravity of the offenses.

As stated above, it is not known upon which of the above grounds the court arrived at its acquittal. It is not believed that it was on account of lack of responsibility of Lieutenant Ridgely as navigator. It is not believed that the court considered that the navigational methods employed were such as the Government has a right to require of officers charged with that responsible duty. A careful review of the case leads to the conviction that the court acquitted him because of his comparative youth, and because he was associated on the bridge with the captain and division commander, whom it appears were practically as familiar with the situation as was the navigator. It this is correct, in the opinion of the Department such a verdict is not justified, does not protect the Government in the navigation of its vessels, would establish an undesirable precedent, and would not carry out the spirit of the Navy Regulations, which impose concurrent resonsibility upon the navigator for the safety of the ship. Where concurrent responsibility is imposed by the Regulations upon several individuals and an accident occurs, it is illogical to hold that a junior is guiltless because a senior was present. The concurrent responsibility which has been established by the Navy Regulations is an additional safeguard of the Government in keeping its ships afloat; not to recognize this in effect nullifies this feature of the regulations. In such cases an endeavor to place the burden of entire responsibility upon some one individual results in confusion and a miscarriage of justice. The only logical method is to hold each in- [P. 5] dividual concerned responsible not for the accident itself, but for neglect of such of his individual duties as may have contributed to the accident.

As bearing on this subject, attention is invited to the following pertinent remarks (C. M. O. No. 33, 1913), placed by the Commander in Chief in his action upon the case of Ensign Bernard O. Wills, U. S. Navy:

> "From a review of this case, the Commander in Chief observes that stress was laid on the inexperience of the accused and the fact that, as the commanding officer was on the bridge, he (the accused) had a very small part to perform in navigating the vessel. No matter who is conning a vessel, it is the plain duty of the officer acting as navigator to keep track of the courses steered and the run of the vessel; and if he fails to use the methods and instruments for fixing the position which are at his command, and further fails to notify the captain when practicable that he believes the ship to be running into danger, he fails in his whole duty."

For the above reasons the Department considers that—

(1) Lieutenant Ridgely was responsible for the efficient performance of duties of navigator which had been assigned to him by the captain.

(2) The methods of navigation employed by him, although they were perfectly known to the captain and the division commander, were nevertheless not such as the Government can approve as being efficient;

(3) If the above be correct, he is culpable, whether or not they contributed directly to the grounding of the ship.

In view of the above the Department would, under ordinary circumstances, return the record, together with a statement of the law governing the case, to the court for a revision of its findings and acquittal. The court in this case, however, is composed of officers of high rank who have been absent from their regular stations, where urgently needed, for an appreciable length of time, and the convening of this court in revision would detain them further. The Department, therefore, having in mind the best interests of the service at large, ap-

[C. M. O. 25—1916]

proves the proceedings, but disapproves the findings and acquittal in the foregoing case of Lieutenant (junior grade) Conrad Ridgely, U. S. Navy. He will be released from arrest and restored to duty.

C. M. O. 25—1916

[P. 1] Assistant Paymaster James P. Jackson, United States Navy, was tried by general court martial on July 20, 1916, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, upon the following charges:

Charge I.—Embezzlement in violation of article fourteen of the Articles for the Government of the Navy (one specification).

Charge II.—Culpable negligence and inefficiency in the performance of duty (one specification).

Charge III.—Neglect of duty (one specification).

Findings

The court aquitted the accused of the first charge and found him guilty of the second and third charges.

Sentence

"The court, therefore, sentences him, Assistant Paymaster James P. Jackson, United States Navy, to lose four (4) numbers in his grade."

Returned for Revision

The record of the proceedings in this case was returned to the court for a reconsideration of its finding upon charge I. The Department's letter returning the same read in part:

> "It has been repeatedly published to the service that it is not the desire or the policy of the Department to coerce courts martial in their judgment of cases when the facts are in dispute, or where there is such a conflict in the evidence that reasonable men might differ as to the facts established thereby. But when there is no conflict whatever in the evidence, all material allegations of the specifications being established thereby, and the only difficulty existing is one of law, a different question is presented. And, under such circumstances, courts martial are to be governed by decisions of the Federal courts, opinions of law officers of the Government, and decisions of the Department.
>
> [P. 2] "The specification of charge I in this case alleges that the accused did 'fail safely to keep and account' for the sum of $800 of money of the United States, furnished and intended for the naval service thereof, and in the possession and control of the said Jackson in the execution and under the color of his office as an assistant paymaster in the United States Navy.
>
> "There can be no possible doubt from the evidence adduced that this officer failed safely to keep and account for this money. The judge advocate definitely proved the existence of the shortage of $800. There is no conflict whatever as to the evidence since the defense, by counsel, stated: 'There is a shortage. We admit that it exists. There is no doubt about it—the accused admits it' (Rec., p. 191). The shortage thus shown to exist in the accounts of the accused was not explained nor accounted for by the accused or the witnesses in his behalf.
>
> "Morever, the court by finding that the accused was guilty of 'culpable negligence and inefficiency in the performance of duty' (charge II), in neglecting to safeguard and keep official records relating to this money, and of 'neglect of duty' (charge III) in failing to verify during the period from March 31 to May 11, 1916, the amount of money in his possession, could not have believed that the accused took every natural and reasonable precaution in safeguarding this money that is obligatory upon an official of the Government entrusted with public funds and receiving a salary for the performance of such duty. It is therefore manifest that the finding of the court on charge I was based on their interpretation of the law governing the question of embezzlement.

"This question of law in regard to embezzlement of public money by public officers has been fully covered in court-martial orders issued by the Department. In fact, there is no subject of law that has been discussed in more detail or with more thoroughness in these orders. Although the judge advocate in this case offered no argument, and failed to advise the court on the points of law involved, yet officers—particularly those of rank and experience—are presumed to know of the subject matter of court-martial orders and to be governed accordingly.

"C. M. O. 4, 1913, and C. M. O. 39, 1913, cover every point that relates to this case. Here it is definitely shown by every authority on the subject, including the Attorney General, that a pay officer, when a shortage is proved, is guilty of embezzlement, even though funds were taken by another, unless he is free from neglect, and that for an aquittal evidence showing absence of such neglect is necessary, and that the accused cannot require the Government to prove misappropriation or negligence, nor can he require the court to indulge in hypotheses to supply evidence which is the duty of the accused to introduce, as claimed by counsel for the defense (Rec., p. 191).

[P. 3] "Since this point has been so fully covered in the aforesaid court-martial orders, it is not considered necessary to repeat in this letter all the points of law involved that have already been so carefully covered. For it is believed that the court after a study of these orders and a resulting knowledge of the law governing the undisputed facts will readily perceive that the accused, upon the facts proved, is, as a matter of law, guilty of embezzlement as charged; otherwise there must result a miscarriage of justice and a confusion of procedure and administration of justice, since the finding of the court and its sentence is not in accordance with the law."

Findings and Sentence in Revision

The court in revision decided to revoke its former findings on the first charge and specification and to substitute therefor the following:

"The specification of the first charge 'proved.'

"And that the accused, Assistant Paymaster James P. Jackson, United States Navy, is of the first charge 'guilty.'"

The court decided to revoke its former sentence and to substitute therefor the following:

"The court, therefore, sentences him, Assistant Paymaster James P. Jackson, United States Navy, to lose six (6) numbers in his grade."

Action of the Secretary of the Navy

The proceedings, findings, and sentence of the general court martial in the foregoing case of Assistant Paymaster James P. Jackson, United States Navy, are approved. Assistant Paymaster Jackson will be released from arrest and restored to duty.

Remarks

(1) It is noted that counsel for the accused in this case delivered an argument in defense of the accused wherein he placed an erroneous interpretation upon the law governing the case, and that the judge advocate of the court failed to advise the court properly in regard thereto, but submitted the case to the court without remark. The action of the judge advocate in this case is censurable, as his action was in direct conflict with the spirit and intent of Navy Regulations, 1913, R–749 (2), which provides:

"On every occasion when the court demands his (judge advocate's) opinion, he is bound to give it freely and fully, and even when it is not requested, to caution the court against any deviation from essential form in its proceedings or against any act or ruling in violation of law or material justice."

[P. 4] The action of the court in this case, in changing its finding to conform to the law, shows a proper appreciation on the part of the court of its true function, that of applying the law to the facts as it finds them. In determining

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the questions of fact the members of the court must arrive at their conclusions solely from the evidence that is adduced or comes before the court and not from any knowledge or information otherwise acquired. In exercising this part of its function a court is assisted by a knowledge and application of the rules of evidence, but no considerable knowledge of the law is required. It is to this duty of deducing the facts from a consideration of the evidence that the part of the oath administered to members requiring them to try a case "according to their own consciences" refers. The facts having been found, it remains for the court to apply the law to them. The exercise of this function depends not on the consciences of the members but upon a knowledge of the law. A comprehensive knowledge of this subject is a profession in itself, and, while officers of the naval service are accountable for the information promulgated by court-martial orders and other official publications, it is to be expected that cases will arise in which naval courts will require assistance in applying the more intricate provisions of law. Therefore, if by reason of a lack of knowledge of the law a court arrives at an incorrect finding or an unjustified sentence, there has been provided, in the interests of justice, a means of correcting such error. The Department may return the record for further consideration, pointing out what the law is and how it should be applied. In such event the court is not justified in disregarding the law because an application of the same may reach a result at variance with the individual beliefs of a majority of its members. It is only right and just for the court to accept the law as laid down to it by proper authority and then to come to its findings and sentence anew accordingly, as was done in this case.

C. M. O. 26—1916

[P. 1] Commander Arthur MacArthur, United States Navy, was tried by general court martial by order of the Secretary of the Navy at the Naval Training Station, Newport, R. I., on July 20, 1916, on the following charges:

Charge I.—Through negligence suffering a vessel of the Navy to be stranded (one specification).

Charge II.—Culpable negligence and inefficiency in the performance of his duty (two specifications).

Charge III.—Improperly hazarding the vessel under his command, in consequence of which she was run upon a shoal and seriously injured.

Specification.—In that Arthur MacArthur, a commander in the United States Navy, being in command of the United States ship *San Francisco*, while making passage from Portsmouth, New Hampshire, to Newport, Rhode Island, did, during the period from about twelve hours and fifteen minutes antemeridian, on the seventeenth day of May, nineteen hundred and sixteen, increase the speed of said ship and cause to be steered a course that led over dangerous shoals and through foul water, well knowing that the position of the ship was uncertain, that the surrounding waters were foul, that a safe deep-water course to Newport was at that time available, and that anchoring was at any moment practicable, and he, the said MacArthur, did cause the said ship to be continued on said course, and thereby hazarded without justifiable cause, in consequence of which hazarding the said ship was, at about twelve hours and forty-one minutes antemeridian, on the date aforesaid, run upon a shoal in about latitude forty-one degrees, twenty-one minutes, thirty seconds north, longitude sixty-nine degrees, forty-eight minutes, forty seconds west, and was seriously injured.

Findings

The specification of the first charge, "not proved."

And that the accused, Commander Arthur MacArthur, U. S. Navy, is of the first charge, "not guilty"; and the court does, therefore, acquit the said Commander Arthur MacArthur, U. S. Navy, of the first charge.

[P. 2] The first specification of the second charge, "proved."

The second specification of the second charge, "not proved."

And that the accused, Commander Arthur MacArthur, U. S. Navy, is of the second charge, "guilty."

The specification of the third charge, "not proved."

[C. M. O. 26—1916]

And that the accused, Commander Arthur MacArthur, U. S. Navy, is of the third charge, "not guilty"; and the court does, therefore, acquit the said Commander Arthur MacArthur, U. S. Navy, of the third charge.

SENTENCE

"The court does, therefore, sentence him, Commander Arthur MacArthur, U. S. Navy, to be placed at the bottom of the list of commanders and there to remain until he shall have lost a total of ten (10) numbers in his grade."

SUMMARY OF EVIDENCE

The evidence adduced in this case shows that the commanding officer of the *San Francisco* had been directed to proceed with the vessel under his command to the entrance of Great Round Shoal Channel. At 12:07 a. m., the ship arrived at the point which by reckonings should have been close to the entrance buoy. Upon arriving at this point the division commander was to decide whether to proceed through the channel or to go outside around Nantucket Shoal, the decision being dependent upon weather conditions. The facts may be stated as follows:

The division commander is weighing the alternatives of the situation in his mind and is about to decide as to the course of action when, at 12:14 a. m., the officer of the deck reports sighting a flashing light bearing 225°; the captain doesn't see it; the navigator doesn't see it; no lookouts report it. The division commander, feeling that this light is the one for which all have been searching, gives the order, at 12:15, "head for the light, captain."

The captain enters no protest to the order of the division commander, but gives the necessary orders; the ship turns slowly to starboard; by order of the captain speed is increased to two-thirds in order to expedite her swinging, and finally is steadied on 231°. Meanwhile the captain reiterates his inability to see the light but steadies the ship one-half point away from the bearing given by the division commander in order to avoid certain foul ground near buoy No. 4, which he at that time thought the light marked. From the evidence recorded it appears that no doubt arose in the mind of any person on the bridge as to whether or not the light was one or the other of the two channel buoys; the only question which [P. 3] seems to have arisen in the mind of the commanding officer was as to whether or not the light actually existed.

Though the navigator plotted the new course 231° on the chart from the dead reckoning position at 12:15, and though he found it passed over a shoal about two miles distant and varied about 25° from the course of the channel, and though this discrepancy was observed by both the commanding officer and the division commander, no action was taken by any person, and the course was followed until the *San Francisco* took ground at 12:41 a. m.

No issue of fact was involved in this case. The regulations bearing upon the issue are as follows:

R–1606. "The commander in chief shall direct the course to be steered by the fleet when at sea, and is responsible for its safe conduct."

R–2081. (5) "Unless in company with a senior, he (the commanding officer) is responsible for the course steered, and he is always responsible for the safe conduct of the ship."

INDORSEMENT OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General placed upon the record the following indorsement:

> "In the light of R–2081 (5) it is the opinion of this office that the commanding officer of a vessel cannot relieve himself from the responsibility for the safe conduct of the vessel under his command without a definite protest when he realizes that the vessel, in obedience to an order, is being steered from an uncertain position into known danger. In this case no protest was made by Commander MacArthur, and accordingly it is not believed that the acquittal on the third charge was justified by the evidence adduced, in view of the above-quoted regulation governing the case, which

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charges the commanding officer with the safe conduct of the vessel under his command at all times.

"In view of the questions of policy and responsibility involved, the record is submitted to the Bureau of Navigation via the Chief of Naval Operations."

VIEWS OF THE CHIEF OF NAVAL OPERATIONS

The Chief of Naval Operations in his indorsement upon this case set forth his views in effect, viz:

That article R–1606—

"The commander in chief shall direct the course to be steered by the fleet when at sea, and is responsible for its safe conduct," does not apply in the case of a single ship, and was not intended to make a flag officer responsible for the detailed handling of a ship on which he is a passenger; that under such [P. 4] circumstances a flag officer is not charged with responsibility unless in his opinion the commanding officer of the ship is incompetent to properly discharge his duties; however, that a flag officer who, as in this case, interferes with the navigation of a ship on which he is a passenger, thereby voluntarily assumes joint responsibility for the safe conduct of the ship and under such circumstances should be held responsible for the consequences;"

That at the same time the last clause of article R–2081 (5)—

"Unless in company with a senior, he (the commanding officer) is responsible for the course steered, and he is always responsible for the safe conduct of the ship," places the responsibility for the safe conduct of a vessel clearly and definitely upon the commanding officer under all circumstances; that the latter, with the assistance of his navigator, the officer of the deck, the quartermaster, the leadsmen, lookouts, and other means at his disposal, should have given the benefit of such assistance and information to the division commander and made it clear to him that he was taking risks in directing the ship to be steered as stated; that it was quite as clearly the duty of the commanding officer of the *San Francisco* to inform the division commander of the risk he was running by steering the course given, as it was the duty of the navigator to so inform the commanding officer, and the responsibility cannot be avoided in either case.

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

"The Bureau concurs in the indorsement hereon by the Judge Advocate General, and recommends that the findings and aquittal of the third charge be disapproved, and that the findings on the first and second charges be approved."

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, the findings on the first and second charges, and the specifications thereunder and the sentence, in the foregoing case of Commander Arthur MacArthur, U. S. Navy, are approved. The findings on the third charge and acquittal thereunder are disapproved. He will be released from arrest and restored to duty.

C. M. O. 27—1916

[P. 1] Commander Reginald R. Belknap, United States Navy, was tried by general court martial by order of the Secretary of the Navy at the Naval Training Station, Newport, R. I., on July 17, 1916, upon the following charges:

Charge I.—Improperly hazarding a vessel of the Navy, in consequence of which she was run upon a shoal and seriously injured.

Specification.—In that Reginald R. Belknap, a commander in the United States Navy, being in command of the Mining and Mine Sweeping Division of the United States Atlantic Fleet, and being in the performance of the duties of that office on board the flagship of said division, the United States ship *San*

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Francisco, then making passage from Portsmouth, N. H., to Newport, R. I., the weather then and there being foggy and misty, the currents thereabout being known to him to be variable in direction and material in strength, and the position of said ship being known by the said Commander Belknap to be uncertain, did, at or about twelve hours and fourteen minutes antemeridian, on the seventeenth day of May, nineteen hundred and sixteen, upon sighting a light, the identity of which was not positively known, order the commanding officer of said ship to head for said light, and did cause and permit to be steered, until about twelve hours forty-one minutes antemeridian, on the date aforesaid, a course which laid over shoals and through foul water; this without causing the light to be definitely identified as the aid to navigation which he, the aforesaid Commander Reginald R. Belknap, supposed it to be; without definitely fixing the position of the said ship, and without any necessity for thus hazarding a vessel of his command; in consequence of which action the said ship *San Francisco* ran upon a shoal and was seriously injured.

Charge II.—Violation of a lawful regulation issued by the Secretary of the Navy.

Specification.—In that Reginald R. Belknap, a commander in the United States Navy, being in command of the Mining and Mine Sweeping Division of the United States Atlantic Fleet, and being in the performance of such duties on board the flagship of said division, the United States ship *San Francisco*, then [P. 2] making passage from Portsmouth, N. H., to Newport, R. I., did, during the period from about twelve hours and seven minutes antemeridian until about twelve hours and forty-one minutes antemeridian, on the seventeenth day of May, nineteen hundred and sixteen, engage in the details of navigating the said ship, and did interfere with the commanding officer of the said ship in the proper performance of his duty, and in the proper exercise of his authority, in that he did, when a light was sighted from said ship, and well knowing that the position of said ship was at that time uncertain, that the identity of the said light had not been definitely determined, and that the commanding officer was unable to see the aforesaid light, order the commanding officer to head for said light; in that he did issue an order that the officer of the deck of said ship should be kept watching said light to the exclusion of other duties of the said officer of the deck; in that he did actively direct the officer of the deck, and participate with him, in timing the flashes of the aforesaid light with a view to its identification; in that he did take bearings of the aforesaid light from a pelorus and utilize the ship's chart board in laying down said courses on the charts in active use; and in these and in various other ways did actively engage in the details of navigation of said ship; this in violation of article nine hundred and fifty-seven of the instructions for the administration of the Naval Establishment of the United States, nineteen hundred and thirteen, as applied to division commanders by article one thousand and one of said instructions; in consequence of which unauthorized interference in the details of navigation aforesaid, the said ship was steered into foul water, was grounded, and seriously injured.

Findings

The specification of the first charge "Proved" and that the accused, Commander Reginald R. Belknap, U. S. Navy, is of the first charge "Guilty."

The specification of the second charge "Proved in part—proved except the words 'in that he did actively direct the officer of the deck, and participate with him, in timing the flashes of the aforesaid light with a view to its identification; in that he did take bearings of the aforesaid light from a pelorus and utilize the ship's chart board in laying down said courses on the charts in active use; and in these and in various other ways did actually engage in the details of navigation of said ship,' which words are not proved."

And that the accused, Commander Reginald R. Belknap, U. S. Navy, is of the second charge, "Guilty."

[P. 3] Sentence

"The court, therefore, sentences him, Commander Reginald R. Belknap, U. S. Navy, to lose ten (10) numbers in his grade."

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Summary of Evidence

The evidence adduced in this case shows that the commanding officer of the *San Francisco* had been directed to proceed with the vessel under his command to the entrance of Great Round Shoal Channel. At 12:07 a. m., the ship arrived at the point which by reckonings should have been close to the entrance buoy. Upon arriving at this point the division commander was to decide whether to proceed through the channel or to go outside around Nantucket Shoal, the decision being dependent upon weather conditions. The facts may be stated as follows:

The division commander is weighing the alternatives of the situation in his mind and is about to decide as to the course of action when, at 12:14 a. m., the officer of the deck reports sighting a flashing light bearing 225°; the captain doesn't see it; the navigator doesn't see it; no lookouts report it. The division commander feeling that this light is the one for which all have been searching, gives the order, at 12:15, "head for the light, captain."

The captain enters no protest to the order of the division commander, but gives the necessary orders; the ship turns slowly to starboard; by order of the captain speed is increased to two-thirds in order to expedite her swinging, and finally is steadied on 231°. Meanwhile the captain reiterates his inability to see the light but steadies the ship one-half point away from the bearing given by the division commander in order to avoid certain foul ground near buoy No. 4, which he at that time thought the light marked. From the evidence recorded it appears that no doubt arose in the mind of any person on the bridge as to whether or not the light was on one or the other of the two channel buoys; the only question which seems to have arisen in the mind of the commanding officer was as to whether or not the light actually existed.

Though the navigator plotted the new course 231° on the chart from the dead reckoning position at 12:15, and though he found it passed over a shoal about two miles distant and varied about 25° from the course of the channel, and though this discrepancy was observed by both the commanding officer and the division commander, no action was taken by any person, and the course was followed until the *San Francisco* took ground at 12:41 a. m.

[P. 4] No issue of fact was involved in this case. The regulations bearing upon the issue are as follows:

R—1606. "The commander in chief shall direct the course to be steered by the fleet when at sea, and is responsible for its safe conduct."

R—2031 (5). "Unless in company with a senior, he (the commanding officer) is responsible for the course steered, and he is always responsible for the safe conduct of the ship."

Indorsement of the Judge Advocate General

The Judge Advocate General placed upon the record the following indorsement:

> "The proceedings and sentence in this case are legal: the findings on the second charge are recommended for approval; the specification of the first charge was proved.
>
> "The question of whether or not Commander Belknap, in giving an order to head for a certain light and in permitting a course to be steered for that light under existing conditions, was guilty of 'improperly hazarding a vessel of the Navy,' is so intimately connected with the policy of the Navy Department in fixing the responsibility and the division of responsibility as between flag officers and commanding officers, that the case is referred to the Bureau of Navigation through the Chief of Naval Operations."

Views of the Chief of Naval Operations

The Chief of Naval Operations in his indorsement upon this case set forth his views in effect, viz:

That article R–1606—

> "The commander in chief shall direct the course to be steered by the fleet when at sea, and is responsible for its safe conduct," does not apply in the case of a single ship, and was not intended to make a flag officer responsible

for the detailed handling of a ship on which he is a passenger; that under such circumstances a flag officer is not charged with responsibility unless in his opinion the commanding officer of the ship is incompetent to properly discharge his duties; however, that a flag officer who, as in this case, interferes with the navigation of a ship on which he is a passenger, thereby voluntarily assumes joint responsibility for the safe conduct of the ship and under such circumstances should be held responsible for the consequences."

That at the same time the last clause of article R-2081 (5)—

"Unless in company with a senior, he (the commanding officer) is responsible for the course steered, and he is always responsible for the safe conduct of the ship," places the responsibility [P. 5] for the safe conduct of a vessel clearly and definitely upon the commanding officer under all circumstances; that the latter, with the assistance of his navigator, the officer of the deck, the quartermaster, the leadsman, lookouts, and other means at his disposal, should have given the benefit of such assistance and information to the division commander and made it clear to him that he was taking risks in directing the ship to be steered as stated; that it was quite clearly the duty of the commanding officer of the *San Francisco* to inform the division commander of the risk he was running by steering the course given, as it was the duty of the navigator to so inform the commanding officer, and the responsibility cannot be avoided in either case.

The situation involved in this case is not covered by the Navy Regulations, but this fact in no wise relieves an officer of culpability for the neglect of duty which his seniority may impose upon him. Not only is it impracticable to anticipate in the Navy Regulations every contingency which may possibly arise, but an attempt to do so would not be conducive to the proper development of character and officer-like qualities. Neither is it considered in the interests of efficiency to restrict too closely the performance of duty by officers, especially those of the higher ranks. Officers have duties and obligations, imposed upon them by the commissions which they hold and the positions which they occupy, which are as binding as express provision of the regulations could be. The language used in an officer's commission imposes upon him the responsibility for the efficient performance of duties of his grade and no court would be justified in relieving of culpability an officer who failed to perform such duties as were imposed by the broad terms of his commission and by the customs of the service, merely because such duties were not definitely enumerated in the regulations.

Recommendation of the Chief of Bureau of Navigation

The Chief of the Bureau of Navigation placed upon the record an indorsement:

"Recommending the approval of the findings and sentence of the general court martial."

Action of the Secretary of the Navy

The proceedings, findings, and sentence, in the foregoing case of Commander Reginald R. Belknap, U. S. Navy, are approved. He will be released from arrest and restored to duty.

C. M. O. 29—1916

[P. 1] Lieutenant (junior grade) William S. Nicholas, United States Navy, was tried by general court martial by order of the Secretary of the Navy on July 29, 1916, at the Navy Yard, Charleston, S. C., upon the following charges:

Charge I.—Improperly hazarding the vessel under his command, in consequence of which she was run upon a shoal and seriously injured (one specification).

Charge II.—Through inattention and negligence suffering a vessel of the Navy to be run upon a shoal and seriously injured (one specification).

Charge III.—Culpable negligence and inefficiency in the performance of duty (two specifications).

[C. M. O. 29—1916]

FINDING

The court found all the charges and specifications not proved and fully acquitted Lieutenant (junior grade) William S. Nicholas, U. S. Navy, thereof.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and acquittal, in the foregoing case of Lieutenant (junior grade) William S. Nicholas, U. S. Navy, are approved, and he will be released from arrest and restored to duty.

REMARKS

The charges and specifications in this case were based upon the navigation of the U. S. S. *Terry* into the harbor of Puerto Plata, Republic of San Domingo, on June 10, 1916, and serious injuries to that vessel resulting therefrom.

The contention of the defense was that the *Terry* did not strike upon a reef on the date in question but was injured by the reason of striking a submerged and unmarked wreck. That this contention was accepted by the court is evidenced by the full acquittal.

The record of the case, however, shows the following facts to stand uncontroverted:

(*a*) That the accused caused the *Terry* to be steered dangerously close to a reef at the entrance of the harbor of Puerto [P. 2] Plata, although there was available a clear and deep channel to the eastward of said reef;

(*b*) That he failed to obtain fixes, thereby enabling him to locate the position of the *Terry*, and that although there was an officer available for such duty present on the bridge of the *Terry* at the time of the accident, still he did not utilize the services of this officer for such duty.

While the findings of the court in the foregoing case were duly approved, the Department takes this occasion to define, for the guidance of courts in the future, the significance of the different forms of acquittal recognized in naval law. They are as follows:

"*The court does, therefore, acquit.*"—This form, which will be herein referred to as a simple acquittal, should be used in all cases except in the few special cases to be hereinafter mentioned under other forms of acquittal. The use of this form sufficiently records the fact that the court has not sustained the charge and has the same legal effect as an acquittal expressed with some embellishment.

"*The court does, therefore, fully acquit.*"—The use of this form of acquittal indicates that a court not only fails to find a charge proved beyond a reasonable doubt, but that it finds no facts whatever, as brought out by the evidence introduced in the case, which reflect adversely on the conduct of the accused in connection with matters pertaining to the charge and specification. In other words, a court should not "fully acquit" in cases where the record shows any uncontroverted facts whatever reflecting upon the accused.

"*The court does, therefore, honorably acquit.*"—This form is to be employed only in cases where the offense charged is, besides being an offense against military authority, of such a character that a conviction thereof would tend to dishonor the accused, such as, for example, a charge of "conduct unbecoming an officer and a gentleman." This acquittal, as in the case of a full acquittal, should never be used if the record shows any adverse reflection whatever upon the accused.

"*The court does, therefore, most fully and honorably acquit.*"—This form should be used only in extreme cases in which not only have the requirements of a "full" and "honorable" acquittal been fulfilled, but in which the court wishes to place the highest stamp of approval upon the actions of the accused in connection with matters covered by the specifications. The use of this form of acquittal might, for example, be justified in the case of an officer charged with unbecoming conduct in battle if the court wishes to make it a matter of record that, far from considering the conduct of such officer censurable, it both approved and commended his conduct. For examples of an improper use of this form of acquittal see C. M. O. 5, 1913, 2–3; 27, 1913, 9; and 41, 1915, 11.

[C. M. O. 30—1916]

[P. 3] It will be noted that there is no legal distinction between a simple acquittal and one to which one of the additional expressions above quoted has been added, and it is to be emphasized that only in exceptional cases is the use of any form of acquittal, other than the simple "acquit," justified. Unless this rule be strictly adhered to and other forms of acquittal reserved for special cases, the distinction drawn above will soon be lost, and not only would a simple acquittal be robbed of its full absolving significance, but also the proper purposes for which the other forms of acquittal are reserved would be defeated.

The foregoing supersedes the forms of acquittal given in Forms of Procedure, 1910, p. 40, and prohibits the use of any form other than those herein specified.

C. M. O. 30—1916

[P. 6] 1. ACT OF AUGUST 29, 1916: RELATING TO THE ADMINISTRATION OF JUSTICE IN THE NAVY.

2. IMMEDIATE SUPERIOR IN COMMAND: CONSTRUCTION OF.

(1) The act of August 29, 1916, provides that:

"Hereafter all officers of the Navy and Marine Corps who are authorized to order either general or summary courts martial may order deck courts upon enlisted men under their command, and shall have the same authority to inflict minor punishments as is conferred by law upon the commander of a naval vessel.

"Summary courts martial may be ordered upon enlisted men in the naval service under his command by the commanding officer of any brigade, regiment, or separate or detached battalion, or other separate or detached command, and, when empowered by the Secretary of the Navy, by the commanding officer or officer in charge of any command not specifically mentioned in the foregoing: *Provided*, That when so empowered by the Secretary of the Navy to order summary courts martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts, and inflict the punishments which the commander of a naval vessel is authorized by law to inflict, upon all enlisted men of the naval service attached thereto, whether for duty or as patients.

"No sentence of a summary court martial shall be carried into execution until the proceedings and sentence have been approved by the officer ordering the court, or his successor in office, and by his immediate superior in command: *Provided*, That if the officer ordering the court, or his successor in office, be the senior officer present, such sentence may be carried into execution upon his approval thereof.

"When empowered by the Secretary of the Navy, general courts martial may be convened by the commanding officer of a squadron, of a division, of a flotilla, or of a larger naval force afloat, and of a brigade or larger force of the naval service on shore beyond the continental limits of the United States: *Provided*, That in time of war, if then so empowered by the Secretary of the Navy, general courts martial may be convened by the commandant of any navy yard or naval station, and by the commanding officer of a brigade or larger force of the Navy or Marine Corps on shore not attached to a navy yard or naval station.

"Courts of inquiry may be convened by any officer of the naval service authorized by law to convene general courts martial.

"When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement [P. 7] thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons embarked thereon."

(2) Whenever a *convening* authority places his endorsement upon the record of a summary court martial, the title of his rank and office appearing therein

[C. M. O. 30—1916]

should clearly show that he is legally empowered to take the action designated in his indorsement. The *convening* authority should sign thus:

A_____ B_____,
Colonel, U. S. Marine Corps,
Commanding __ Regiment, U. S. Marine Corps.
C_____ D_____,
Commander, U. S. Navy,
Commanding U. S. S. _____

In accordance with the terms of the above-quoted act of August 29, 1916, the sentence does not go into effect until approved by the "immediate superior in command," except in case the officer ordering the court is the senior officer present, in which event the approval of the officer ordering the court is alone necessary to give effect to the sentence; but *in such case*, he should always sign his indorsement as "senior officer present" in addition to signing as convening authority, thus:

A_____ B_____,
Colonel, U. S. Marine Corps,
Commanding __ Regiment, U. S. Marine Corps, and senior officer present.
C_____ D_____,
Commander, U. S. Navy,
Commanding U. S. S. _____, and senior officer present.

The term "immediate superior in command," as used in the above act, is construed as meaning that officer present who, in the chain of command of the forces immediately present, is next above the officer ordering the summary court martial. Thus the officer present commanding a division is next above each of the commanding officers of the ships of that division present; the officer present commanding a brigade is next above each of the commanding officers of the regiments of that brigade present; and when ships are present which are not attached to a unit under the command of an officer present junior to the senior officer present, the commanding officers of such ships are next below the senior officer present, which latter officer is the immediate superior in command of such commanding officers. If the officer who orders the summary court martial is in the presence of an "immediate superior in command," he should sign and forward [P. 8] the record to such superior in command for the latter's final action, and the latter should sign thus:

E_____ F_____,
Rear Admiral, U. S. Navy,
Commander Battleship Division _____, U. S. Atlantic Fleet, immediate superior in command.
G_____ H_____,
Captain, U. S. Navy, Commanding U. S. S. _____, immediate superior in command.

From the above it will be seen that in acting upon summary-court martial records in the future the term "senior officer present" is to be used only when the officer convening the court is in fact the senior officer present. A revising authority, whose action is essential to validate the sentence of a summary court, will in every case indicate the fact by using the term "immediate superior in command," even though such revising authority be in fact the senior officer present.

PAY CLERKS: MAY BE DETAILED TO DUTY IN HAITI INDEPENDENT OF PAY OFFICERS.

The act of June 12, 1916, entitled "An act to authorize and empower officers and enlisted men of the Navy and Marine Corps to serve under the Government of the Republic of Haiti, and for other purposes," is construed as authorizing the President to detail such chief pay clerks, pay clerks, and acting pay clerks to assist the Republic of Haiti "as may be mutually agreed upon by him and the President of the Republic of Haiti," notwithstanding that such clerks may, under such detail, be in the performance of duty independent of pay officers. By this construction the above act modifies the act of March 3, 1915 (38 Stat.

[C. M. O. 31—1916]

943), providing that "chief pay clerks, pay clerks, and acting pay clerks shall be assigned to duty with pay officers under such rules as the Secretary of the Navy may prescribe," to the extent above indicated (File 5460–84, J. A. G., August 16, 1916.

PROPERTY OF THE UNITED STATES: RECOVERY OF SAME WHEN STOLEN AND PAWNED.

The law is well settled that no pawnbroker may legally retain property of the United States which has been stolen and pawned. It is the duty of any such broker having such property in his possession to return the same to the United States on demand, and, in the event of his refusal to do so, legal proceedings against him may be instituted through the Department of Justice. Also the United States, through any of its officers or representatives detailed for the purpose, may retake said property if this can be done without a breach of the peace. In any event, the United States cannot be required, nor is it authorized to refund the amount loaned on its property by a pawnbroker to persons by whom said property has been stolen (File 26804–8, J. A. G., August 28, 1916).

C. M. O. 31—1916

[P. 1] Lieutenant Isaac F. Dortch, United States Navy, was tried by general court martial on July 31, 1916, at the Naval Training Station, Newport, R. I., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Improperly hazarding a vessel under his command, in consequence of which she was seriously injured (one specification).

Charge II.—Through inattention and negligence suffering a vessel of the Navy to be seriously injured (one specification).

Charge III.—Culpable negligence and inefficiency in the performance of duty (one specification).

SENTENCE

"The court, therefore, sentences him, Lieutenant Isaac F. Dortch, U. S. Navy, to lose thirty (30) numbers in his grade."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record by the court:

> "In consideration of his previous excellent record and high reputation as testified to before the court and of the fact that U. S. Coast and Geodetic Survey Charts, numbers two hundred and forty-three (243) and one hundred and nine (109), which were furnished to the U. S. S. *Warrington*, contain misleading information with respect to the breakwater on the eastern side of Sandy Bay, we recommend Lieutenant Isaac F. Dortch, U. S. Navy, to the clemency of the revising power."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The Chief of the Bureau of Navigation placed upon the record an endorsement:

> "Recommending approval of the findings and sentence of the court; but in view of the unanimous recommendation for clemency by the court, it is recommended that the loss of numbers be reduced from thirty to twenty."

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Isaac F. Dortch, U. S. Navy, are approved, but, in view of the recommendation of the Bureau of Navigation, the loss of numbers is reduced from thirty to twenty. He will be released from arrest and restored to duty.

C. M. O. 33—1916

[P. 5] ACT OF AUGUST 29, 1916: ABSENCE CAUSED BY DISEASE CONTRACTED THROUGH MISCONDUCT.

Referring to that clause of the act of August 29, 1916 (39 Stat. 580), which provides that—

> "Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be [P. 6] prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct."

Held: (1) That where such disease has been contracted prior to August 29, 1916, pay shall not be deducted for absence on account of such disease. (See 19 Comp. Dec. 483; File 7657–394, Sec. Navy, Sept. 11, 1916.)

(2) That enlisted men shall be required to "make good" any time lost during current enlistment in excess of one day on account of sickness or disease resulting from their own intemperate use of drugs or alcoholic liquors, or other misconduct, *only* where such sickness or disease was contracted on or subsequent to August 29, 1916. (See 19 Comp. Dec. 483; File 7657–394: 1, Sec. Navy, Sept. 20, 1916.)

ACT OF AUGUST 29, 1916: "CREDITABLE RECORDS," WITHIN THE MEANING OF SAME AS APPLIED TO THE CLAUSE PROVIDING FOR INCREASED PAY FOR COMMISSIONED WARRANT OFFICERS AFTER SIX YEARS FROM DATE OF COMMISSION, CONSTRUED.

The act of August 29, 1916 (39 Stat. 578), provides that—

> "Hereafter chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after six years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant (junior grade), United States Navy: *Provided*, That chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after twelve years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant, United States Navy."

The Judge Advocate General of the Navy rendered an opinion to the effect that "creditable records," within the meaning of the above clause, does not import distinguished records, but requires only that a record be such that upon examination for promotion it would be found satisfactory. In passing upon the creditability of an officer's record in these cases consideration should be given to all matters therein disclosed, whether pertaining to his mental, moral, or professional qualifications, and it is necessary that an officer be satisfactory in all these respects if his record is to be deemed creditable. Further, in determining whether the record of a commissioned warrant officer is creditable, the investigation should ordinarily be limited to a scrutiny of his record in his present grade, and his prior record in the service should not be taken into consideration except in the cases where under existing law this would be done in determining his fitness for promotion. And, when a commissioned [P. 7] warrant officer has the necessary length of service, and it has been decided by the Department that his record is creditable, this definitely fixes the rate of pay and allowances to which he is entitled under the above statute, and, in the event of his record ceasing to be creditable, the same cannot be affected except by means of disciplinary action as in the case of all officers (File 17789–27, J. A. G., Sept. 21, 1916).

[C. M. O. 34–1916]

ACT OF AUGUST 29, 1916: PAY AND ALLOWANCES OF RETIRED OFFICER ON ACTIVE DUTY.

In reference to that clause of the act of August 29, 1916 (39 Stat. 581), which provides that—

> "Hereafter any retired officer of the naval service who shall be detailed on active duty shall, while so serving, receive the active-duty pay and allowances of the grade, not above that of lieutenant commander in the Navy or of major in the Marine Corps, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement."

Held, That provided a retired officer meets the other requirements of the law quoted, that said law operates ex proprio vigore to confer upon such officer the benefits mentioned, and it is accordingly decided that the issuance of "new orders to active duty" is not necessary to accomplish the purpose of the law. (See 20 Op. Atty. Gen., 687; File 27231–77, Sec. Navy, Sept. 19, 1916).

C. M. O. 34—1916

[P. 1] Boatswain William H. Morin, United States Navy, retired, was tried by general court martial by order of the Secretary of the Navy at the United States Naval Academy, Annapolis, Md., on August 7, 1916, and found guilty of the following charges:

Charge I.—Conduct unbecoming an officer and a gentleman (three specifications thereunder alleging the nonpayment of certain indebtedness, which had been outstanding over a considerable period of time).

Charge II.—Disobedience of a lawful order of the Secretary of the Navy (one specification).

SENTENCE

"The court, therefore, sentences him, William H. Morin, a boatswain, United States Navy, retired, to be dismissed from the United States naval service."

RECOMMENDATION FOR CLEMENCY

The following unanimous recommendation for clemency was spread upon the record by the court:

> "In consideration of the following facts, that the accused holds a medal of honor for personal heroism during time of war; that the accused has made satisfactory arrangements with practically all of his creditors, making as large monthly payments as is consistent with the support of his family; that from his appearance before the court and from the evidence adduced, the accused has, for some time, been under considerable mental strain, we recommend Boatswain William H. Morin, United States Navy, retired, to the clemency of the revising authority."

ACTION OF THE SECRETARY OF THE NAVY

The records of the Department show numerous complaints from the creditors of Boatswain Morin concerning the nonpayment of his debts, many of which have extended over such a period of time that prosecution thereof is barred by the statute [P. 2] of limitations. Furthermore, his reports of fitness show numerous unfavorable entries concerning the careless and indifferent manner in which he attended to his financial obligations.

The records of the Department also show that on a previous occasion he was convicted by general court martial of "Violation of a lawful regulation issued by the Secretary of the Navy," the specification thereunder alleging that on or about June 28, 1908, he borrowed from Chief Boatswain's Mate H. Duckgeischel, United States Navy, the sum of $150. His report of fitness from January 1 to March 29, 1910, shows the following entry:

> "This officer is in the habit of hanging around barrooms with enlisted men, and has borrowed money from the crew of this vessel and failed to return

[C. M. O. 35—1916]

it; he is totally unfit for an officer. I would respectfully request that he be compelled to return this money."

The Bureau of Navigation, after careful consideration of this case, recommended the approval of the findings and sentence. The Department concurs in the recommendation of the Bureau of Navigation, and, in view thereof and of the past record of this officer, the proceedings, findings, and sentence in the foregoing case of Boatswain William H. Morin, United States Navy, retired, are approved.

ACTION OF THE PRESIDENT

In conformity with the provisions of article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record, on October 7, 1916, was respectfully submitted to the President of the United States, who, on October 10, 1916, confirmed the sentence of the court.

C. M. O. 35—1916

[P. 1] Second Lieutenant Philip T. Case, United States Marine Corps, was tried by general court martial at Santo Domingo City, Santo Domingo, on September 22, 1916, by order of Commander of Cruiser Force, and Commander in Chief, Detached Squadron, U. S. Atlantic Fleet, and found guilty of the following charges, the specifications of which were proved by plea:

Charge I.—Disobeying the lawful order of his superior officer (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (three specifications alleging that the accused, while on duty as officer of the day and making an inspection of the city of Santo Domingo, ordered intoxicating liquor in a public place of said city and conducted himself while in this public place in other ways prejudicial to good order and discipline).

SENTENCE

"The court, therefore, sentences him, Second Lieutenant Philip T. Case, United States Marine Corps, to be placed at the foot of the list of second lieutenants of the United States Marine Corps, there to remain until he shall have lost fifty (50) numbers on the list of Officers of the Marine Corps as borne by the Register of the Navy and Marine Corps, of January first, nineteen hundred and sixteen."

ACTION OF CONVENING AUTHORITY

The Convening Authority on September 23, 1916, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Second Lieutenant Philip T. Case, U. S. Marine Corps, and directed that he be released from arrest and restored to duty.

RECOMMENDATION OF COMMANDANT, MARINE CORPS

The record in this case was referred to the Major General Commandant, U. S. Marine Corps, who placed thereon an indorsement in part as follows:

> "While the sentence of the court in this case is severe, it is not, in the opinion of the undersigned, adequate, in view of the [P. 2] nature of the specification to which the accused pleaded guilty. In February 1914, this officer was tried by general court martial and found guilty of 'Drunkenness' and 'Scandalous conduct tending to the destruction of good morals,' and was sentenced to a loss of ten numbers in grade: * * * The undersigned believes that Second Lieutenant Philip T. Case has demonstrated his inaptitude for the service."

ACTION OF THE SECRETARY OF THE NAVY

The Department concurs in the remarks of the Major General Commandant relative to the inadequacy of the sentence adjudged in this case. The gravity

of the offenses to which the accused pleaded guilty—serious under any circumstances—is augmented by the fact that they were committed by an officer of the Marine Corps performing duty in the Republic of Santo Domingo under circumstances which make it highly desirable that officers of the military forces of the United States conduct themselves in a manner beyond criticism. Moreover, these offenses are further aggravated by the fact that they were committed while the accused was on duty as patrol officer. The Department, therefore, considers that Lieutenant Case has demonstrated a total lack of appreciation of responsibility and of regard for the reputation of the commissioned personnel of which he is a member.

C. M. O. 36—1916

[P. 1] Chief Pay Clerk Frank D. Foley, United States Navy, was tried by general court martial on September 14, 1916, at the Navy Yard, Puget Sound, Washington, by order of the Secretary of the Navy, upon the following charge:

Charge.—Drunkenness (one specification).

Finding

"The specification of the charge 'Not Proved.'

"And that the accused, Chief Pay Clerk Frank D. Foley, United States Navy, is of the charge 'Not guilty,' and the court does, therefore, acquit the said Chief Pay Clerk Frank D. Foley, United States Navy, of the charge."

Returned for Revision

The Department on October 9, 1916, returned the record in this case to the court directing that it reconvene for the purpose of reconsidering its findings and acquittal. The Department's letter transmitting the record to the court stated in effect:

The Department after a careful review of this case, is of the opinion that the evidence introduced by the prosecution is of such a nature as to necessitate the return of the record to the court for reconsideration of the findings and acquittal therein.

The attention of the court is particularly invited to certain testimony introduced by the prosecution which, standing unrefuted, upon review appears to establish the offense alleged in the charge and the specification thereunder, viz:

> "Lieutenant Commander W. B. Wells, U. S. Navy, testified that on August 18, 1916, at about 7:50 p. m., he saw a man staggering through the yard apparently intoxicated—the accused later being identified as the person seen by this witness—and that the accused was in such condition as to cause him to direct the corporal of the guard to arrest and deliver the accused to his proper station. Lieutenant Commander Wells further testified that the accused later voluntarily confessed to him that he had been drinking on the date in question.
>
> "Private Percy Pizor, U. S. M. C., testified that the accused on the date in question was staggering to such an extent as to necessitate his being assisted while walking in the vicinity of the drydock; also that the accused 'asked a sailor to escort him through the yard.'
>
> "Corporal Melvin E. Stamm, U. S. M. C., testified that he was directed, in the performance of duty, to arrest the accused and that the familiarity of the accused convinced him that the accused was drunk."

To rebut this evidence the defense introduced Dr. J. F. Munns, of Bremerton, Wash., whose testimony cannot be held to refute that introduced by the prosecution, as his observations of the accused occurred about 7 p. m. on the date in question, whereas the accused was found in an intoxicated condition about one hour later.

While the Department is not unmindful of its policy of approving the findings of a court when the facts are in dispute or where there is such a conflict in the evidence that reasonable men might differ as to the conclusions to be drawn therefrom, in this case the Department is of the opinion that the evi-

[C. M. O. 37—1916]

dence adduced by the prosecution is so convincing that the interests of justice and discipline require that this record be resubmitted to the court in order that, having in mind the facts above set forth, a reconsideration may be given to its findings and acquittal.

FINDING IN REVISION

The court in revision "decided respectfully to adhere to its former finding."

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and acquittal of the general court martial in the foregoing case of Chief Pay Clerk Frank D. Foley, U. S. Navy, are approved. He will be released from arrest and restored to duty.

C. M. O. 37—1916

[P. 6] DECISIONS AND OPINIONS: DISTINCTION BETWEEN.

When the Judge Advocate General renders an opinion, he states his inference or conclusion of what, in contemplation of law, would or should follow from a given state of facts, and where an opinion of the Judge Advocate General is received, it may be followed or not in the judgment of the person whose duty it is to act in the premises.

A decision is a ruling, or command, that certain things shall follow from a given state of facts, and departmental decisions are made by the head of the Department. Where a decision has been rendered in any case by the Secretary of the Navy, it is an authoritative ruling or instruction which has all the force and effect of an order or command.

As with court decisions, so with departmental decisions there may be presented with the decision an opinion or statement of the reasons which influenced the head of the Department in arriving at his conclusions and which influenced him in rendering his decision, while in other cases the decision may stand alone. In either case, it is the decision, and not the opinion, which is binding upon all persons in the naval establishment whose cases come within its terms.

From the above it will be observed that the Judge Advocate General does not render decisions, and that the Secretary of the Navy does not render opinions.

Where an authoritative ruling, which will have the force and effect of an order or command, is desired, a decision should be requested and this would refer to a decision of the Department. Where advice upon legal questions is deemed desirable, an opinion of the Judge Advocate General should be requested (File 13673–3897, J. A. G., Oct. 31, 1916).

EXAMINATION FOR PROMOTION: BECAME VOID WHEN TAKEN PRIOR TO BUT NOT FINALLY ACTED UPON BEFORE AUGUST, 29, 1916, UPON THE PASSAGE OF THE ACT OF THAT DATE (39 STAT. 578) CHANGING THE LAW GOVERNING THE PROMOTION OF A CANDIDATE.

Held, that the act of August 29, 1916, (39 Stat. 578) providing that "Hereafter, all promotions to the grades of commander, captain, and rear admiral of the line of the Navy * * * shall be by selection only from the next lower respective grade * * *," made null and void the examination for promotion of an officer who was undergoing examination prior to that date in accordance with the then existing law, where such examination and promotion were not completely consummated prior to the passage, on August 29, 1916, of the above act changing the law governing the promotion [P. 7] of said officer. The examination in question having been nullified upon the approval of this law, it follows, therefore, that subsequent action upon such examination could carry with it no legal consequence such as would have obtained had action been taken prior to the change in the law (File 26260–3663:2, Sec. Navy, Oct. 9, 1916).

FLEET NAVAL RESERVE: CONSTRUCTION OF "NAVAL SERVICE" IN CONNECTION WITH ENROLLMENT, TRANSFER, AND RETIREMENT OF MEN IN THE FLEET NAVAL RESERVE AS PROVIDED FOR IN THE ACT OF AUGUST 29, 1916, (39 STAT. 589–591).

Held: (1) Previous service in the Marine Corps in the case of a man honorably discharged from the Navy can be construed as "naval service," and permit

[C. M. O. 37—1916]

of his enrollment at the rate of pay allowed by law for men with eight and twelve years' service, respectively, in the Fleet Naval Reserve. (In support of the proposition that service in the Marine Corps is comprehended in the expression "naval service" see 21 Comp. Dec. 700.)

(2) For purposes of permitting men with sixteen and twenty years' service, respectively, to transfer to the Fleet Naval Reserve, previous service in the Marine Corps may be construed as "naval service" in computing their sixteen or twenty years' service in the Navy, but previous service in the Army cannot be so construed.

(3) For the purpose of determining the thirty years' service necessary for retirement, all service should be counted, namely, Army, Navy, Marine Corps, active Naval Reserve service as referred to in the act of March 3, 1915, (38 Stat. 940), and Fleet Naval Reserve service, in the cases of men transferred to and retired from the Fleet Naval Reserve.

(4) Members of the Fleet Naval Reserve upon retirement are entitled to have war service "computed as double time in computing the thirty years necessary to entitle" them to be retired in accordance with the Navy Personnel Act of March 3, 1899 (30 Stat. 1008; File 26254–2114, Sec. Nav., Oct. 16, 1916).

NAVAL MILITIA: "SYSTEM OF DISCIPLINE," AS PRESCRIBED FOR THE SAME BY THE ACT OF AUGUST 29, 1916, (39 STAT. 599), CONSTRUED.

The act of August 29, 1916, (39 Stat. 599) provides "That the Naval Militia shall be subject to the system of discipline prescribed for the United States Navy and Marine Corps, * * *." In construction of the words "system of discipline" as used therein, the Judge Advocate General of the Navy rendered an opinion to the effect that these words extend to the Naval Militia of the States the provisions of the regulations, Articles for the Government of the Navy, and other laws relating to the Navy, which provide for training and general rules of conduct, but do not extend to the Naval Militia the provisions of regulations, Articles for the Government of the Navy, and other laws which relate to the administering of punishment. In other words, the expression "system of discipline" in this connection refers to matters of substantive law, that is "the positive law of duties and rights," as distinguished from adjective law, or "rules of procedure," intended for the enforcement of such [P. 8] duties and rights. Accordingly, the laws and regulations of the Navy which prescribe the system of training, the duties and rights, and the general rules of conduct of persons in the Navy, apply to the Naval Militia under the above clause of this statute; but not the laws and regulations of the Navy which provide for the enforcement of discipline by means of punishment (File 8124–55, J. A. G., Oct. 17, 1916).

SECOND LIEUTENANT IN THE MARINE CORPS: FORMER OFFICERS OF THE MARINE CORPS REINSTATED AS SUCH IN DIFFERENT STATUS FROM APPOINTEES FROM NONCOMMISSIONED OFFICERS OF THE MARINE CORPS AND FROM CIVIL LIFE.

Referring to that part of the act of August 29, 1916, (39 Stat. 610–611), providing that for the appointment of second lieutenants "from noncommissioned officers of the Marine Corps and from civil life," each said appointee, before being commissioned, is required to establish his mental, physical, moral, and professional qualifications "for such commission"; and that the reinstatement as second lieutenants of "former officers of the Marine Corps," such former officers, before such reinstatement, shall establish their moral, physical, mental, and professional qualifications "to perform the duties of that grade"; and further providing that appointments from noncommissioned officers and from civil life "shall be for a probationary period of two years," the Judge Advocate General of the Navy rendered an opinion to the effect that the above law, by its language, does not contemplate the issuance of probationary appointments to former officers of the Marine Corps reinstated as second lieutenants, after successfully passing the required examinations, and that the purpose of Congress to this effect is manifested by the difference in the nature of the examinations prescribed for former officers as compared with those required of original appointees. (In this connection for distinction between reinstatement and appointment see 48 Ct. Cls. 386.) (File 13261–544: 1, J. A. G., Oct. 10, 1916.)

C. M. O. 38—1916

[P. 1] Chief Gunner William J. Creelman, United States Navy, was tried by general court martial at the Navy Yard, New York, on October 23, 1916, by order of the Secretary of the Navy, on the following charges:

Charge I.—Wrongfully disposing of property of the United States intended for the naval service thereof, in violation of article 14 of the Articles for the Government of the Navy (three specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (five specifications alleging that the accused utilized the services of certain government employees to perform labor for his own benefit during regular working hours).

Charge III.—Drunkenness (four specifications).

Charge IV.—Conduct to the prejudice of good order and discipline (one specification alleging unauthorized absence from station and incapacity for duty by reason of intemperate use of intoxicating liquors).

Findings

The court found the accused guilty of the first charge (one specification, in part—so much of as alleged the use of a comparatively negligible quantity of government stores for his own benefit); the second charge (one specification, in part—so much of as alleged the utilization by the accused of the services of a government employee during working hours on several days on certain inconsequential jobs for his own benefit).

The court found all the specifications of the third charge "not proved" and "most fully and honorably acquitted" the accused of this charge.

The court found the specification of the fourth charge "not proved" and acquitted the accused thereof.

[P. 2] Sentence

"To be publicly reprimanded by the Secretary of the Navy."

Recommendation of Chief of Bureau of Navigation

"The Bureau recommends that the findings of the court be approved, but that the sentence be disapproved in accordance with the policy of the Department in regard to public reprimands."

Action of the Secretary of the Navy

(1) The proceedings and findings in the foregoing case of Chief Gunner William J. Creelman, U. S. Navy, are approved. The sentence is inappropriate and in conflict with the policy of the Department as set forth in previous court-martial orders. Accordingly, in order that the well-established policy of the Department in looking with disfavor on sentences involving public reprimand may be brought to the attention of the service, the sentence is disapproved. Chief Gunner Creelman will be released from arrest and restored to duty.

Remarks

(2) Aside from the substance of the sentence, as commented upon above, attention is called to the irregular form in which it is expressed. That the sentence of a general court martial should include the name and designation of the accused is so well settled and admits of such ready verification that it is considered that the error in this case was made through carelessness rather than unenlightenment and that it is unnecessary to add to what has been previously published on this subject. (See C. M. O. 42, 1914, 5 and citations given therein.)

(3) The court in this case found several specifications under charges I and II "proved in part" and excepted from the part of such specifications which it did find proved the very words which constituted the gravamen of the offenses charged. For example, one specification under charge I was found "proved in part, proved except for the words 'knowingly and wrongfully' which words are not proved." With the excepted words left out the specification no longer

[C. M. O. 41—1916]

charges any offense but reads as a mere narrative, and the proper recordation of such a finding upon a specification is simply "not proved."

(4) In addition to the foregoing the recordation of the findings in this case gives further evidence—too trivial and obvious to call for special notation—of a lack of care in making up the [P. 3] record and indicates an inattention upon the part of the judge advocate and a perfunctory performance of duty on the part of the court which it was hoped that, in view of all that has been commented upon this subject in the past (C. M. O. 10, 1916, 3 and citations therein), it would be unnecessary to further mention at this late date.

(5) The court "most fully and honorably acquitted" the accused of charge III. The use of this form of acquittal was not in accord with the requirements therefor laid down in C. M. O. 29, 1916. This order, however, had not been issued to the court at the time of this trial and the matter is here mentioned, not as a reflection upon the court, but merely as a matter of record.

C. M. O. 41—1916

[P. 6] ACT OF AUGUST 29, 1916: ABSENCE CAUSED BY DISEASE CONTRACTED THROUGH MISCONDUCT.

In the case of an enlisted man who had been a patient in a hospital for 26 days prior to the expiration of his enlistment with disease resulting from his own misconduct and who, upon the expiration of his enlistment, was not physically fit for discharge to duty—the date of his eventual and complete recovery being problematic—the Judge Advocate General rendered an opinion to the effect that the provisions of that clause of the act of August 29, 1916, which is quoted in C. M. O. 33, 1916, 5–6, do not contemplate that a man sick in a hospital when his enlistment expires, and whose recovery is problematic, should be held in the service beyond the actual date of the expiration of his enlistment in order to "make good" time lost as stated in the above law, but contemplates that such time be "made good" in a duty status; that the man in question should be discharged from the service; that proper notation should be made upon the records to show that he had 26 days' time to "make good" before his enlistment could be regarded as complete—which time, however, could not be made good, because of his physical condition and the uncertainty as to when he would be fit for duty; and that he be retained in the hospital in the status of a patient whose enlistment has expired (File 7657–394:17, J. A. G., Nov. 11, 1916).

AVIATION: OFFICERS UNDERGOING INSTRUCTION IN, HELD TO BE IN DUTY STATUS.

While the Department could not undertake to determine in advance whether its decision in the case of an officer "accidentally killed or disabled while undergoing instruction" in aviation would or would not be "in line of duty," the Department holds that an officer undergoing instruction in aviation in accordance with permission or orders from proper authority is in a duty status and rendering service to the Navy in all respects the same as any other duty which is performed by an officer with permission or under orders from proper authority (File 28569–5, Sec. Navy, Nov. 23, 1916).

FLEET NAVAL RESERVE: AS PROVIDED FOR IN ACT OF AUGUST 29, 1916. (39 STAT. 589–591.)

(1) The Judge Advocate General rendered an opinion to the effect that the retainer pay of all members of the Fleet Naval Reserve, not [P. 7] on active duty and while in a Navy hospital for treatment, should be checked 30 cents per ration for each day therein, and that same should be credited to the Navy hospital fund. In cases where a member of the Fleet Naval Reserve is on active duty, he would be entitled to rations, or commutation therefor, and while in a hospital should be treated in the same manner as any other officer or enlisted man of the naval service (File 28550–23, J. A. G., Nov. 24, 1916).

(2) *Held* that the deposits, with interest, of enlisted men of the naval service transferred to the Fleet Naval Reserve under the provisions of the above act,

[C. M. O. 45—1916]

must be paid to them at the time they are so transferred (File 28550–22, Sec. Navy, Nov. 23, 1916).

FURLOUGH WITHOUT PAY: AS PROVIDED FOR IN ACT OF AUGUST 29, 1916 (39 STAT. 580–581).

The above-cited clause of the said act provides that:

> "The Secretary of the Navy is hereby authorized to grant furloughs without pay to enlisted men for a period covering the unexpired portion of their enlistment: *Provided*, That such furloughs be granted under the same conditions and in lieu of discharge by purchase or by special order of the department. Enlisted men so furloughed shall be subject to recall in time of war or national emergency to complete the unexpired portion of their enlistment, and shall be in addition to the authorized number of enlisted men of the Navy."

(1) *Held* that enlisted men of the Marine Corps, as well as enlisted men of the Navy proper, are within the purview of the above-quoted statute (File 7657–402, Sec. Navy, Nov. 21, 1916).

(2) The Judge Advocate General rendered opinions to the effect that (*a*) When an enlisted man is furloughed without pay for the unexpired portion of his enlistment in accordance with the above-quoted statute, his deposit, if any, with interest, should be paid on that date; that is, the date the furlough is granted (File 7657–402:1, J. A. G., Oct. 18, 1916). (*b*) An enlisted man furloughed without pay, as above, is entitled to treatment in Navy hospitals (File 7657–411, J. A. G., Nov. 18, 1916).

NAVAL RESERVE (FORMER): STATUS OF MEN DISCHARGED THEREFROM BY OPERATION OF LAW ON AUGUST 28, 1916.

(1) The Judge Advocate General rendered an opinion to the effect that men discharged from the former Naval Reserve on August 28, 1916, by the passage of the act of August 29, 1916 (39 Stat. 587–592), which legislated the Naval Reserve established by the act of March 3, 1915 (38 Stat. 940–941), out of existence (23 Comp. Dec. 190), are entitled to continuous service pay if they reenlist in the Regular Navy before December 28, 1916 (within four months of their discharge from the Naval Reserve by operation of law), but not to a gratuity of four months' pay (File 28550–20, J. A. G., Nov. 4, 1916).

(2) In the case of a man discharged as above from the former Naval Reserve on August 28, 1916, and who enrolled in the Fleet Naval Reserve on October 23, 1916, the Department affirmed the above [P. 8] opinion of the Judge Advocate General and further held that the man in question was not entitled to the increase of 25 percent in retainer pay as authorized by the act of August 29, 1916 (39 Stat. 590) for men enrolling in the Fleet Naval Reserve within four months of the date of the termination of their last service (File 28550–21:1, Sec. Navy, Nov. 10, 1916).

C. M. O. 45—1916

[P. 1] Passed Assistant Surgeon James A. Bass, United States Navy, was tried by general court martial by order of the Commander in Chief, U. S. Asiatic Fleet, on board the U. S. S. *Brooklyn* at Shanghai, China, on October 28, 1916, and was found guilty of the following charges, the specifications of which were "proved by plea":

Charge I.—Absence from station and duty after leave had expired (one specification).

Charge II.—Drunkenness.

Specification.—"In that James A. Bass, a passed assistant surgeon in the United States Navy, attached to and serving on board the United States ship *Galveston*, at Shanghai, China, was, on the seventeenth day of October, nineteen hundred and sixteen, upon his return to said ship from leave, so much under the influence of intoxicating liquor as to be unable to properly perform his duty."

Charge III.—Conduct to the prejudice of good order and discipline.

[C. M. O. 46—1916]

Specification.—"In that James A. Bass, a passed assistant surgeon in the United States Navy, attached to and serving on board the United States ship *Galveston*, at Shanghai, China, did, at or about ten hours and thirty minutes antemeridian on the seventeenth day of October, nineteen hundred and sixteen, return to his station and duty on board said ship so much under the influence of intoxicating liquor as to be unable to properly perform his duty."

SENTENCE

"The court, therefore, sentences him, Passed Assistant Surgeon James A. Bass, U. S. Navy, to lose twenty-five (25) numbers in his grade."

ACTION OF CONVENING AUTHORITY

The convening authority on November 9, 1916, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Passed Assistant Surgeon James A. Bass, U. S. Navy, but reduced the loss of numbers in his grade to ten (10); and directed that he be released from arrest and restored to duty.

[P. 2] (1) The specifications under charges II and III, quoted above, appear to be based on identical facts and both charges seem to be founded on the same act of drunkenness. It has previously been published that "the Department does not approve of trying an accused on two charges where the identical facts are made the basis of both" (C. M. O. 5, 1914, 7). Insofar as the record discloses there appears to have been no necessity in this case for resorting to multiplicity or plurality of charges in order "to provide for every possible contingency in evidence," as explained in C. M. O. 42, 1914, 7, and the offense set forth under charge III is not distinguished from that under charge II.

(2) It is further to be noted in connection with the specification under charge III that even if the offense alleged therein were not identical with that alleged under charge II, it should properly be charged as an additional specification under charge II for "when the offense is a neglect or disorder specifically provided for, it is properly chargeable under the specific charge, and not under the general or catch-all clause (article 22) of the Articles for the Government of the Navy" (C. M. O. 49, 1915, 18). The offense charged under charge III, insofar as the specification discloses, falls quite clearly under charge II.

Inasmuch as the convening authority has already mitigated the sentence of Passed Assistant Surgeon Bass, and as the sentence as approved is an extremely lenient one for the actual offenses of which that officer admitted his guilt, the Department has taken no further action on the record in this case and has invited attention to the foregoing, not because it appears that Passed Assistant Surgeon Bass has suffered any injustice, but in order that a recurrence of the irregularities noted herein may be prevented.

C. M. O. 46—1916

[P. 6] PROTECTION OF THE UNIFORM: FEDERAL STATUTE RELATING THERETO.

The Department has received, from persons both in and out of the service, letters bringing to its attention cases of alleged unlawful wearing of the uniform of the United States Navy.

The law on the subject is contained in the National Defense Act of June 3, 1916 (39 Stat. 216), which provides that:

> "It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps, to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps: *Provided*, That the foregoing provision shall not be construed so as to prevent officers or enlisted men of the National Guard from wearing in pursuance of law and regulations, the uniform lawfully prescribed to be worn by such officers or enlisted men of the National Guard;

[C. M. O. 46—1916]

nor to prevent members of the organization known as the Boy Scouts of America, or the Naval Militia, or such other organizations as the Secretary of War may designate, from wearing their prescribed uniforms; nor to prevent persons who in time of war have served honorably as officers of the United States Army, Navy, or Marine Corps, Regular or Volunteer, and whose most recent service was terminated by an honorable discharge, muster out, or resignation, from wearing, upon occasions of ceremony, the uniform of the highest grade they have held by brevet or other commission in such Regular or Volunteer service; nor to prevent any person who has been honorably discharged from the United States Army, Navy, or Marine Corps, Regular or Volunteer, from wearing his uniform from the place of his discharge to his home, within three months after the date of such discharge; nor to prevent the members of military societies composed entirely of honorably discharged officers or enlisted men, or both, of the United States Army, Navy, or Marine Corps, Regular or Volunteer, from wearing, [P. 7] upon occasions of ceremony, the uniform duly prescribed by such societies to be worn by the members thereof; nor to prevent the instructors and members of the duly organized cadet corps of a State university, State college, or public high school offering a regular course in military instruction from wearing the uniform duly prescribed by the authorities of such university, college, or public high school for wear by the instructors and members of such cadet corps; nor to prevent the instructors and members of the duly organized cadet corps of any other institution of learning offering a regular course in military instruction, and at which an officer or enlisted man of the United States Army, Navy, or Marine Corps, is lawfully detailed for duty as instructor in military science and tactics, from wearing the uniform duly prescribed by the authorities of such institution of learning for wear by the instructors and members of such cadet corps; nor to prevent civilians attendant upon a course of military or naval instruction authorized and conducted by the military or naval authorities of the United States from wearing, while in attendance upon such course of instruction, the uniform authorized and prescribed by such military or naval authorities for wear during such course of instruction; nor to prevent any person from wearing the uniform of the United States Army, Navy, or Marine Corps in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military or naval character not tending to bring discredit or reproach upon the United States Army, Navy, or Marine Corps: *Provided further*, That the uniforms worn by officers or enlisted men of the National Guard, or by members of the military societies or the instructors and members of the cadet corps referred to in the preceding proviso shall include some distinctive mark or insignia to be prescribed by the Secretary of War to distinguish such uniforms from the uniforms of the United States Army, Navy, and Marine Corps: *And provided further*, That the members of the military societies and the instructors and members of the cadet corps hereinbefore mentioned shall not wear the insignia of rank prescribed to be worn by officers of the United States Army, Navy, or Marine Corps, or any insignia of rank similar thereto.

"Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding $300, or by imprisonment not exceeding six months, or by both such fine and imprisonment."

It is to be noted that the above-quoted statute makes the wearing of the uniform in violation of its terms unlawful. Inasmuch as this statute is, by its terms, of general application and not restricted to places exclusively under Federal jurisdiction, such unlawful wearing of the uniform may be prosecuted in the Federal courts throughout the States, wherever it may take place, and reference need not be had to the laws of any particular State for this purpose. The above statute, however, is not to be confused with the prior Federal statute prohibiting discrimination against the uniform (36 Stat. 963), which last-mentioned statute is, by its terms, specifically restricted in its application to places exclusively under Federal jurisdiction [P. 8]—that is "in the District of Columbia, or in any Territory, the District of Alaska or Insular Possessions of the United States." In cases of discrimination against the uniform arising in any of the States, prosecution therefor can be based only upon a prohibition

against such discrimination contained in the laws of the State in which such discrimination takes place. (For States having laws prohibiting discrimination of the uniform see C. M. O. 9, 1916, 9. To the list enumerated therein should be added the States of Connecticut, Florida, and Oklahoma.)

RETIRED OFFICER: EMPLOYMENT OF, BY COMPANY FURNISHING NAVAL SUPPLIES OR WAR MATERIALS TO THE GOVERNMENT, UNLAWFUL.

A retired officer recently refunded his retired pay for a certain period during which he stated that he had been employed "by a concern making naval supplies and war materials." It appeared from the statement of this officer upon further investigation that he had been employed during the period in question by a company supplying materials to the Navy and that he had refunded his retired pay for that period in an effort to comply with the provisions of the act of June 10, 1896 (29 Stat. 361), which prohibits payment "to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed * * * by any person or company furnishing naval supplies or war materials to the Government," and provides that "such employment is hereby made unlawful." The Department held that the fact that this officer returned the pay due him while so employed did not fully relieve him from his responsibilities, as the above statute renders such services unlawful, and directed that the returned pay be turned in to the credit of the United States, and that the officer be admonished to be more careful in the future (File 9736–61: 1–2, Sec. Navy, Dec. 8, 1916). (In this connection see C. M. O. 35, 1915, 11.)

SENTENCE TO LOSS OF NUMBERS: BECOMES FULLY EXECUTED UPON PROMOTION OF OFFICER SO SENTENCED.

In the case of an officer, who, while in grade of ensign, was sentenced to a loss of numbers, and who subsequently was promoted to the grade of lieutenant (junior grade) and now requests that he be restored to his "former position in the service," said officer was informed that he now occupies in the grade of lieutenant (junior grade) the place to which the date of his present commission entitles him, and that the sentence to loss of numbers has been completely executed. Accordingly, to restore said officer to his former relative position would require that he be placed above other officers whose present commissions antedate his own; and the President, under the existing law, is authorized so to advance an officer only for eminent and conspicuous conduct in battle or extraordinary heroism (File 26261–246: 1, Sec. Navy, March 18, 1914; and 26261–246: 2, Sec. Navy, Dec. 8, 1916; File 26262–1794: 1, Sec. Navy, Dec. 21, 1916).

C. M. O. 1—1917

[P. 1] Lieutenant (junior grade) Thomas M. Tipton, United States Navy, was tried by general court martial on November 21, 1916, on board the U. S. S. *North Dakota*, at the Navy Yard, Philadelphia, Pa., by order of the Commander in Chief, U. S. Atlantic Fleet, and found guilty of the following charges, the specifications of which were "proved by plea."

Charge I.—Drunkenness (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification alleging disorderly conduct).

Charge III.—Resisting arrest (one specification).

Charge IV.—Assaulting and striking a sentinel (one specification).

Charge V.—Using profane and obscene language toward a sentinel (one specification).

SENTENCE

"The court, therefore, sentences him, Lieutenant (junior grade) Thomas M. Tipton, U. S. Navy, to be dismissed from the United States naval service."

[C. M. O. 1—1917]

RECOMMENDATION TO CLEMENCY

The members of the court spread upon the record the following unanimous recommendation to clemency:

"The court has felt compelled under its oath and in view of the nature of the offenses to adjudge the sentence of dismissal as an adequate punishment. The court feels, however, that the excellent record of the accused, clear of all previous offenses and showing a steadily increasing efficiency, indicates that the accused is a very valuable officer to the Navy. Moreover the court is of opinion that his record warrants the belief that the offense does not correctly indicate the true character of the accused, but rather that it is an isolated case in the career of an officer whose previous good conduct and record for efficiency entitles him to consideration.

"The court does, therefore, unanimously and most strongly recommend the accused to the clemency of the revising power."

[P. 2] The convening authority on November 27, 1916, approved the proceedings, findings, and sentence in the foregoing case of Lieutenant (junior grade) Thomas M. Tipton, U. S. Navy, subject to the following remarks:

"After a thorough examination of the record in this case, and the consideration of all the evidence submitted, of the circumstances under which the offense was committed, and of the unanimous recommendation to clemency, the Commander in Chief is of the opinion that the clemency of the reviewing authority should be excercised in this case.

"It is therefore recommended that the execution of the sentence be held in abeyance for a period of one (1) year, and if at the end of that time favorable reports have been received as to the conduct of Lieutenant (junior grade) Thomas M. Tipton, U. S. Navy, that the sentence be mitigated to the loss of one hundred (100) numbers in his grade."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

"The Bureau has carefully considered the record of this case, together with the excellent previous record of the accused, and his statement before the court. This officer's record is clear of all previous offenses and he has been in the naval service for over twelve years. A perusal of his record shows that he is steadily increasing in efficiency, that he is interested in his profession and the naval service, that he is held in high esteem by his previous commanding officers, that he has just made 100 percent of hits with his turret and obtained an "E" for the practice, the score being the highest ever made with that type of turret.

"While the Bureau does not condone an offense of this nature, it is of the opinion that the clemency of the reviewing authority should be exercised in his case. This officer has been educated at a great expense to the Government and has now attained the rank and experience where his services are of real value, and the Bureau considers him a very valuable officer to the Navy.

"It is therefore recommended that the execution of the sentence be held in abeyance for a period of one (1) year, and if at the end of that time favorable reports have been received as to the conduct of Lieutenant (junior grade) Thomas M. Tipton, U. S. Navy, that the sentence be mitigated to the loss of one hundred (100) numbers in his grade."

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

The Department, after a careful consideration of all the circumstances of this case and after deliberating upon the aggravated nature of the offenses involved, could not concur in the foregoing recommendations and felt that no punishment less than dismissal from the service would be adequate. Accordingly, on December 21, 1916, the proceedings, findings, and sentence in the foregoing case of Lieutenant (junior grade) Thomas M. Tipton, U. S. Navy, were approved.

[C. M. O. 2—1917]

ACTION OF THE PRESIDENT

In conformity with the provisions of article 53, Articles for the Government of the Navy (section 1624 of the Revised Statutes) the record was submitted to the President of the United States, who, on January 3, 1917, confirmed the sentence of the court.

C. M. O. 2—1917

[P. 1] DOCUMENTARY EVIDENCE: IMPROPERLY INTRODUCED.

Lieutenant (junior grade) Edward C. Lange, United States Navy, was tried by general court martial on November 20, 1916, on board the U. S. S. *Pennsylvania*, at Hampton Roads, Va., by order of the Commander in Chief, U. S. Atlantic Fleet, and found guilty of the following charge, the specifications of which were "proved by plea."

Charge.—Conduct to the prejudice of good order and discipline (two specifications alleging that the accused was, by reason of excessive use of intoxicating liquor, incapacitated for duty and in such condition as to necessitate his transfer to a hospital).

SENTENCE

"The court, therefore, sentences him, Lieutenant (junior grade) Edward C. Lange, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by four of the seven members of the court, was spread upon the record:

> "In consideration of this officer's excellent character and service, as testified to by his immediate superior officers, we recommend the accused in this case to the clemency of the revising authority."

ACTION OF THE CONVENING AUTHORITY

The convening authority on November 21, 1916, approved the proceedings, findings, and sentence in the foregoing case of Lieutenant (junior grade) Edward C. Lange, U. S. Navy, subject to the following remarks:

> "After careful consideration of all the circumstances of this case, the evidence as to character presented to the court, the recommendation to clemency signed by four members of the court, and the service record of Lieutenant (junior grade) Edward C. Lange, U. S. Navy, as well as the voluntary pledge, a copy of which is attached to the proceedings of the court, the Commander in Chief is of the opinion that the exercise of clemency in this case would be justified and would result in saving to the Navy the services of a capable young officer.
>
> "It is therefore recommended that the execution of the sentence be held in abeyance for one (1) year, at the end of that period, if his conduct has proved satisfactory, that the sentence [P. 2] be mitigated by the President, to the loss of one hundred (100) numbers in his grade."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

"The Bureau concurs in the endorsement hereon by the convening authority and recommends approval thereof."

ACTION OF THE SECRETARY OF THE NAVY

The Department, after a careful consideration of all the circumstances of this case and after considering the serious nature of the offense involved, and the fact that Lieutenant Lange was found guilty by a general court martial on a previous occasion of a similar offense involving drunkenness (C. M. O. 39. 1912), could not concur in the foregoing recommendations, and felt that no punishment less than dismissal from the service would be adequate. Accord-

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ingly, on January 5, 1917, the proceedings, findings, and sentence in the foregoing case of Lieutenant (junior grade) Edward C. Lange, U. S. Navy, were approved.

ACTION OF THE PRESIDENT

In conformity with the provisions of article 53, Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, who on January 9, 1917, confirmed the sentence of the court.

REMARKS

It appears from the record that while the judge advocate was on the stand as witness for the defense:

> "Counsel for the accused submitted a letter from the accused to the Navy Department and requested that it be read into the record by the judge advocate.
> "The court was cleared. When opened all parties to the trial entered, and the president announced that the request of counsel was granted.
> "The witness read the said letter, copy appended, marked '2.'"

It may be seen from the foregoing that, insofar as the record shows, the document in question was not identified, nor was it duly offered to the judge advocate and court in order to afford opportunity for objection to its introduction; nor does the record disclose that there was in fact no objection offered to its admission in evidence, as there might well have been on the ground that it was a self-serving statement.

The proper procedure for introducing documentary evidence has been set forth fully in C. M. O. 15, 1916, 3, and a repitition thereof is not deemed necessary.

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[P. 4] SENTENCE: REMISSION OF—WHEN SENTENCE INCLUDES A TERM OF CONFINEMENT TOGETHER WITH "ACCESSORIES," THE CONFINEMENT SHOULD NOT BE REMITTED WITHOUT REMITTING THE LOSS OF PAY IN WHOLE OR IN PART.

In the general court-martial case of Halford L. Hall, fireman third class, United States Navy, the court sentenced him "to be confined for a period of one year, then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence, as prescribed by the Navy Regulations." The "other accessories" of the sentence include loss of pay "during his current enlistment" except for a sum of $3 per month during confinement and $20 on discharge. (See Navy Regulations, 1913, R–816 (5).)

The convening authority, in acting upon this case, remitted the confinement and dishonorable discharge without at the same time remitting any part of the loss of pay. As this action, under the terms of the above sentence, would mean that Hall might be required to serve during the remainder of his enlistment without pay, the Secretary of the Navy remitted the loss of pay adjudged (G. C. M. Rec. No. 33050).

[P. 5] Aside from any consideration of the legality of the convening authority's action in the above case, the Department desires, as a matter of policy, that convening authorities, in acting upon general court-martial cases in which the sentence is in accordance with the form prescribed by Navy Regulations, 1913, R–816 (4), shall not remit the confinement without remitting the loss of pay in whole or in part (File 26262–2742:1).

TESTIMONY: VERIFICATION OF.

In a recent general court-martial case it appears from the record that a witness for the prosecution, at the completion of his examination, was duly directed to return to the court at a later date for the purpose of verifying his testimony.

The subsequent proceedings of the court show that when it was desired to verify the above testimony the witness was not available.

The judge advocate stated that said witness was absent from his station on authorized leave and that his whereabouts were uncertain but that steps were being taken to locate and recall him. The judge advocate also cited to the court in this connection C. M. O. 44, 1909, in which the proceedings of a court were disapproved because witnesses were recalled, *after the court had arrived at its findings and in the absence of the accused*, and permitted to make material changes in their testimony while verifying same.

Counsel for the accused stated that the defense was willing to waive the reading and verification of this testimony in the present case.

The court decided that, owing to the exigencies of the service and in order to avoid undue delay, "the trial shall proceed—there being no objection."

Both the judge advocate and the counsel for the accused stated that there was no objection.

Accordingly the trial proceeded and the court arrived at its findings without verification of the aforesaid testimony (G. C. M. Rec. No. 33198).

The verification of the testimony of witnesses is not, as would appear from the foregoing, a matter to be waived at the discretion of a court, even in the absence of objection by either side. It does not appear in the above case that the recall of this witness would necessarily have resulted in undue delay and, even had such been found to be the case, the proper procedure would have been to report the circumstances to the convening authority and request instructions.

While irregular, it was not considered that, under the circumstances of the above case, this defect was fatal nor that it operated to invalidate the proceedings.

[P. 6] CIVIL PURSUITS: ENLISTED MEN ENGAGING THEREIN—CONSTRUCTION OF SECTION OF NATIONAL DEFENSE ACT OF JUNE 3, 1916, RELATING THERETO.

Section 35 of the National Defense Act of June 3, 1916 (39 Stat. 188), reads as follows:

> "Hereafter no enlisted man in the active service of the United States in the Army, Navy, and Marine Corps, respectively, whether a noncommissioned officer, musician, or private, shall be detailed, ordered, or permitted to leave his post to engage in any pursuit, business, or performance in civil life, for emolument, hire, or otherwise, when the same shall interfere with the customary employment and regular engagement of local civilians in respective arts, trades, or professions."

The question arose shortly after the passage of this act as to whether same prohibited enlisted men from leaving their posts "to engage in any pursuit, business, or performance in civil life," *without remuneration*. It was the opinion of the Judge Advocate General that it did not so prohibit (File 4924–435, J. A. G., June 20, 1916).

Upon the question being presented as to whether the above act prohibited the use of a naval band at a charity ball where the transportation and subsistence of the enlisted personnel of the band were to be furnished by those conducting the ball, the Judge Advocate General rendered an opinion that the furnishing of transportation and subsistence only, as proposed in this case, could not be construed as remuneration and was not in violation of law; and that the law does not prohibit enlisted men from engaging in any pursuit, business, or performance in civil life *without remuneration*, notwithstanding that same may "interfere with the customary employment and regular engagement of local civilians in the respective arts, trades, or professions" (File 4850–219, J. A. G., Jan. 16, 1917).

MISCONDUCT: ABSENCE FROM DUTY ON ACCOUNT OF SICKNESS OR DISEASE RESULTING THEREFROM—CONSTRUCTION OF PROVISION OF ACT OF AUGUST 29, 1916, RELATING THERETO.

Referring to that clause of the act of August 29, 1916 (39 Stat. 580), which provides that:

> "Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other

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misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors or other misconduct."

[P. 7] (1) The Judge Advocate General rendered an opinion to the effect that a person in the Navy or Marine Corps should not be penalized in accordance with its terms "for misconduct committed prior to his entry into the service" (File 7657–394:21, J. A. G., Jan. 26, 1917).

(2) The Comptroller of the Treasury held that it "does not prohibit the receipt of pay by officers or men of the Navy or Marine Corps, on the sick list or otherwise, for time absent from duty on account of injury resulting from their own intemperate use of drugs or alcoholic liquors or other misconduct." That is, that the term "sickness or disease" as used in the above-quoted clause of the act of August 29, 1916, does not include "injury" (Comp. Dec. of Nov. 22, 1916).

(In this connection see C. M. O. 33, 1916, 5–6, and 41, 1916, 6, for further construction of this clause of act of Aug. 29, 1916.)

PROMOTION BY SELECTION OF CERTAIN LINE OFFICERS: CONSTRUCTION OF PROVISION OF ACT OF AUGUST 29, 1916, RELATING THERETO.

Referring to that part of the act of August 29, 1916 (39 Stat. 578–579), which provides for the promotion by selection "to the grades of commander, captain, and rear admiral of the line of the Navy," it was the opinion of the Judge Advocate General:

That the act of June 18, 1878 (20 Stat. 165)—which limits the part of the record of officers, examined for promotion in accordance with laws in effect prior to August 29, 1916, to be considered by the examining board (see Navy Regulations, 1913, R–334 (2))—is not applicable to the different form of promotion established by the above-mentioned clause of the act of August 29, 1916; and accordingly, the entire records of officers eligible for promotion under the terms of this last-mentioned law should be transmitted to the Board of Selection for such promotion (File 26251–169, J. A. G., Nov. 28, 1916).

This opinion was sustained by the Attorney General in his opinion of January 13, 1917.

PROMOTION BY SELECTION OF OFFICERS OF THE STAFF CORPS.

(1) The Judge Advocate General rendered an opinion on the question of promotion by selection in the staff corps of the Navy under the following heads:

(*a*) Advancement of staff officers in rank without change in office (grade).

(*b*) Advancement of staff officers to higher offices with or without advancement in rank.

As to (*a*) the conclusion of this officer was that the advancement of staff officers in rank without change in office may be regulated by Congress, but that Congress has not enacted any statutory regulations on the subject other than as applicable only to the lower ranks in said corps; and, accordingly, that the President may in his discretion select any staff officer with the rank of captain for advancement to the rank of rear admiral in the same office, or may [P. 8] prescribe general rules governing such advancement in rank—the rank of rear admiral in the staff corps having been established by recent law without making any provision as to how advancements thereto shall be effected.

As to (*b*) consideration was given to the fact that from time immemorial the advancement of naval officers to higher offices has been made by seniority. This rule, however, was not established by Congress, but by the executive branch of the Government, although since its inception statutes have been enacted by Congress in recognition of the rule and even purporting to make the same obligatory. To this effect are sections 1458 and 1480 of the Revised Statutes providing for promotion by seniority and modified by subsequent statutory enactment only to the extent that the act of August 29, 1916, establishes a system of promotion by "selection" for certain line officers.

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The question has repeatedly been raised as to the power of Congress to control the president's power of appointment which, under the Constitution, is subject only to the concurrence of the Senate. The authorities upon this question establish the following:

First. That Congress has not the power to designate an appointee by name (18 Op. Atty. Gen., 18; *United States* v. *Ferreira*, 13 How., 40).

Second. That Congress has not the power to require the appointment of an individual who stands highest upon a competitive examination (13 Op. Atty. Gen., 516).

Third. That Congress cannot require the President to appoint to a vacancy in the military service the senior officer in the next lower grade (30 Op. Atty. Gen., 177).

The above propositions all rest upon the underlying principle that "the power of appointment of officers, the duty to appoint whom devolves directly on the President and Senate by virtue of the Constitution itself, is one involving a discretion not entirely to be controlled by Congress. This power is from a source above Congress, namely, the Constitution, and cannot be destroyed by the inferior power" (30 Op. Atty. Gen., 177). The foregoing authorities, therefore, if they do not clearly define the respective powers of Congress and the President, at least leave no doubt that Congress has not the power to require the appointment of a particular individual either by name or description. This, of course, applies equally to promotions, for a promotion is "an appointment to a higher office" (30 Op. Atty. Gen., 177).

As to the respective powers of Congress and the President, the Attorney General has said:

> "Although the appointing power alone can designate an individual for office, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications and require that the designation shall be made out of a class of persons ascertained by proper tests to have those qualifications; * * *" (13 Op. Atty. Gen. 516; see also 26 Op. Atty. Gen. 502).

In the matter of the advancement of staff officers in grade Congress has not merely limited the President's power of selection to a class [P. 8] of officers, as, for example, it might have done by requiring that the vacancies in higher grades should be filled from among officers in the next lower grade, but instead has proceeded to the very point of requiring that a particular individual be appointed to fill a vacancy existing in a higher grade. In other words, Congress has done precisely what the Attorney General stated in an opinion "it is not supposable" that it would do, namely, required of canditates for higher offices in the Navy "qualifications unattainable by a sufficient number to afford ample room for choice"—for obviously only one officer can be the "highest" member in his grade or "the next officer in rank" to the grade in which a vacancy occurs, and Congress has said with reference to vacancies in the staff corps, that "the highest members in each corps" shall be appointed to vacancies therein; and on the general subject has said that "the next officer in rank" shall be promoted to the place of a retired officer. There is hardly room for doubt that such legislation is necessarily an attempted infringement upon the constitutional power of the President, and therefore cannot be binding upon him.

Accordingly, the Judge Advocate General concluded that the advancement of staff officers to higher offices with or without advancement in rank is a matter resting entirely within the constitutional power of the President, subject to such regulations by Congress as may not deprive him of the right to exercise his individual judgement and will; that the attempted regulations of Congress have gone beyond this point and are, therefore, void as binding regulations; and that the President may make such advancements by selection should he, as a matter of policy, deem such action expedient (File 28687–4:4, J. A. G., Sept. 12, 1916).

The Attorney General, in an opinion dated December 27, 1916, sustained the opinion of the Judge Advocate General on both of the above propositions.

(2) It was the opinion of the Judge Advocate General that, where advancement in rank in a staff corps involves promotion in grade, the officers selected for such advancement are subject in all respects to the examinations prescribed by sections 1493 and 1496 of the Revised Statutes (File 28687–4:5, J. A. G., Nov. 23, 1916).

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[P. 1] ACTION OF CONVENING AUTHORITY: SHOULD, IN CASES INVOLVING THE DISMISSAL OF AN OFFICER, NOTE THE REFERENCE OF THE RECORD TO THE SECRETARY OF THE NAVY FOR TRANSMISSION TO THE PRESIDENT.

Lieutenant (junior grade) Anson A. Merrick, U. S. Navy, was tried by general court martial on January 24, 1917, on board the U. S. S. *North Dakota*, at the Navy Yard, Philadelphia, Pa., by order of the Commander, Reserve Force, U. S. Atlantic Fleet, and was found guilty of the following charges, the specifications of which were "proved by plea."

Charge I.—Absence from station and duty after leave had expired (one specification).

Charge II.—Drunkenness (one specification).

SENTENCE

"The court, therefore, sentences him, Lieutenant (junior grade) Anson A. Merrick, United States Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

The convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Anson A. Merrick, U. S. Navy, on January 24, 1917.

ACTION OF THE SECRETARY OF THE NAVY

This officer was, but a short time ago, previously convicted of "absence from station and duty after leave had expired," (C. M. O. 39, 1916). The present offenses, combined with his previous one, indicate that he is unworthy of the trust and confidence which is reposed in a commissioned officer. Accordingly the Department, on February 5, 1917, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Anson A. Merrick, U. S. Navy.

ACTION OF THE PRESIDENT

In conformity with the provisions of article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, who, on February 6, 1917, confirmed the sentence of the court.

[P. 2] It was noted that the convening authority in his action on the foregoing case, which involves the dismissal of an officer from the naval service, failed to embody in said action the reference of the record to the Secretary of the Navy for transmission to the President of the United States as required by article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), and as prescribed by Forms of Procedure, 1910, p. 53, var. 8.

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[P. 1] 1. PRIVILEGED COMMUNICATIONS: LETTERS FROM A PERSON TO HIS ATTORNEY IN FACT DO NOT COME WITHIN THIS CLASS.

2. ADMISSIONS IN OPEN COURT: ESTABLISH THE FACTS SET FORTH IN SPECIFICATIONS AND THUS ADMITTED BY THE ACCUSED, AND DISPENSE WITH THE NECESSITY OF EVIDENCE TO ESTABLISH SAME.

3. PUBLICATION OF A LIBELOUS LETTER: WHAT CONSTITUTES SAME.

4. "SUPERIOR OFFICER: TERM INCLUDES AN OFFICER "SUPERIOR IN RANK, AND DOES NOT REQUIRE ASSOCIATION ON DUTY IN THE HIERARCHY OF COMMAND.

5. JUSTIFIABLE CAUSE: WHAT THE LAW RECOGNIZES AS SUCH FOR THE EXPRESSION IN WRITING OF UNFAVORABLE OPINIONS OF OTHERS.

Lieutenant Walter B. Decker, United States Navy, was tried by general court martial on September 22, 1916, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy, upon the following charges:

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Charge I.—Conduct to the prejudice of good order and discipline (one specification alleging that the accused did, in reference to a disagreement between himself and a superior officer in regard to a disputed claim, "write, send, and publish, or cause to be sent and published without justifiable cause," to his (the accused's) father, and to a law firm, and to the Navy Department, a letter containing "abusive, disrespectful, and defamatory" language of and about the said superior officer).

Charge II.—Conduct unbecoming an officer and a gentleman (two specifications alleging that certain threatening letters were written to a superior officer of the accused at the instigation of the accused).

FACTS

Briefly stated, the facts in the case are as follows: The accused claimed that an officer, his senior in rank, was indebted to him in the sum of fifty-seven dollars, while the latter contended that this was not a just debt.

The accused, instead of taking the matter up in a civil court authorized to pass upon the rights and liabilities of the respective parties—which is a proper procedure for persons in the naval service, as well as persons in civil life, to pursue under such circumstances—wrote a letter of instructions to his father, at the same time appointing his father as attorney in fact to collect the claim in question.

The letter of instructions written by claimant to his attorney in fact is rather lengthy and need not be quoted in detail. Briefly stated, it refers to an "informal contract" for the sublease of a house made by the writer with his superior officer; [P. 2] expresses the writer's doubt "if there is a person in the service who has the least bit of regard or respect for" said superior officer, and states "furthermore he is the most despised"; indicates that the writer would not report the matter to the Navy Department "except under great pressure—I wouldn't even want him (said superior officer) to know I was contemplating it for he might get mulish and call any bluff"; suggests that "a letter from a lawyer" to the writer's superior officer "would sort of stir him up," and expresses a doubt as to whether said officer "would like to go to court and be publicly branded as a man who does not live up to his agreements"; states that his superior officer "stands the chance of losing a darn sight more than" the writer, and that "the news once started will spread like wildfire that he isn't a man to be trusted"; indicates that the writer wants his agent "to find out from a lawyer whether or not that agreement is valid"; and concludes by stating "if it isn't we are of course up against it."

In furtherance of the above the accused's father—his attorney in fact or agent—employed a lawyer, who addressed a threatening letter to the accused's superior officer. Later the attorney in fact himself addressed a threatening letter to said officer in pursuance of the above claim.

Finally, the matter was reported to the Navy Department by the lawyer employed by the accused's attorney in fact and the serious nature which the controversy between the accused and his superior officer had assumed compelled the Department to convene a court of inquiry, in consequence of which charges and specifications were preferred against both the officer whose case is now under consideration and the other party to the controversy.

Charge I is based upon the letter written by the accused to his father, his attorney in fact. Charge II, specifications 1 and 2, respectively, are based upon the letter written by the lawyer employed by the attorney in fact, and the letter written by the attorney in fact himself to the superior officer of the accused.

DEFENSE

The accused at the outset of the trial admitted the authorship of the letter to his father (attorney in fact), which was set out in full in the specification under charge I, but reserved the right to object to the admission of the letter itself in evidence. (This objection was subsequently made by the accused and sustained by the court.)

The whole defense of the accused was based substantially upon the following points:

(*a*) That the letter written by him to his attorney in fact is a privileged communication and protects him from responsibility therefor.

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[P. 3] (*b*) That he is not answerable for the subsequent action taken by his attorney in fact and the lawyer employed by the latter.

FINDINGS

The court most fully and honorably acquitted the accused of both charges.

RETURNED FOR REVISION

The Department, on October 7, 1916, returned the record in this case to the court for a reconsideration of its findings. In its letter returning the record the Department invited particular attention to the following points:

(*a*) Proof was unnecessary that the accused wrote the letter set forth under charge I, as he admitted authorship thereof, after which evidence on the part of the judge advocate to establish the fact admitted would have been not only unnecessary but objectionable.

(*b*) Even though said letter had otherwise been privileged, it would have lost that character the moment that the accused by counsel in open court formally admitted authorship thereof, thus himself divulging the full contents of the letter, the original of which he stated was in his possesion and was exhibited by him to the court.

(*c*) Said letter never was privileged, because of its illegal nature, which excluded it from privilege no matter to whom addressed. Moreover, aside from this feature, it was addressed to an attorney in fact, not an attorney at law, and letters from a person to his attorney in fact do not come within the class of privileged communications, which is also true of letters to a member of the writer's family.

(*d*) The letters set forth under charge II were plainly written at the instigation of the accused, as disclosed by his letter set forth under charge I. Furthermore, when the accused was furnished with copies of said letters, there is no evidence that he immediately or at any time thereafter disavowed same, and promptly advised the addressee that they were written without his authority and met with his disapproval. It must, therefore, be accepted as against the accused that he not only instigated the writing of said letters, but tacitly approved thereof when copies were furnished him.

(*e*) That it was the purpose of the accused to attempt the collection of his claim by threats in preference to invoking proper legal procedings is disclosed by his letter set forth under charge I, and that his agent and lawyer both so understood his instructions is conclusively shown by the fact that instead of instituting legal proceedings as they might have done, regardless [P. 4] of the adverse party's whereabouts, they proceeded to write threatening letters in violation of the New York statutes (said letters were written in New York), in an attempt to coerce settlement of a claim, the validity of which had not been established, and which was certainly disputed by the adverse party.

FINDINGS IN REVISION

The court decided "respectfully to adhere to its former findings."

RETURNED FOR REVISION

The Department on October 30, 1916, again returned the record to the court for reconsideration of its findings and acquittal upon both charges, further discussing various points covered in its previous letter, explaining the Department's uncertainty "as to the exact feature which governed the court in its finding." and directing that "should the particular feature which has governed the court in its previous finding not be adequately covered in the above and should the court therefore still adhere to its previous finding, that it spread upon the record for the information of the Department the reasons complete and in detail which governed it in arriving at its finding."

FINDINGS IN REVISION

The court again decided "to respectfully adhere to its original findings and most full and honorable acquittal" of both charges, and, pursuant to the Depart-

ment's instructions, recorded the reasons for its conclusions fully and in detail. The following appeared to be the principal points:

(*a*) That in its opinion the letter written by the accused and forming the basis of charge I was a privileged communication.

(*b*) That, inasmuch as the admission of authorship by the accused was qualified by the right of claiming privilege, the letter in question was never properly before the court.

(*c*) That the accused was not responsible for the publication of his letter by the addressee.

(*d*) That the officer alleged to have been defamed therein was not the "superior officer" of the accused, being merely senior to the accused in the same grade and performing duty on a different station.

(*e*) That the alleged defamatory letter was not written and sent by the accused "without justifiable cause."

RETURNED FOR REVISION

The Department, on December 9, 1916, again returned the record to the court for the purpose of informing it definitely upon [P. 5] the various questions of law presented by the above points on which the court based its findings; and, in this connection, invited the court's attention to the propriety of its accepting the advice of the Department on questions of law, and cited C. M. O. 25, 1916, 4, to this effect. The Department's letter brought out the following:

(1) That the proposition stated in the Department's letter of October 7, 1916, that—

> "Letters from a person to his attorney in fact do not come within the class of privileged communications."

is a correct statement of the law on the subject.

In the case of *Collins* v. *Johnson* (16 Ga. 458), which is a leading case on this point, the question was presented whether information acquired by an attorney was privileged where he was in fact an attorney at law and employed as such, but the particular transaction which was the subject of inquiry was not necessarily such as called for an exercise of his functions as an attorney at law. The court held that, with reference to the transaction in question, the attorney acted in the capacity of an attorney in fact rather than in his capacity of an attorney at law, and therefore might be required to disclose the information so obtained.

In 26 Ann. Cas. 13 (note to *Collins* v. *Hoffman*), the following appears:

> "It has been held that communications made to an attorney acting merely in the capacity of an attorney in fact are not privileged."

To the same effect is Cyc. 2365, which reads as follows:

> "Neither is there any privilege as to communications in reference to a matter in which the attorney acts, not in his professional capacity, but merely as an agent or attorney in fact."

In Greenleaf on Evidence (16th edition, Wigmore), it is stated (secs. 237, 239):

> "And, in the first place, in regard to professional communciations, the reason of public policy, which excludes them, applies solely, as we shall presently show, to those between a client and his legal adviser. * * * In regard to the persons to whom the communications must have been made in order to be thus protected, they must have been made to the counsel, attorney, or solicitor, acting, for the time being, in the character of legal adviser."

In Wigmore on Evidence, sections 2286, 2309, it is stated:

> "In general, then, the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. This rule is not questioned today. * * * Accordingly, a confidential communication to a clerk, to a trustee, to a commercial agency, to a banker, to a journalist, or to any other person not holding [P. 6] one of the specific relations hereafter considered, is not privileged from disclosure. * * * There is no ground for encouraging the relation

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of client and legal adviser except when it is formed with one who has been formally admitted to the office of attorney or counselor as duly qualified to give legal advice."

The Department's letter contained a number of other citations and excerpts from court's decisions in support of this same proposition. In all the cases cited it is noteworthy that the party concerned was an attorney at law as well as an attorney in fact, and the privilege was claimed upon the former ground without even attempting to argue that a communication to him as an attorney in fact was entitled to privilege.

(2) As to the question of whether the letter under charge I was properly before the court and must be considered by it, this point was quite plainly covered in the Department's letter of October 7, 1916, in which it was stated:

"As to the first contention, that the letter in question is a privileged communication, the point thus presented is at this stage purely academic in view of the fact that at the outset of the trial the accused admitted the 'authorship of the letter' which was quoted in full under charge I. This admission was made subject only to one reservation, viz, the right of the accused to object to the admission of the letter itself in evidence. This reservation was purely pro forma and without legal bearing upon the case because the accused having admitted the authorship of the letter as set forth in the specification, it was thereby made unnecessary to introduce same, and it should not thereafter have been offered in evidence by the judge advocate. The letter was already as fully before the court as though the original had been legally introduced, and thus having been made a part of the record, the subsequent proceedings cannot have the effect of excluding it from consideration."

The Department, it will be noted, did not cite any authority upon this point, which would seem no more open to question than the fact that evidence is not required to prove a charge to which an accused has pleaded guilty. The practice of accepting admissions in open court as fully establishing facts set forth in specifications has been published to the service in Navy Department court-martial orders which members of naval courts martial are bound by their oaths to consult and apply. As an example of the practice mentioned, the court's attention is directed to Court-Martial Order No. 37, 1915, page 2, indexed in Court-Martial Index, 1915, page 3, under "Admissions."

A plea of guilty is a judicial confession and dispenses with evidence to prove the facts set forth in a specification. To a lesser extent an admission in open court of any material fact set forth in a specification, when such admission is voluntarily made by the accused or by his counsel in his presence and with [P. 7] his express or implied authority, is a judicial confession of such fact and dispenses with the necessity of evidence to establish same. "*Admissions of defendant are competent to show his authorship or publication of the defamation*" (25 Cyc. 582).

The court will hardly require citations to satisfy it that a person cannot make a voluntary confession, in or out of court, without inducement or coercion of any kind, and then, of his own authority, attach to such a confession a binding condition that it shall not be used against him. When it is established that a confession is voluntary, this settles the question of its admissibility in evidence; and when such a confession is made in open court it is as much before the court as a plea of guilty. Therefore, in this case the admission made by counsel before the court, in the presence and with the consent of the accused, established to a legal certainty the fact that the accused was guilty of writing and sending the letter under charge I, and that said letter was in words and figure as set forth therein, just as fully as it established the fact that the accused was serving on the U. S. S. *Chester* at the time of the recitals as set forth in the specification. If the court were by any possibility right in considering that the letter was not put in evidence before it by such admission, it would necessarily result that all other cases in the history of the Government in which the same practice has been followed must have been wrong. Even if the accused had a right to tie a string to his judicial confession, the only reservation in this case, as already pointed out, was without legal effect. Inasmuch as the accused was represented in court by a counsel of his choice, there

is no ground upon which he should be released from the legal effect of his formal admissions.

(3) The next question concerns the responsibility which attaches to the accused for the publication of his letter. Upon this point, the Department in its letter of October 7, 1916, stated:

> "The offense was complete when the accused wrote and mailed the letter libeling his superior officer, and he must take the consequences which follow when persons to whom he writes such letters see fit to place them in the hands of others with the result that they ultimately reach the authorities.
>
> "The writer of a letter never knows to a certainty into whose hands his communication might fall. Letters not infrequently miscarry or are opened by unauthorized persons. The practice of writing libelous letters concerning superiors is not therefore to be sanctioned on any ground, regardless of the person to whom they might be addressed."

The court has rejected the Department's views upon this point also. The question is thus presented as to what constitutes [P. 8] "publication" of a libelous letter under the criminal law. Upon this point, the following is quoted:

> "It is commonly said that a libel must be 'published' to constitute a wrong, but a communication of the defamatory matter to the mind of another—even privately to the party injured, and not to a third person—is a publication thereof, rendering the offender subject to trial under penal statutes (*State* v. *Shaffner*, 44 Atl. 620, 621; *Swindle* v. *State*, 10 Tenn. 581, 582); and it has even been held that the writing of a letter and depositing it in the post office for transportation to the party addressed, constitutes a publication of it within the law of criminal libel (*Mankins* v. *State*, 41 Tex. Cr. R. 662), though the contents should not in fact become known (*Haase* v. *State*, 53 N. J. Law 34). On the other hand, under the law of civil libel it is necessary merely that the matter should be communicated to some person other than the parties to the action, and the dictation of a libelous letter to a stenographer is held a sufficient publication thereof (*Gambrill* v. *Schooley*, 93 Md. 48, and cases there cited)." File 26251–2993, Mar. 10, 1910.)

In 25 Cyc. 570, it is stated on this point:

> "Giving a letter containing defamatory matter to a clerk to copy, or sending it to an attorney for the prosecution, is a publication. So a communication of the defamatory matter to the person defamed alone is a sufficient publication; the basis of the rule being the tendency of a criminal libel to produce a breach of the peace."

It follows, therefore, that the accused "published" the letter in this case. Certainly, he published it to the addressee, and whether or not the further publication of the letter was in accordance with his desire, the fact cannot be escaped that he wrote the letter and started it on its way; and thereby placed himself at the mercy of those who might receive it. All that results must be directly traced back to him as the cause, and he cannot escape the consequences. It may well be believed that neither the accused nor his father desired this particular letter to reach the Navy Department, and for reasons which may easily be imagined. It did, however, reach the Navy Department and through their acts. The offense was just as great had it never become officially known and the accused thus escaped responsibility therefor. Having become known to the authorities, it is the duty of the Department to take such action as will not only adequately punish this accused, but deter others who may be inclined to commit similar offenses against discipline. In so doing, the Department is not abridging the constitutional rights of any naval officer, as indicated by the court, but is merely attempting to enforce the same standard which is applied by the criminal courts of the land, and which is certainly [P. 9] no higher than that to which officers of the Navy are expected to conform. No civilian has a right under the law to send such a defamatory letter to his attorney in fact, and certainly it has never been claimed that persons in a military service are allowed greater freedom of speech than in civil life.

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It is difficult to understand how the court could find that the accused wrote the letter in question to his father, and that his father turned it over to a law firm, and that the law firm sent a copy thereof to the Navy Department, all of which facts are admitted without in any way affecting its findings upon the charge of "conduct to the prejudice of good order and discipline." The accused in deliberately writing and sending such a letter about a brother officer, whether his official superior or inferior, was guilty of the offense charged, no matter to whom it was sent, and the fact that the person to whom he intrusted such a communication published same to others is matter of aggravation. To say that the statements in said letter were "irregular, unofficerlike, and prejudicial to good order and discipline," as averred in the specification of charge I, is hardly overstating the facts. "*If a person composes a libel and sends it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is a sufficient publication to support action*" (25 Cyc. 369).

(4) The court has taken the attitude that "seniority in the Navy list does not convey superiority. Between officers so nearly of the same seniority, on widely different stations, performing duty so dissimilar, there does not appear to be any question of superiority. The Revised Statutes, by implication, in their limiting the use of the term 'superior officer,' require that, for an officer to be superior to another, he must have a duty to perform that places him over the other in the hierarchy of command."

The proposition for which the court here contends is that a "senior officer" is not the "superior" of another who is his junior except when both are associated together on duty with the right of command and requirement of obedience. The fact that the officers may be "so nearly of the same seniority" is necessarily immaterial.

In 1909 the question was presented whether Civil Engineer Peary was the official superior of other officers in the corps of engineers with whom he was not associated on duty, and who desired to present him with a testimonial. The civil engineers who submitted this question to the Department stated:

> "Our interpretation of this statute is that contributions, gifts, or presents to a superior official, only, are thereby debarred, and that the meaning of superior is one whose position places [P. 10] him over, and in charge or control, of those contributing to or presenting him with a gift, and that a senior naval officer is not necessarily a superior under this clause. Thus an officer in command of a ship would be a superior of the junior officers serving on that ship, under him, but would be a senior and not a superior to officers on other ships not under his command. Similarily, a chief of bureau would be the superior of the officers serving under him under the bureau, and would be a senior but not a superior to officers serving under other bureaus or upon detached duty independent to that bureau."

The Department's decision, November 9, 1909 (File 26806–33), was as follows:

> "The interpretation in question depends upon a definition of the words superior official in which the Department cannot concur, as it is considered that an officer superior in rank is a superior official within the intention of the regulation, which is section 1784 of the Revised Statutes with a paragraph added to prevent indirect presents to officers of the Navy * * *."

(5) The specification under charge I avers that the defamatory letter was written and sent by the accused "without justifiable cause." While the wording of the specification in this particular would seem to indicate inferentially that there might under some circumstances be "justifiable cause" for one commissioned officer to address such a letter to his agent concerning another, such circumstances must be so very exceptional that the Department does not feel prepared at this time to define precisely what, if anything, would constitute "justifiable cause" for such action.

On the general subject, however, it may be stated for the court's information that the law recognizes certain conditions under which persons may, in the exercise of a legal or moral duty, express in writing their unfavorable opinion of others without being held answerable therefore. Such, for example, would be the case of a business man asked for his views of a former subordinate by a prospective employer of the latter; or the case of a relative or friend who has been consulted by a father concerning his daughter's suitor; or one who reports

to the authorities well-founded suspicions concerning the criminality of a public official; et cetera. But even in such cases the law surrounds the exercise of this privilege with strict limitations so that one who assumes to avail himself thereof must move with extreme caution and circumspection or else proceed at his own peril. "Thus a letter written to a woman containing libelous matter concerning her suitor is not justified by the fact that the writer was her friend and former pastor and that letter was written at the request of her parents who assented to all of its contents." (25 Cyc. 595.)

[P. 11] The present case, however, does not come within any of the exceptions known to the law where the writing of unfavorable matter concerning another is treated as justified. The letter, therefore, is exactly what it appears to be on its face, a libel by the writer upon a brother officer for which he is responsible to the fullest extent and in no manner whatever protected by the law.

With reference to charge II and the specifications thereunder it is believed that the threatening letters, written to the accused's superior officer by the agent of the accused and the attorney employed by him, and forming the basis of said charge, were in violation of the penal law of New York. It is also believed that their action in writing such letters was not authorized by the power of attorney which the accused gave his father and the contrary was not alleged in the specifications under charge II nor in the Department's previous communications to the court. It would seem, however, that the letter of instructions which the accused wrote his father and which formed the basis of charge I, instigated and was intended to instigate the action thereafter taken by the latter in writing threatening letters to the accused's superior officer and in employing an attorney to do likewise. If this were so the accused would be guilty of the offenses set forth under charge II in causing such threatening letters to be written. There is, however, possible room for doubt as to the guilt of the accused upon this charge, although the statements in his letter such as "I have a hunch that a letter from a lawyer would sort of stir him up," and "I hope you will see your way clear to carry out my wishes," might very well be construed as connecting the accused with the letters afterward sent to the aforesaid officer as set forth in this charge. In view of the overshadowing importance of charge I, and the question of fact presented under charge II, the Department has no inclination to enter upon a detailed discussion of this second charge.

Findings in Revision

The court decided to reverse its decision as to privilege for the letter written by the accused.

The court revoked its former finding on the specification of the first charge and found said specification proved with certain exceptions; revoked its "most full and honorable" acquittal upon the first charge and substituted therefor that it "does therefore acquit" the accused of the first charge; adhered to its original findings on the specifications of the second charge, but revoked its "most full and honorable" acquittal upon said charge, and substituted therefor that "it does therefor acquit" the accused of the second charge.

[P. 12] The parts of the specification of the first charge found "proved" considered in connection with the parts found "not proved" show the court to have decided:

(*a*) That the officer alleged to have been defamed was the "superior officer" of the accused as charged.

(*b*) That the accused was not responsible for the publication of his letter by the addressee.

(*c*) That the letter was not written and sent by the accused "without justifiable cause."

(*d*) That the letter did not contain "abusive, disrespectful, and defamatory language."

(*e*) That the said letter was not "irregular, unofficerlike, and prejudicial to good order and discipline."

* * * * * * *

The problem presented by the court's findings upon the first charge is of military importance, and accordingly, the record was submitted to the Bureau

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of Navigation through the Chief of Naval Operations. The problem may be stated as follows:

A commissioned officer has a disagreement with his superior concerning the amount of a disputed claim alleged to be due by the latter to the former; with reference to this disagreement, the junior writes a letter to a civilian in which letter the junior makes numerous statements reflecting upon his superior officer, such as, "he is most despised." One purpose of the letter which the junior writes to the civilian is to appoint the latter an agent or, technically, "attorney in fact," to collect the disputed claim. Communications to an "attorney in fact" are not entitled in law to the privilege extended by the civil courts to communications between a client and his "attorney at law." A general court martial holds that there was "justifiable cause" for the writing of the letter, that said letter was not "abusive, direspectful, and defamatory," and that it was not "irregular, unofficerlike, and prejudicial to good order and discipline." Query, Whether the findings of the court should be approved?

RECOMMENDATION OF JUDGE ADVOCATE GENERAL

The Judge Advocate General, after an exhaustive review of the case, was of the opinion that the findings and acquittal of the court upon the first charge were not in accord with the evidence and should be disapproved; and that the findings and acquittal upon the second charge involved a question of fact upon which reasonable men might differ, and, in accordance with the Department's precedents and announced rules in such cases, should be approved.

[P. 13] RECOMMENDATION OF CHIEF OF NAVAL OPERATIONS

The Chief of Naval Operations placed upon the record the following indorsement:

> "After a careful review of the court-martial proceedings in the case of Lieutenant W. B. Decker, U. S. N., the Chief of Naval Operations is unable to agree with the conclusions of the court. The proceedings as originally submitted to the Department, and after having been once returned to the court for further consideration, indicate a misunderstanding on the part of the court as regards the law governing such cases. As finally returned to the court by the Department, the record clearly indicates that every effort was made by the Judge Advocate General of the Navy to point out specifically the laws which were either unknown to the court or not understood.
>
> "Notwithstanding these facts, the court has found that the action of Lieutenant Decker in writing a letter concerning a brother officer and containing statements such as 'he is most despised,' etc., was not 'irregular, unofficerlike, and prejudicial to good order and discipline,' and that the letter did not contain 'abusive, disrespectful, and defamatory language.' The Chief of Naval Operations regrets that he can find nothing in the latter part of the proceedings to indicate that there was any misunderstanding on the part of the court as regards the points of law which the Department brought to the attention of the court.
>
> "The action of Lieutenant Decker in writing a letter to anyone such as that upon which the proceedings of this court were based, is, in my opinion, highly reprehensible, most unofficerlike, and decidedly prejudicial to good order and discipline. Such conduct is undermining to the esprit de corps of the naval service.
>
> "That two naval officers who have attained the rank of lieutenant could so far forget themselves as to permit a petty disagreement, such as that upon which this controversy was based, to magnify itself to such an extent as to become the subject of a general court martial, is a reflection upon the best traditions of the naval service * * *."

RECOMMENDATION OF CHIEF OF BUREAU OF NAVIGATION

"The Bureau concurs in the indorsements hereon by the Judge Advocate General and the Chief of Naval Operations, and recommends approval thereof.

"It is further recommended that the President and members of the court be informed that their action in this case has resulted in a miscarraige of justice."

[C. M. O. 6—1917]

[P. 14] ACTION OF THE SECRETARY OF THE NAVY

The Department fully concurs in the recommendations of the Judge Advocate General, the Chief of the Bureau of Navigation, and the Chief of Naval Operations. The proceedings in the foregoing case of Lieutenant Walter B. Decker, U. S. Navy, and the findings on the second charge and the specifications thereunder and the acquittal are approved, and, in order that the interests of justice and discipline may be conserved as far as practicable, the findings on the first charge and the specification thereunder and the acquittal are disapproved. He will be released from arrest and restored to duty.

C. M. O. 6—1917

[P. 1] Lieutenant Edward L. McSheehy, United States Navy, was tried by general court martial on September 21, 1916, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (one specification alleging that the accused did, in reference to a disagreement between himself and another officer of the Navy in regard to a disputed claim, "write, send, and publish, or cause to be sent and published, without justifiable cause," to the father of said other officer, and to a law firm, and to the Navy Department, a letter containing "threatening abusive, and defamatory" language of and about said officer).

SENTENCE

"The court, therefore, sentences him, Lieutenant Edward L. McSheehy, U. S. Navy, to lose ten (10) numbers in his grade."

RECOMMENDATION OF CHIEF OF NAVAL OPERATIONS

"The Chief of Naval Operations has carefully considered the court martial proceedings in the case of Lieutenant E. L. McSheehy, U. S. Navy, together with that of Lieutenant W. B. Decker, U. S. Navy, the other party to the controversy out of which arose the trials of these two officers.

"That two naval officers who have attained the rank of Lieutenant could so far forget themselves as to permit a petty disagreement, such as that upon which this controversy was based, to magnify itself to such an extent as to become the subject of a general court martial, is a reflection upon the best traditions of the naval service.

"Inasmuch as Lieutenant Decker will receive no punishment for his reprehensible acts in connection with this affair, the Chief of Naval Operations recommends that the loss of numbers adjudged in the case of Lieutenant McSheehy be remitted."

RECOMMENDATION OF CHIEF OF BUREAU OF NAVIGATION

The Chief of the Bureau of Navigation placed upon the record an indorsement "recommending that the findings and sentence of the general court martial be approved but the loss of numbers be remitted."

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Edward L. McSheehy, U. S. Navy, are approved, but, in accordance with the [P. 2] recommendation of the Chief of Naval Operations, concurred in by the Chief of the Bureau of Navigation, and in order to prevent the injustice of requiring Lieutenant McSheehy to undergo substantial punishment for his part in the controversy in question while the other party to the controversy escapes punishment for his reprehensible conduct, and not as an exercise of clemency, the loss of numbers is set aside. Lieutenant McSheehy will be released from arrest and restored to duty.

C. M. O. 7—1917

[P. 1] Captain Edward L. Beach, United States Navy, was tried by general court martial on December 21, 1916, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy, upon the following charges:

Charge I.—Improperly hazarding the vessel under his command, in consequence of which she was cast upon the shore (one specification).

Charge II.—Through inattention and negligence suffering a vessel of the Navy to be stranded (three specifications).

Charge III.—Culpable inefficiency in the performance of duty (three specifications).

Findings

The court found the accused guilty of the first charge and of second charge (one specification) and acquitted him of the third charge.

Sentence

"The court, therefore sentences him, Captain Edward L. Beach, United States Navy, to be placed at the foot of the Captains' list of present date and to there remain until he shall have lost twenty numbers in his grade."

Recommendation to Clemency

The members of the court spread upon the record the following unanimous recommendation to clemency:

> "In view of his previous excellent record; and in view of the fact that he took extra precautions which in his judgment would have met the requirements of any contingency; and in view of the fact that the extraordinary conditions that arose so quickly were not only unprecedented but could not be foreseen and came with only slight warning; that apart from the fact that he did not have steam in sufficient boilers to get underway immediately he took every measure which could be taken to ensure the safety of his vessel, we recommend the accused in this case to the clemency of the revising authority."

Action of the Secretary of the Navy

The Department has given careful consideration not only to the record of the foregoing trial of Captain Edward L. Beach, United States Navy, but also to the unusual circumstances out [P. 2] of which this trial arose (the wrecking of the U. S. S. *Memphis* off Santo Domingo City on August 29, 1916).

The only portion of the specifications found proved by the court consists of the allegation that Captain Beach failed to keep sufficient steam on his vessel to get underway "on short notice."

The records of the Department show that Captain Beach has served in the Navy for over thirty-two years, during which time he has maintained a spotless record. His reports on fitness are conspicuous on account of the zeal and careful and efficient manner in which he has always performed his duty. The efficient manner in which he has done so has always met the highest approval of the various distinguished officers under whom he has served.

As shown by the recommendation to clemency, his actions on the occasion of the disaster were sufficient to impress the members of the court martial which tried him and inspire them to spread upon the record the above quoted impelling and unanimous recommendation for clemency.

The proceedings, findings, and sentence in the foregoing case of Captain Edward L. Beach, United States Navy, are approved, but in view of the recommendation to clemency and the previous excellent record of Captain Beach, the loss of numbers is reduced to the loss of five numbers in his grade.

C. M. O. 11—1917

[P. 1] Lieutenant (junior grade) Herbert A. Ellis, United States Navy, was tried by general court martial on board the U. S. S. *New Jersey*, at the Navy Yard, New York, N. Y., on January 30, 1917, by order of the Commander, Reserve Force, U. S. Atlantic Fleet, and found guilty of the following charge, the specification of which was "proved by plea":

Charge.—Drunkeness (one specification).

Sentence

"The court, therefore, sentences him, Lieutenant (j. g.) Herbert A. Ellis, U. S. Navy, to lose three (3) numbers in his grade."

Returned for Revision

The convening authority, on February 7, 1917, returned the record to the court for a reconsideration of its sentence, which, in his opinion, was wholly inadequate for the offense found proved.

Sentence in Revision

The court decided to revoke its former sentence and to substitute therefor the following:

"The court, therefore, sentences him, Lieutenant (j. g.) Herbert A. Ellis, U. S. Navy, to lose five (5) numbers in his grade."

Action of the Convening Authority

The convening authority, subject to the remark that the sentence in revision was still inadequate, and in order that the accused might not wholly escape punishment, on February 11, 1917, approved the proceedings and finding, and the proceedings and sentence in revision in the foregoing case of Lieutenant (junior grade) Herbert A. Ellis, U. S. Navy, and directed that he be released from arrest and restored to duty.

[P. 2] In reviewing the foregoing record the Department fully concurs in the attitude of the convening authority in considering the sentence inadequate and approves his efforts to convey to the court a proper appreciation of their duties by reconvening the court for a reconsideration of the sentence. It is surprising and deeply regretted that a court of experienced officers should have so light a regard for the discipline of the service as to impose even in revision so totally an inadequate sentence, and the Department concurs with the opinion of the convening authority that the only ground for the approval of the sentence of the court is in order that the accused may not wholly escape punishment.

C. M. O. 12—1917

[P. 1] EXPERT TESTIMONY: improperly introduced.

Pay Clerk Walter R. Lowther, United States Navy, was tried by general court martial on February 1, 1917, on board the U. S. S. *New York*, at Guantanamo, Cuba, by order of the Commander in Chief, U. S. Atlantic Fleet, and was acquitted of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (one specification alleging incapacity for the proper performance of duty by reason of his own intemperate use of alcoholic liquors).

Action of the Convening Authority

"The proceedings of the general court martial in the foregoing case of Walter R. Lowther, Pay Clerk, U. S. Navy, are approved. While the evidence clearly showed that the accused was, on December 28, 1916, suffering from alcoholic or other poisoning to such an extent as to be utterly incapacitated for duty, the court evidently entertained a reasonable doubt that his incapacity was the result

[C. M. O. 15—1917]

of his own intemperate use of alcoholic liquors. From the statement of the accused upon the stand, it appears that during the space of five hours on December 27, 1916, he consumed five drinks of whiskey, partaking of the last in a saloon of such a character as should cause a respectable man to hesitate before entering. All of these actions on his part were entirely voluntary and the situation in which he subsequently found himself was thus entirely one of his own creation. It is trusted that this experience may prove such a lesson to Pay Clerk Lowther, that in the future his conduct may be above suspicion.

"Subject to the foregoing remarks, the finding and acquittal of the general court martial in the foregoing case of Pay Clerk Walter R. Lowther, U. S. Navy, are approved.

"Pay Clerk Walter R. Lowther, U. S. Navy, will be released from arrest and restored to duty."

REMARKS

It was noted in the record of the above case that a medical officer of the Navy was called as a witness by the defense. At the outset of his testimony said medical officer stated, in effect, that he had never seen the accused before. Thereupon counsel for the accused immediately began a highly technical examination of the witness, based largely upon hypothetical questions, during which it was apparent that the witness was being examined as an "expert."

[P. 2] The court erred in not requiring that the witness be qualified as an expert before receiving the above testimony. The matter of expert testimony, its scope, the rules governing, and the qualification of witness to so testify has been previously covered in court martial orders and no repetition thereof is deemed necessary. (See C. M. O. 24, 1914, 22; 51, 1914, 6–8; 19, 1915, 5.)

C. M. O. 15—1917

[P. 8] COURTS, EXCEPTIONAL MILITARY: CONDUCT OF SAME WHEN HELD BY NAVAL AUTHORITY.

Since a naval court martial is a court of limited jurisdiction, restricted by law to the trial of officers and men of the naval service, it sometimes becomes necessary for the naval establishment, when its duty is such as to place under it the wider jurisdiction conferred by the exercise of military government, to employ tribunals other than courts martial and which have been referred to as exceptional military courts. (See C. M. O. 13, 1916, 6.) These exceptional military courts, unlike the court martial, derive their sanction from the laws of war and not from the enactments of Congress. Among such exceptional military courts are included the military commission, the superior provost court, and the provost court. While the military commander of occupying forces is, by the laws of war, charged with the administration of the occupied territory and is, therefore, not to be unduly restricted in the measures to be employed in such administration, the following is laid down, supplementary to the instructions contained in C. M. O. 13, 1916, 6, on this subject, as a guide in respect to the above-mentioned military courts:

A military commission should, in general, correspond to a general court martial both as to its constitution and as to its proceedings. Except in a case where the convening authority may, for military reasons, direct otherwise, all evidence taken before such commission shall be recorded as in general courts martial. A military commission should be limited in the punishments which it may adjudge only to such an extent as the convening authority may deem proper.

A superior provost court should, in general, correspond to a summary court martial both as to its constitution and as to its proceedings. Except where the convening authority may, for military reasons, direct otherwise, evidence introduced before such court shall be recorded. A superior provost court ordinarily should not be granted authority to impose sentences involving confinement for more than five years nor fines of more than $3,000.

A provost court should, in general, correspond to a deck court both as to its constitution and as to its proceedings. Evidence taken before such court need not ordinarily be recorded. A provost court ordinarily should not be granted authority to impose sentences involving confinement for more than six months, nor fines of more than $300.

[C. M. O. 15—1917]

[P. 9] The authority to convene the above-mentioned exceptional military courts vests only in the military commander or military governor of an occupied territory, and all such courts may be ordered only in the name of such commander or governor. When a military commander or governor desires to authorize an officer under his command to convene any of the above courts, he may delegate such authority to a subordinate, but the latter may so act only as a representative and in the name of the military commander or governor. When so acting, such subordinate officer may, subject to any action in remission or mitigation he may see fit to take, upon his own approval, put into immediate execution the sentences of such exceptional military courts as the military commander or governor has empowered him to convene. But in all cases the records of such courts shall be forwarded to the military commander or governor, who shall review all such records, and who may set aside the proceedings, or remit or mitigate, in whole or in part, the sentence imposed by any military commission, superior provost court, provost court, or other exceptional military court convened by his order or by that of his predecessor in command, or by that of any officer under his command or the predecessor of any such officer. Also, nothing herein shall be taken to modify the limitation prescribed in C. M. O. 13, 1916, 6, in regard to the execution of a death sentence.

Insofar as practicable, the employment of exceptional military courts should, as a general rule, be restricted to the trial of offenses in breach of the peace, in violation of military orders or regulations, or otherwise in interference with the exercise of military authority.

Inasmuch as the most frequent offenses are the minor offenses which should be tried by the provost court, the following form is given to guide in such cases:

PRECEPT

_____ _____
Place and date

Captain A_____ B_____, U. S. Marine Corps, is hereby ordered as provost court for the district of _____ (or otherwise describe the locality) for the trial of such of the inhabitants or sojourners therein—not including members of the military services of the United States (and other exceptions if desired)—as may commit offenses not deemed to warrant punishment exceeding confinement, with or without hard labor, for thirty days and fines not exceeding $100 (and any other restrictions upon the offenses coming under the jurisdiction of this court which may be desired).

All cases brought before this court which the court shall deem deserving of a greater punishment than that above prescribed shall be certified to the superior provost court for the district of _____ and the offenders shall be ordered kept in confinement awaiting the [P. 10] action of such superior court (or shall be reported to the undersigned for other disposition of their cases).

Reports of cases tried and dispositions therof shall be rendered daily to the undersigned.

C_____ D_____,
Rear Admiral, U. S. Navy,
Commanding U. S. Forces Occupying _____.

(When the authority to convene such courts has been delegated by the military commander to a subordinate, the precept should so state. Thus, the above should read:

In accordance with the authority delegated to me by Rear Admiral C_____ D_____, U. S. Navy, Commanding the U. S. Forces Occupying _____, under date of _____, Captain A_____ B_____, U. S. Marine Corps, is hereby ordered, etc.)

RECORD OF PROCEEDINGS

_____ _____
(Place and date)

Proceedings of provost court held for the district of _____ by the authority of (name and office of the convening authority) under date of _____.

The court met at 10 a. m.

E_____ F_____ was arraigned on the charge of _____ and pleaded as follows:

Witnesses for prosecution:

[C. M. O. 17—1917]

Witnesses for defense:
(Testimony of witnesses need not be recorded.)
Finding: Guilty (Not guilty).
Sentence: Confinement for _____ days (with or without hard labor); or, to be fined _____ dollars; or, confinement for _____ days, and to be fined _____ dollars.

A_____ B_____,
Captain, U. S. Marine Corps, Provost Court.

G_____ H_____ was arraigned, etc.
The court adjourned at _____.

DISCHARGE: BY REASON OF EXPIRATION OF ENLISTMENT—WHEN EFFECTIVE.

In the case of an enlisted man who died upon the last day of his enlistment after the delivery of his discharge by reason of the expiration of his enlistment, the Department held that an enlistment does not expire until midnight of the last day (Comp. Dec. 8/14/15, 174 S. & A. Memo. 3759); that the delivery of the discharge certificate, that is, the evidence of discharge at an earlier hour of the last day of an enlistment does not affect the fact of the discharge, which does not take place until midnight of that day; and that, therefore, [P. 11] the above man was in the status of an enlisted man in the service at the time of his death (File 27381–31, Sec. Navy, 2/5/17).

It is to be noted that the above holding is limited to discharge "by reason of expiration of enlistment." (In the case of an enlisted man who was overpaid upon discharge with an undesirable discharge, it was held that, upon the discovery of the error on the same day but subsequent to the delivery of the discharge, the man was no longer amenable to naval jurisdiction and could not legally be detained.) (File 26254–70, Sec. Navy 7/8/08.)

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[P. 1] 1. JUDGE ADVOCATE: AS PROSECUTOR, SHOULD PROPERLY REPRESENT THE INTERESTS OF THE GOVERNMENT.
2. COURT: SHOULD EXCLUDE IMPROPER EVIDENCE.
3. EXPERT TESTIMONY: IMPROPERLY INTRODUCED.
4. RECORD OF OFFICER: MUST BE INTRODUCED IN EVIDENCE BEFORE THE COURT CAN PROPERLY TAKE COGNIZANCE OF ITS CONTENTS.
5. DRUNKENNESS: WHAT CONSTITUTES.
6. FINDING: NOT IN ACCORD WITH THE EVIDENCE.

Surgeon Walter S. Hoen, United States Navy, was tried by general court martial on January 2, 1917, at the Naval Station, Hawaii, Pearl Harbor, T. H., by order of the Commandant of the Naval Station, Hawaii, Pearl Harbor, T. H., upon the following charge:

Charge.—Drunkenness.

Specification.—In that Walter S. Hoen, a surgeon in the United States Navy, attached to and serving on board the United States ship *St. Louis*, at Hilo, T. H., was, at or about one o'clock antemeridian, on the ninth day of December, nineteen hundred and sixteen, on board said ship, under the influence of intoxicating liquor and thereby incapacitated for the proper performance of duty.

Findings

The court aquitted the accused of the charge.

Returned for Revision

The convening authority, on January 9, 1917, returned the record of proceedings in this case to the court and directed that the court reconvene for the purpose of reconsidering its findings which, in his opinion, was not in accord with the evidence.

Finding in Revision

The court decided "respectfully to adhere to its former finding."

[C. M. O. 17—1917]

ACTION OF THE CONVENING AUTHORITY

The convening authority, on January 17, 1917, approved the proceedings of the general court martial in the foregoing case of Surgeon Walter S. Hoen, U. S. Navy, but disapproved the finding, and directed that he be released from arrest and restored to duty.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

The Department, subject to certain remarks, the substance of which are hereinafter set forth, concurred in the final action of the convening authority in disapproving the finding of the court.

REMARKS

The record in the foregoing case discloses a failure, both on the part of the judge advocate and the court, to appreciate and properly perform their respective functions. The following points appear to be noteworthy in connection with the review of this case:

(1) The accused was represented by counsel of his own selection, thus relieving the judge advocate from any duty in connection with the presentation of the defense and leaving him free to devote all his efforts to the conduct of the prosecution. The judge advocate's performance of this duty was perfunctory in the extreme. The following may be mentioned as some of the specific instances in which he failed properly to represent the interests of the Government and as being indicative of his indifferent attitude toward his duties as prosecutor:

The principal witness for the prosecution was asked by the counsel for the defense in cross-examination many irrelevant questions and also questions which had previously been answered in another form. The cross-examination of this witness was lengthy and a reading of the record shows that much of it did not serve any purpose other than to require the witness to repeat his former answers. To this procedure—apparently followed for the purpose of confusing the details and leading the witness into a contradiction—the judge advocate interposed no objection. Finally, counsel's efforts became so persistent and his purpose so apparent as to lead the witness himself to object and appeal to the court.

Another witness for the prosecution was, in addition to the introductory questions, examined by the judge advocate as follows:

> "3. Q. Were you in the company of the accused on the night of December 8–9, 1916?
> "A. I was.
> "4. Q. The accused is charged with certain irregularities after arriving on board ship that evening. Did the accused, in your company, partake of any intoxicating liquor that evening?
> "A. While on shore; yes, sir."

This ended the judge advocate's direction examination of this witness. Neither the judge advocate nor the court followed up the above testimony by attempting to ascertain how much liquor the accused had drunk. Counsel for the defense, however, in his [P. 3] cross-examination of this witness was not required to restrict himself to the above-quoted direct examination, but was allowed the widest latitude and covered matters not only beyond the scope of the direct examination but also irrelevant to anything contained in the specification. As to all this the record shows that "the judge advocate called the attention of the court to the irregular introduction of this testimony, but *offered no objection.*"

A witness for the prosecution, called and examined in direct examination as to facts, was, in cross-examination, questioned by counsel for the accused as to his opinion in regard to the legal sufficiency of the specification. The judge advocate made no objection to this at the time, but did, in his remarks in presenting the case to the court, state that "such questions are considered highly irregular and should have been objected to by the judge advocate at the time"—a comment in which the Department concurs.

[C. M. O. 17—1917]

Further instances of the shortcomings of the judge advocate might be cited, but the foregoing are considered sufficient to set forth the Department's disapproval of the judge advocate's conduct of this case and its reasons therefor.

(2) Notwithstanding the failure of the judge advocate to enter objections, however, the court could have excluded objectionable testimony. Navy Regulations, 1913, R–751 (1) provides that "the court shall determine all questions as to the admissibility of evidence, and its decision thereon is final." And yet in the instance above mentioned when a witness appealed to the court to be protected from improper questioning, the court ruled that "the objection by the witness should be stricken from the record and that the witness was to answer questions as propounded, unless objection was raised by the judge advocate and sustained by the court." And again, when, as above stated, another witness for the prosecution was submitted to an irregular cross-examination, the court did not see fit to bring it to an end, even after attention was called to the same by the judge advocate. Nor were the instances already cited the only occasions on which the court failed to exclude improper evidence.

(3) A medical officer of the Navy was called as a witness by the defense. He was not examined as to the facts in the case on trial, but as an "expert." The court erroneously permitted such examination without requiring the qualification of the witness as an expert. The matter of expert testimony has previously been covered and the citations thereon will be found collected in C. M. O. 12, 1917, 1–2.

(4) The record states that "the accused (counsel) made verbal statement for the defense, as follows: 'Dr. Hoen has had thirteen and one-half years of commissioned service, and during this period his record has been entirely clear'." The [P. 4] record of the accused was not in evidence. The action of the court in allowing counsel to make the above statement concerning the contents of the accused's official record, when the same had not been introduced in evidence, was irregular. (In this connection see C. M. O. 19, 1915, 9.)

(5) In reference to certain evidence brought out by the defense as to the degree of intoxication, the judge advocate invited the attention of the court to C. M. O. 5, 1915, in which it is stated that "the degree of intoxication goes to the gravity of the offense, but does not relieve an officer of the consequences of his condition if he has been guilty of such overindulgence as will incapitate him for the full performance of his duties." In the Army Digest, 1912, 540 (XII A 9 a) "drunkenness" within the meaning of the Articles of War is defined as "any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical facilities." Nor do the Articles for the Government of the Navy require any particular degree of drunkenness, and it is considered that such charge is supported by showing incapacity for the full performance of duty as a result of indulgence in intoxicating liquor.

(6) In regard to the merits of the present case, the record shows that the commanding officer of the accused testified that, "Dr. Hoen then continued in a voluntary statement, without any questions having been asked, that he wanted to say to me that he then was himself under the influence of liquor and unfit for the performance of duty. While making this statement Dr. Hoen was noticeably unsteady on his feet, swaying back and forth appearing to labor heavily from the effects of some intoxicant. To me he presented, such as I know them, all the evidences of a man slightly affected by liquor. His speech was thick, his bearing unsteady, and the subject matter of his statement bore considerably on the situation as he viewed it from a personal point of view and was not confined simply to a report regarding the case." Again (quoting from the testimony of the same witness during cross-examination) "I do not think that anyone in his sober senses would accuse himself in front of his commanding officer of being under the influence of intoxicating liquor when the matter in question had not even been raised, and no matter what his excitement, I do not think that it would go to the extent of making such a statement. I might say on that point there was no question in my mind from his appearance, his bearing, his speech, and his unsteady carriage, that such a condition was an actual fact." And again (on cross-examination) in answer to the question, "Are you willing, sir, to state positively on your own observation, that Dr. Hoen was under the influence of liquor and was not in a condition brought on by the mental strain and the excitement of handling a man who has since been adjudged men-

tally unsound?" the witness replied, "I do so [P. 5] state." Another witness testified that the accused had partaken of intoxicating liquor on the evening in question while on shore. And the accused himself, while on the stand on his own behalf, testified, "I told the commanding officer I had had several drinks ashore, and in my statement to him, I told him that this in connection with the excitement and the physical exertion of handling Mr (_____), might possibly have had some effect upon me."

In view of the above, the Department does not consider that the present case is one in which the facts are in dispute and the evidence in such conflict that reasonable men might differ as to the conclusions to be drawn therefrom, and in which the Department has frequently held that the findings of the court should not be disturbed. The Department, therefore, has no hesitancy in holding that the findings of the court in the foregoing case is not in accord with the evidence.

C. M. O. 21—1917

[P. 1] 1. CLEMENCY: RECOMMENDATION TO—SHOULD NOT BE BASED UPON DOUBT AS TO THE GUILT OF AN ACCUSED.

2. CLEMENCY: RECOMMENDATION TO—MADE BY MEMBERS NOT BY COURT.

Chief Boatswain Christopher Murray, United States Navy, was tried by general court martial on March 15, 1917, on board the U. S. S. *Wyoming* at the Gulf of Guacanayabo, Cuba, by order of the Commander in Chief, U. S. Atlantic Fleet, and was found guilty of the following charge:

Charge.—Drunkenness on duty.

Specification.—In that Christopher Murray, a chief boatswain in the United States Navy, attached to and serving as commanding officer of the U. S. S. *Patuxent*, was, at or about twelve hours and thirty minutes postmeridian on the thirteenth day of March, nineteen hundred and seventeen, on board said vessel, being then and there on duty, under the influence of intoxicating liquor.

SENTENCE

"The court, therefore, sentences him, Chief Boatswain Christopher Murray, U. S. Navy, to lose fifty dollars ($50) per month of his pay for a period of six (6) months."

RECOMMENDATION TO CLEMENCY

The members of the court spread upon the record the following unanimous recommendation to clemency:

> Owing to the fact that the court believes that Chief Boatswain Christopher Murray's condition might well have been caused by the whisky given him by the Pharmacist's Mate, on account of his loss of sleep and run down condition, and that Chief Boatswain Christopher Murray was guilty of an indiscretion in taking the whisky at this time, rather than of a willful offense, and his excellent record, the court recommends him, Chief Boatswain Christopher Murray, U. S. Navy, to the clemency of the revising power."

ACTION OF THE CONVENING AUTHORITY

The convening authority on March 17, 1917, took the following action:

> "The proceedings of the general court-martial in the foregoing case of Chief Boatswain Christopher Murray, U. S. Navy, are approved.
>
> "A careful reading of the evidence in this case, together with the statement made in the recommendation to clemency, 'that the court believes that Chief Boatswain Murray's condition [P. 2] might well have been caused by the whisky given him by the pharmacist's mate on account of his loss of sleep and his run-down condition,' leaves a 'reasonable doubt' in the mind of the convening authority as to the guilt of the accused.
>
> "The evidence is clear as to the fact that the accused was slightly under the influence of intoxicating liquor, but the testimony is also uncontroverted

[C. M. O. 21—1917]

that such liquor was administered for medicinal purposes by the duly authorized representative of the medical department.

"The record of the accused is apparently clear.

"In view of the above, the finding and sentence are disapproved.

"Chief Boatswain Christopher Murray, U. S. Navy, is hereby released from arrest and restored to duty."

REMARKS

(1) After a review of the record in the above case it is not clear to the Department just what the members of the court had in mind when they stated in their recommendation to clemency that they believed that the accused "was guilty of an indiscretion in taking the whisky at this time, rather than of a willful offense." According to the interpretation of the convening authority the evidence shows "that the accused was slightly under the influence of intoxicating liquor," but that "such liquor was administered for medicinal purposes by the duly authorized representative of the medical department." If such interpretation is correct, then the fact that the accused's condition was the result of medical treatment properly administered would constitute a valid defense and would be a proper ground for acquittal rather than a recommendation to clemency. If for example, an officer reports some defect in his physical condition to proper medical authority and such authority administers as a proper treatment medical whisky in a sufficient quantity to impair the faculties of the patient, then it is difficult to see wherein such patient is guilty even of an "indiscretion." However, under such circumstances it is clearly the duty of the medical representative to bring the condition of the patient to the attention of proper authority, and the necessary steps should be taken toward protecting the government and the patient himself from the consequences of permitting him to continue on duty in such condition.

In the present case the defense of the accused was that he was "in such a run-down physical condition that it became necessary for me (the accused) to order hospital apprentice H. K. Jackson, who is attached to this ship, to give me a stimulant in the shape of a drink of medical whisky, in order that I might be sufficiently strengthened to bring my ship to her destination [P. 3] alongside the U. S. S. *Jupiter*." Thus, even the accused himself did not contend that he had requested medical attention and submitted himself to such treatment as the proper medical authority might prescribe, as contemplated in the facts set forth above as constituting a valid defense in such cases. As to the intoxicated condition of the accused at the time in question the record leaves no doubt. It also appears from the record that an officer of the grade of boatswain was serving on the *Patuxent* at the time as "second in command." That the accused should have been on duty in such a condition was subversive of the interests of the government and not in accordance with the proper procedure under such circumstances as outlined in the preceding paragraph.

As above stated, it is not clear to the Department, after considering the recommendation to clemency in connection with the finding of the court, whether or not the court accepted the defense of the accused in the present case and gave it the interpretation indicated in the action of the convening authority. Without particular reference, therefore, to the foregoing case, but as a matter for the guidance of courts in general, attention is here called to the fact that the record of a court-martial trial should show no inconsistency between the findings of the court and the grounds upon which its members recommend clemency. After a court has found an accused guilty of an offense, there are many grounds upon which any or all of its members may properly base a recommendation to clemency. But, a court having found an accused guilty beyond a reasonable doubt, its members cannot consistently sign a recommendation to clemency based upon a ground which would tend to subvert the court's findings by raising a doubt as to the guilt of such accused.

(2) Inasmuch as a recommendation to clemency is not an action by the court as a body, but by the individual members thereof, it should not be stated in such recommendation that "the court recommends," but instead should be stated that "we recommend."

C. M. O. 22—1917

[P. 7] ACTING PAY CLERKS: BOARD FOR EXAMINATION OF, HOW COMPOSED UNDER 38 STAT. 943

The act of March 3, 1915, 38 Stat. 943, requires that boards for the examination of candidates for appointments as acting pay clerk under its provisions, be composed of officers of the Pay Corps when practicable, consequently such boards may not be composed of other officers when pay officers are available (File 26521–188, J. A. G., Mar. 26, 1917).

CHECKAGE FOR LOSS OR DAMAGE TO PUBLIC PROPERTY: ILLEGAL.

The pay of officers and enlisted men is not legally subject to checkage for loss or damage to public property (File 26283–1213, Sec. Navy, Mar. 20, 1917).

DENTAL SURGEONS: ACTING ASSISTANT, AS MEMBERS OF SUMMARY COURT MARTIAL OR GENERAL COURT MARTIAL.

It was held that an acting assistant dental surgeon may be a member of a summary court martial, being an "officer not below the rank of ensign" as required by art. 27, A. G. N.; but an acting assistant dental surgeon, not being a "commissioned officer," as required by art. 39, A. G. N., is not eligible to serve as member of a general court martial (File 26504–301, J. A. G., Mar. 8, 1917).

DISCHARGE: EFFECT OF, UPON STATUS OF ENLISTED MAN COMMITTING SUBSEQUENT OFFENSE AND REENLISTING.

A question was presented as to whether an enlisted man in the Navy is amenable to trial by court martial for an offense committed on the day of, but subsequent to the delivery of, his discharge from the naval service, the man in question having reenlisted on the day following his discharge. If the man in question was discharged for any cause other than expiration of enlistment, he was not in the naval service when his offense was committed and therefore could not be tried by court martial for said offense, notwithstanding his subsequent reenlistment. If, however, the man in question was [P. 8] discharged by reason of expiration of enlistment he was in the naval service when his offense was committed, his discharge not having become effective until midnight of that day. Notwithstanding his subsequent reenlistment on the day following, this man's connection with the Navy had been completely severed by discharge; although in similar cases in the Army the view has been expressed that a subsequent reappointment or reenlistment into the Army would not revive the jurisdiction for past offenses, but that such jurisdiction would properly be considered as finally lapsed, yet the question is not free from doubt, and should a case arise in which the interests of the service demand the trial of a reenlisted man for an offense committed in his previous enlistment, it is considered that the question of naval jurisdiction should be raised by bringing the offender to trial by court martial to the end that he might present the jurisdictional question to the civil courts by habeas corpus proceedings. If the offense is discovered and the accused is placed under arrest to await action before his discharge takes effect, the general rule is that when jurisdiction has thus attached the same is not divested by any subsequent change in the status of the accused (File 26504–298, J. A. G., Feb. 26, 1917).

FURLOUGH WITHOUT PAY: AS PROVIDED FOR IN THE ACT OF AUGUST 29, 1916 (39 STAT. 580–581).

In reference to enlisted men on "furlough without pay," as provided for in the act of August 29, 1916 (39 Stat. 580–581), the Department approved an

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opinion of the Judge Advocate General to the effect that men in such status who desire hospital treatment are entitled to make application to the commanding officer of a naval hospital, and, when in such commanding officer's opinion such an applicant is in need of hospital treatment, the Surgeon General should, if practicable, authorize his admission (File 7657–411:2, Sec. Navy, Mar. 15, 1917).

GOOD CONDUCT MEDAL: STATUS OF MAN TRANSFERRED TO FLEET NAVAL RESERVE AS TO.

A man who is in other respects entitled to a good-conduct medal should not be deprived thereof when, at the expiration of a term of enlistment after having completed 16 years' naval service, he is transferred to the Fleet Naval Reserve, and such a medal may be issued under such circumstances, for his last enlistment in the active Navy from which he is not discharged but is simply transferred to said reserve (File 26517–7, Sec. Navy, Mar. 2, 1917).

[P. 9] LIGHTHOUSE VESSEL OF THE UNITED STATES: STATUS OF MEMBER OF CREW OF WHILE SERVING UNDER THE NAVY DEPARTMENT PURSUANT TO ACT OF AUG. 29, 1916 (39 STAT. 556, 602).

A member of the crew of a lighthouse vessel of the United States doing duty under the Navy Department under the act of August 29, 1916 (39 Stat. 556, 602), who is killed or wounded by gunfire or other casualty would be considered as a member of the naval service for the time being, and would be entitled to receive hospital treatment; if the result of his wound should carry with it future disability, he would be entitled to pension; in case of death under such circumstances the widow, and children under 16 years of age, would be entitled to pension under act of August 7, 1882 (22 Stat. 345) (File 7014–321:3, Sec. Navy, Mar. 6, 1917).

In the event of the capture by a public enemy of the United States of a member of the crew of a lighthouse vessel serving as above indicated, his status would be that of a prisoner of war (Supra).

MARINE CORPS RESERVE: STATUS OF MEMBER OF, AS TO EMPLOYMENT, CONSTRUING ACT OF AUG. 29, 1916 (39 STAT. 556, 587).

There is no legal objection, so far as his Marine Corps Reserve membership is concerned, to the serving by a member of said reserve, on board vessels of the merchant service as a gunner. In the event of war, or national emergency as declared by the President to exist, such member of the Marine Corps Reserve, so serving, could be ordered to perform duty in the naval service (File 28553–5, J. A. G., Mar. 12, 1917).

MIDSHIPMEN: STATUS OF, AFTER GRADUATION UNDER ACTS OF AUG. 29, 1916, AND MAR. 4, 1917.

The act of March 4, 1917, authorizes the graduation of midshipmen who have completed a three-year course at the Naval Academy; the number of officers in the grades of lieutenant (junior grade) and ensign is limited by act of August 29, 1916; a sufficient number of vacancies will not exist in the line of the Navy to admit of commissioning all graduates of the Naval Academy, prior to July 1, 1917. In the meantime such graduates may be appointed as acting ensigns; or may be commissioned as ensigns in the Naval Reserve Force; or may be ordered to duty as "midshipmen after graduation" (File 5252–83, J. A. G., Mar. 20, 1917).

NATIONAL NAVAL VOLUNTEERS: CITIZENSHIP OF OFFICERS.

Offices held by officers of the National Naval Volunteers being offices in the Navy within the meaning of regulation (R–3301 (1)), before anyone may be

[C. M. O. 24—1917]

appointed to an office in the National Naval [P. 10] Volunteers he must not only have declared his intention to become a citizen but he must in fact be a citizen (File 3973–184, J. A. G., Mar. 17, 1917).

NAVAL COAST DEFENSE RESERVE: ENROLLMENT OF WOMEN IN.

Women may be enrolled in the Naval Coast Defense Reserve organized under the act of August 29, 1916 (File 28550–45, Sec. Navy, Mar. 14, 1917).

OATHS: AUTHORITY TO ADMINISTER.

By the act of March 4, 1917, officers of the Regular Navy and Marine Corps, of the Naval Reserve Force, of the Marine Corps Reserve, and of the National Naval Volunteers, when designated by the Secretary of the Navy so to do, are authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration (File 19037–55, J. A. G., Mar. 13, 1917).

PAY CLERK: RESPONSIBILITY FOR ERROR OF.

It is held that a pay clerk cannot be held responsible for his error in pay-roll computations whereby an overpayment on discharge takes place, to the extent of a checkage of his own pay account in the amount so overpaid. The disbursing officer carrying the accounts is responsible for the same and cannot shift such responsibility to a subordinate (File 5460–89, Sec. Navy, Mar. 26, 1917).

PHYSICAL DISABILITY: WAIVER OF, NOT LAWFUL ON EXAMINATION FOR PROMOTION.

Under section 1493, R. S., waiver of a physical disability of an officer of the Navy upon his examination for promotion is not authorized by law. If, in the opinion of the board of medical examiners, the disability of an officer so examined does not disqualify such officer for the performance of all his duties at sea in the next higher grade, it is competent for the board so to find, and the candidate may then be recommended for promotion (File 26260–4294, Sec. Navy, Feb. 23. 1917).

RECRUIT: PAYMENT OF POSTMASTERS FOR SECURING, UNDER ACT OF AUG. 29, 1916.

A postmaster procuring for reenlistment an ex-marine within one week of the date of his discharge from the Marine Corps is entitled to the sum of $5 granted by the act of August 29, 1916, to postmasters of certain classes who procure the enlistment of recruits (File 7657–425, J. A. G., Mar. 1, 1917).

[P. 11] SUMMARY COURT MARTIAL: ELIGIBILITY OF OFFICER OF NAVAL MILITIA TO SERVICE AS RECORDER OF.

An officer of Naval Militia, not in active service under call of the President but attached to a command for "routine practical instruction" only, may not be ordered to act as recorder of a summary court martial (File 26287–3802, Sec. Navy, Mar. 15, 1917).

C. M. O. 24—1917

[P. 1] Lieutenant William C. I. Stiles, United States Navy, was tried by general court martial, March 1, 1917, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy and found guilty of the following charges:

Charge I.—Culpable negligence and inefficiency in the performance of duty (one specification).

Charges II.—Neglect of duty (one specification).

[C. M. O. 26—1917]

SENTENCE

"The court, therefore, sentences him, Lieutenant William C. I. Stiles, U. S. Navy, to lose ten (10) numbers in his grade."

ACTION OF THE SECRETARY OF THE NAVY

The record in this case was referred to the Bureau of Navigation with the following recommendation by the Judge Advocate General:

"1. Respectfully submitted to the Secretary of the Navy.

"2. The court in this case found Lieutenant Stiles guilty of charge I, 'Culpable negligence and inefficiency in the performance of duty,' and Charge II, 'Neglect of duty,' and sentenced him to lose 10 numbers in his grade.

"3. The court's findings upon both charges are, in my opinion, supported by the evidence legally adduced.

"4. However, the proceedings in this case are, in my opinion, fatally defective owing to the fact that the court, over objection of the accused, received in evidence the entire record of proceedings of the court of inquiry which investigated the grounding of the U. S. S. *Culgoa.*

"5. The testimony of Lieutenant Stiles before the court of inquiry was legally admissible in evidence before the court martial in this case, as a confession, and also under article 60 A. G. N., as supplying evidence of facts concerning which necessary oral testimony could not be obtained. But this fact did not render the entire proceedings of the court of inquiry legally admissible in evidence before the court martial.

"6. It is impossible to know from this record how much, if any, of the record of the court of inquiry was actually considered by the court martial beyond what was read to it by the judge advocate, but it is apparent that the accused by his earnest and repeated objections to the introduction in evidence of the entire record of the court of inquiry considered such procedure prejudicial to his interests and rights, as may readily have been the case. As it is impossible to say that the error of the court, in insisting on such [P. 2] procedure over these objections of the accused and without legal authority, was not prejudicial to the accused, I am of the opinion that the proceedings of the general court martial in this case are thereby invalidated and should be disapproved. Other irregularities of a minor nature in the court's procedure are also noted.

"7. Referred to the Bureau of Navigation for comment as to disciplinary features."

The Bureau of Navigation made the following recommendation in the foregoing case:

"1. Forwarded. The Bureau concurs in the indorsement hereon by the Judge Advocate General and recommends that the proceedings be disapproved.

"2. It is further recommended that a letter of reprimand be addressed to Lieutenant C. I. Stiles, U. S. N., and that the same be filed with his efficiency record."

The foregoing recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, is approved. The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant William C. I. Stiles, U. S. Navy, are disapproved. This officer was released from arrest and restored to duty on March 6, 1917.

C. M. O. 26—1917

[P. 1] FORMER OFFICER: TRIED UPON A CHARGE PREFERRED AGAINST HIM WHILE AN OFFICER OF THE NAVY.

John C. Sweeney, formerly an assistant naval constructor in the United States Navy, was tried by general court martial on April 9, 1917, at the Navy Yard,

[C. M. O. 32—1917]

Washington, D. C., by order of the Secretary of the Navy, and found guilty of the following charge, which was preferred against him on May 31, 1912, while an assistant naval constructor in the United States Navy, and the specification of which was "proved by plea":

Charge.—Desertion (one specification).

SENTENCE

"The court, therefore, sentences him, John C. Sweeney, to be dismissed from the United States naval service."

RECOMMENDATION OF CLEMENCY

The members of the court spread upon the record the following unanimous recommendation to clemency:

> "In view of the present state of war and of the probable value of the accused to the Government, and further that this offense antedates the provisions of article R-3644, U. S. Navy Regulations, we recommend John C. Sweeney to the clemency of the revising authority."

ACTION OF THE SECRETARY OF THE NAVY

The proceedings and findings of the general court martial in the foregoing case of John C. Sweeney are approved. The sentence is set aside owing to the fact that John C. Sweeney's connection with the United States Navy was terminated by the appointment of a successor by the President of the United States with the advice and consent of the Senate prior to this trial. He will be released from arrest immediately.

C. M. O. 32—1917

[P. 5] COMPENSATION: EXTRA, FOR DUTY INVOLVING FLYING.

It is required that certificates for use as evidence to establish claim for extra compensation for duty involving flying should show the capacity in which the officer or man is detailed; the duty to which detailed; the station where he is in the performance of the duty for which detailed; that said duty had during the period of current detail included actual flight by the applicant in aircraft; and the date of the last flight made. The certificate should be made by the officer or man claiming the increase of pay and should, in case of either, bear the approval of the commandant. In the case of an enlisted man, the approval of his certificate by the officer immediately in charge of him should precede that of the commandant (File 28569–7, J. A. G., Apr. 28, 1917).

[P. 6] ENLISTMENT: REQUISITES TO COMPLETE.

A man who signs the shipping articles; accepts and is furnished transportation; is passed by a medical officer; is furnished and accepts clothing and subsistence; and is actually assigned to duty; becomes legally, and for all purposes, an enlisted man of the Navy despite his refusal to take the oath of allegiance (File 19037–58, J. A. G., Apr. 6, 1917).

FLEET NAVAL RESERVE: STATUS OF MEMBER OF, DESIRING TO RETURN TO REGULAR SERVICE.

An enlisted man who, on the date of expiration of enlistment and after having served sixteen years in the Navy, was transferred to the Fleet Naval Reserve and shortly thereafter desires to return to the Regular Service, is entitled to receive a discharge from the Fleet Naval Reserve and also from the Navy prior to again enlisting (File 28550–47, J. A. G., Apr. 3, 1917).

[C. M. O. 33—1917]

MILEAGE: EFFECT OF SURRENDER OF RIGHT TO, BY OFFICER.

It has been held that an officer of the Navy cannot surrender his right to mileage or to any other emolument or allowance pertaining to his office and prescribed by statute and that any effort on his part to waive such right is without effect (File 26280–78, J. A. G., Mar. 9, 1917, referring to decision of the Court of Claims in case of Paymaster's Clerk Katzer; *Glavey* v. *U. S.* (182 U. S. 595) and *U. S.* v. *Andrews* (240 U. S. 90) cited in support of holding).

MINORITY ENLISTMENTS: EXTENSION OF, AUTHORIZED IN NAVAL SERVICE.

Any enlistment for minority in the Navy or Marine Corps may be extended as is provided by law for extending an enlistment for a term of four years under similar conditions and with like rights, privileges, benefits, and obligations under the provisions of the act of Congress approved April 25, 1917.

OFFICERS OF PUBLIC HEALTH AND MARINE HOSPITAL SERVICE: AUTHORITY OF, TO ADMINISTER DISCIPLINE.

Medical officers of the Public Health and Marine Hospital Service are without authority of law to administer discipline as to Navy or Marine Corps patients under their care, and can only take such action as could be taken in the case of a civilian being treated in the hospital, i. e., preserve order and compel compliance with rules or regulations governing patients in the hospital, such action not being taken as a matter of administering punishment (File 28092–21, J. A. G., Apr. 7, 1917).

In view of the fact that, in conformity with section 1757, R. S., such officers are required to take an oath of allegiance upon appointment, they would not be required to take any further oath when rendering service for the medical department of the Navy. (Supra.)

[P. 7] VOLUNTARY SERVICE—BOY SCOUTS: NEITHER DEPARTMENT NOR ANY OFFICER THEREOF ALLOWED TO ACCEPT.

Section 3679, R. S., as amended by act of March 3, 1905 (33 Stat. 1257), and act of February 27, 1906 (34 Stat. 49), forbids the acceptance by the Navy Department, or any officer serving thereunder, of any voluntary service "except in cases of sudden emergency involving the loss of human life or the destruction of property" (File 28602–93, J. A. G., Mar. 31, 1917).

WITNESSES: PROCEDURE IN CASE COMPETENCY OF, IS QUESTIONED.

A summary court martial would be justified in exercising its discretion as to whether or not a witness before it, whose competency is questioned, should be required to withdraw pending the taking of testimony by it as to such competency; its decision either way would not invalidate the proceedings.

A witness, whose competency is questioned, has no right to introduce evidence with a view to establishing the same, or to examine witnesses testifying with reference thereto, but such examination should be conducted by the court or the parties to the trial (File 26276–163, J. A. G., Apr. 9, 1917).

C. M. O. 33—1917

[P. 5] COURTS MARTIAL: COMPOSITION OF.

For the trial of officers or enlisted men of the United States Navy or Marine Corps, the majority of the members of a general court martial must be officers of the regular naval service (File 28025–488: 2, J. A. G., April 28, 1917).

[C. M. O. 35—1917]

[P. 6] NAVAL MILITIA: PAY OF OFFICERS OF, BEGINS WHEN.

The pay of an officer of the Naval Militia who is required to be bonded does not begin until such bond is approved (File 26254–2247, J. A. G., May 12, 1917).

NAVAL RESERVE FORCE: LONGEVITY PAY OF OFFICERS OF.

An officer of the Naval Reserve Force who was formerly in the (then) Revenue-Cutter Service is not entitled, while on active duty with the Navy, to credit for his previous service in the former Revenue-Cutter Service in determining his right to longevity pay (File 28550–85, J. A. G., May 17, 1917).

PRECEDENCE OF RETIRED OFFICERS.

The precedence of line officers, active or retired, is determined first, by rank, and second, by date of commission, except in cases where officers have gained or lost numbers, in which event they gain or lose seniority accordingly. The fact that an officer attained his rank in consequence of retirement under section 9 of the Navy Personnel Act of March 3, 1899, does not affect the question of his precedence (File 28025–495: 1, J. A. G., May 2, 1917).

ERRATA: COURT-MARTIAL ORDER NO. 11, 1917, PAGE 1, LINES 5 AND 6. COURT-MARTIAL ORDER NO. 32, 1917, PAGE 3, "MISCELLANEOUS."

In Court-Martial Order No. 11, 1917, page 1, lines 5 and 6 after the words: "following charge," change the comma to a colon and strike out the word "the" and the line which follows.

C. M. O. 35—1917

[P. 1] Second Lieutenant David H. Owen, United States Marine Corps, was tried by general court martial on May 21, 1917, at the Marine Barracks, Fort Ozama, Santo Domingo City, D. R., by order of the commanding officer, Second Brigade, U. S. Marine Corps, and found guilty of the following charges:

Charge I.—When on shore maltreating an inhabitant (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

SENTENCE

"The court, therefore, sentences him, Second Lieutenant David H. Owen, U. S. Marine Corps, to lose twenty (20) numbers in his grade."

ACTION OF CONVENING AUTHORITY

"The proceedings, findings, and sentence in the foregoing case of Second Lieutenant David H. Owens, U. S. Marine Corps, are approved.

"Because of the youth and inexperience of Second Lieutenant Owen, of his good character and promise, as testified to by his superior officers, and in the hope that a mild punishment will be sufficiently corrective to cause him to control his temper, and to treat all persons, inferiors as well as equals, with justice, the loss of numbers in his grade is reduced to five (5).

"Second Lieutenant Owen will be released from arrest and restored to duty."

ACTION OF THE SECRETARY OF THE NAVY

The Department cannot forbear to express surprise that a court composed of officers of mature judgment should regard offenses of such seriousness as those of which Lieutenant Owen stands convicted as meriting a loss of but twenty numbers in grade. The action of the convening authority in reducing this already inadequate sentence to one which is but little more than nominal is viewed with distinct regret and disapprobation.

[C. M. O. 37—1917]

The Department does not feel disposed to accept any measure of responsibility for the results which must necessarily ensue from such action and has therefore felt constrained to express its views as matter of record.

C. M. O. 37—1917

[P. 11] ALCOHOLIC LIQUORS: SECTION 12 OF THE SELECTIVE DRAFT ACT ADMINISTRATIVELY CONSTRUED BY THE ATTORNEY GENERAL APPLICABLE TO THE NAVAL SERVICE.

Sections 12 and 13 of the Selective Draft Act of May 18, 1917, read as follows, viz:

"SEC. 12. That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided*, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this Act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months or both.

"SEC. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said place as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both."

On June 2, 1917, the Attorney General advised the Department that he had administratively construed the provisions of section 12 [P. 12] above set out as covering the entire Military Establishment of the United States, including the Navy and the Marine Corps. The Department has requested the Attorney General's opinion as to the applicability of section 13 above, to the naval service but has not yet received that officer's views on that subject (Op. Atty. Gen., June 2, 1917).

CHECKAGE OF PAY ACCOUNTS OF OFFICER.

There is no authority of law for the checkage of the pay accounts of an officer for his indebtedness to a wardroom mess (Naval Digest 1916, 448; *Melville* v. U. S., 23 Ct. Cls. 77).

COURTS MARTIAL.

Attention is invited to the fact that important decisions of the Department with relation to courts martial are set forth in General Order No. 296, Navy Department, of May 18, 1917.

[C. M. O. 37—1917]

DISHONORABLE DISCHARGE: EFFECT OF UPON CITIZENSHIP.

Dishonorable discharge from the naval service of the United States inflicted by reason of conviction of an offense other than that of "desertion in time of war" is not attended with loss of rights of citizenship under the laws of the United States. Whether or not such discharge effects the loss of the individual's rights of citizenship in his State is a matter dependent upon the laws of that particular jurisdiction (File No. 28798–6, J. A. G., June 11, 1917).

EMPLOYMENT FOR COMPENSATION: ACCEPTANCE OF BY ENLISTED MAN ON FURLOUGH WITH PAY FORBIDDEN.

An enlisted man sent home on furlough, with pay, to await call, is in the active service of the United States within the meaning of section 35 of act of June 3, 1916 (National Defense Act) and is therefore prohibited from engaging "in any pursuit, business, or performance in civil life, for emolument, hire or otherwise" in competition with local civilians (File No. 7657–449, J. A. G., June 19, 1917).

MARINES: ENLISTMENT OF ABROAD.

There is no provision of law prohibiting the original enlistment of marines abroad, this inhibition having its origin and existence in Navy Regulations only (File No. 3980–1363, J. A. G., June 8, 1917).

MARINES QUARTERED ON A NAVAL VESSEL TEMPORARILY: STATUS OF.

The officers of a force of marines temporarily quartered on a naval vessel, not forming a part of the complement of that vessel, are [P. 13] vested with the same authority and powers over such force as such officers could lawfully have exercised were the force serving at a barracks, subject only to the paramount authority inhering in a commanding officer of a naval vessel over all persons embarked on his ship (File No. 5474–620, J. A. G., June 5, 1917).

NATIONAL NAVAL VOLUNTEERS: AUTHORITY OF COMMANDING OFFICER TO DISRATE.

Members of the National Naval Volunteers serving under a permanent rating may be disrated by sentence of a general or summary court martial only. If serving under acting appointments they may be disrated by their commanding officer for incompetency, but not as a punishment. To be disrated as a punishment requires—in the case of acting appointments as well as permanent appointments—the intervention of a court martial (File No. 3973–190, J. A. G., June 4, 1917).

PAY OF RETIRED ENLISTED MEN ON ACTIVE DUTY.

A retired enlisted man called into active service in time of war or national emergency receives the same pay and allowances that he was receiving when placed on the retired list. He is not entitled to the benefit of any law or regulation, enacted or promulgated, since the date of his retirement, which increases the pay or allowances of enlisted men of the Navy (act of Aug. 29, 1916, 39 Stat. 591; File No. 7657–450, J. A. G., June 22, 1917).

PENSACOLA: STATUS OF NAVAL RESERVATION.

The health authorities of the State of Florida have no jurisdiction to require the naval authorities to report to them any vital statistics or conditions relating to contagious or other diseases prevalent on the Pensacola Reservation (File No. 5716–486, J. A. G., June 6, 1917).

[C. M. O. 40—1917]

PRECEDENCE OF ENSIGNS, UNITED STATES NAVAL RESERVE FORCE.

There being no statutory provision covering the question of the precedence with relation to each other of commissioned warrant officers of the Regular Navy and ensigns of the United States Naval Reserve Force, and it having been held by the Attorney General (23 Op. Atty. Gen. 156, 160) that the Secretary of the Navy may determine such a question by virtue of his general authority under the President to make rules and regulations for the government of the Navy, it is held that the rank and precedence of the officers hereinafter set forth are as indicated, viz:

[P. 14] 1. Ensign, U. S. Navy,
2. Commissioned warrant officer, U. S. Navy,
3. Ensign, U. S. Naval Reserve Force,
4. Commissioned warrant officer, U. S. Naval Reserve Force (File No. 11130–40, Sec. Navy, June 23, 1917).

SURRENDER OF DESERTER: WHAT CONSTITUTES.

The term "surrender" as used in connection with the return of a straggler or alleged deserter refers to his surrender to a naval authority only. The burden rests upon the deserter or straggler to effect his own return to duty or to the custody of such naval authorities as may have been authorized to receive him. The limitation of punishment for desertion (in case of surrender), page 316, Forms of Procedure, has already been changed to read "Desertion (in case of surrender to the naval authorities)" (File No. 26516–248, J. A. G., June 20, 1917).

TEMPORARY APPOINTMENTS: STATUS OF ENLISTED MEN OF NAVY AND MARINE CORPS HOLDING SAME, WHOSE ENLISTMENTS EXPIRE DURING CONTINUANCE OF TEMPORARY APPOINTMENTS.

There is no obligation on the part of the Government to discharge men temporarily appointed as warrant and commissioned officers under the act of May 22, 1917, whose enlistments expire while holding such appointments. Withholding their discharges and final settlements under such circumstances does not amount to detaining them in the service within the meaning of section 1422 of the Revised Statutes as amended by the act of March 3, 1875 (18 Stat. 484). By their acceptance of such appointments under the conditions imposed by the statute of May 22, 1917, they are deemed to have voluntarily waived their right to discharge upon the expiration of their terms of enlistment and to have accepted all of the conditions imposed by the statute, including the requirement that upon the termination of their temporary appointments they "shall revert to the grade, rank, or rating from which temporarily advanced," unless in the meantime they become entitled to promotion to a higher grade in the permanent Navy or Marine Corps (File No. 7657–445, J. A. G., June 21, 1917).

TEMPORARY WARRANT OR COMMISSION: EFFECT OF ON CONTINUOUS SERVICE.

Under the provisions of section 7 of the act of May 22, 1917, an enlisted man given a temporary warrant or commission would not in consequence of his acceptance thereof, lose his continuous service as an enlisted man (File No. 7657–448, J. A. G., June 18, 1917).

C. M. O. 40—1917

[P. 1] Assistant Surgeon Thomas A. Fortescue, United States Navy, was tried by general court martial on June 5, 1917, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, upon the following charge:

Charge.—Culpable negligence and inefficiency in the performance of duty (one specification).

[C. M. O. 41—1917]

FINDING

The court acquitted the accused of the charge.

RETURNED FOR REVISION

The Department on June 25, 1917, returned the record of proceedings in this case to the court and directed that the court reconvene for the purpose of reconsidering its finding and acquittal which in the opinion of the Department was not in accord with the evidence adduced.

FINDING IN REVISION

The court revoked its former finding in the above case and instead found the specification proved in part and the accused guilty in a less degree than charged.

SENTENCE

"The court therefore sentences him, Assistant Surgeon Thomas A. Fortescue, United States Navy, to lose three (3) numbers in his grade."

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence, in revision, of the general court martial in the foregoing case of Assistant Surgeon Thomas A. Fortescue, U. S. Navy, are approved. He will be released from arrest and restored to duty.

C. M. O. 41—1917

[P. 1] Lieutenant Arthur A. Garcelon, Junior, United States Navy, was tried by general court martial on February 16, 1917, on board the U. S. S. *Brooklyn* by order of the Commander in Chief, United States Asiatic Fleet, and found guilty of the following charges:

Charge I.—Making false and fraudulent official reports in violation of article 14 of the Articles for the Government of the Navy (seven specifications of which five were not proved).

Charge II.—Embezzlement, in violation of article 14 of the Articles for the Government of the Navy (one specification).

Charge III.—Scandalous conduct tending to the destruction of good morals (three specifications of which two were not proved).

SENTENCE

"The court, therefore, sentences him, Lieutenant Arthur A, Garcelon, Junior, U. S. Navy, to lose twenty-five (25) numbers in his grade."

RETURNED FOR REVISION

The convening authority, on March 20, 1917, returned the record of the proceedings in this case to the court and directed that the court reconvene for the purpose of reconsidering its sentence which, in his opinion, was entirely inadequate to the offenses of which the accused was found guilty.

SENTENCE IN REVISION

The court decided "respectfully to adhere to its former sentence."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on March 24, 1917, took the following action in the foregoing case, viz:

> "1. The accused in this case was found guilty of 'making false and fraudulent official reports in violation of article 14 of the Articles for the Government of the Navy,' 'embezzlement, in violation of article 14 of the Articles for

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the Government of the Navy,' and 'scandalous conduct tending to the destruction of good morals,' and was sentenced to lose twenty-five (25) numbers in his grade.

[P. 2] "2. The convening authority returned the record to the court for revision of its sentence as inadequate for the offenses of which the accused was found guilty.

"3. The court in revision decided to adhere to its former sentence.

"4. The court in its proceedings gave the accused the benefit of every doubt and found the accused guilty of all three charges. The accused having been found guilty of such grave charges, it then became the duty of the court to award a sentence adequate to the offenses of which the accused was convicted. This the court failed to do and the convening authority is unable to see how a court composed of officers with experience in the Navy can conscientiously agree upon the sentence.

"5. It is noted that the testimony of W. C. Powers, Jr., captain, U. S. Marine Corps, judge advocate, on the third day, and that of Otto Huebner, yeoman, third class, on the eleventh day, were not verified, but the testimony referred to does not appear to be material to the case, and therefore, it is considered that these errors in no way invalidate the proceedings.

"6. Subject to the above remarks the proceedings and findings of the general court martial in the foregoing case of Lieutenant Arthur A. Garcelon, junior, U. S. Navy, are approved, and in order that the accused may not entirely escape punishment, the sentence is approved.

"7. Lieutenant Arthur A. Garcelon, junior, U. S. Navy will be released from arrest and restored toduty.

Action of the Secretary of the Navy

1. The action of the convening authority in this case is concurred in. It is with regret, surprise, and unqualified disapprobation that the Department learns that officers of the experience and length of service of the members of the court which tried this case, regard one whom they have found guilty of making false and fraudulent official reports, of embezzlement, and of scandalous conduct tending to the destruction of good morals, as fit to continue to hold a commission, to serve and dwell among them on terms of equality and to represent the authority of the Republic.

2. Were it not for the fact that the accused would thereby escape all punishment for his serious and highly discreditable offenses, the Department would feel constrained to set aside the proceedings, finding, and sentence in this case as constituting a travesty upon justice.

C. M. O. 46—1917

Remarks

[P. 13] It has come to the attention of the Department that considerable uncertainty seems to exist in the minds of some regarding the admissibility as evidence before general courts martial of the proceedings of courts of inquiry and boards of investigation and inquest; also with respect to the consequent rights involved of parties to such courts and boards. Therefore the following notes on these subjects, as representing the present holdings of the Department, seem appropriate, as of interest and value to the service.

Court of Inquiry Proceedings as Evidence Before Courts Martial

Admissibility under article 60, A. G. N.—This article provides that the proceedings of courts of inquiry shall be admissible in evidence before courts martial under the following conditions:

1. That such proceedings must be "duly authenticated by the signature of the president of the court and of the judge advocate";

2. That the case in which the proceedings are received in evidence must be one "not capital";

3. That the case in which the proceedings are received in evidence must be one not "extending to the dismissal of a commissioned or warrant officer";

4. That "oral testimony cannot be obtained."

The second and third conditions above stated have been construed to mean that the proceedings of courts of inquiry shall not be admissible in evidence before a court martial, under authority of article 60, A. G. N., where the sentence of death or dismissal is by law made *mandatory* upon conviction of the offense charged (C. M. O. 88–1895, pp. 13, 14; G. C. M. Rec. No. 11279). The sentence of death is not, under the Articles for the Government of the Navy mandatory upon the conviction in any case triable by a naval court martial. (See article 7, A. G. N.)

Where a court martial is authorized but not required to adjudge the punishment of death or dismissal upon the conviction of an offense, the proceedings of a court of inquiry may, under the terms of article 60, A. G. N., be introduced in evidence against the accused, subject to the remaining conditions prescribed in said article, [P. 14] but in any case which the proceedings of a court of inquiry are so used in evidence under article 60, A. G. N., the court must be careful not to adjudge a sentence extending to death or dismissal. In time of peace the punishment which may be imposed upon conviction in such cases in which the proceedings of a court of inquiry are used in evidence against an officer on trial by court martial, is limited by section 390, Naval Courts and Boards, "to loss of one hundred numbers in rank." This limitation does not apply in time of war, and courts-martial may under such circumstances adjudge any appropriate sentence authorized by the Articles for the Government of the Navy, provided it does not extend to death or dismissal.

The fourth condition above stated is that "oral testimony can not be obtained." The circumstances under which oral testimony may be unobtainable are varied. The following rules are established for the guidance of courts martial with reference to this condition, and are not intended to be unalterable or exclusive:

(1) Oral testimony may be regareded as unobtainable under the following circumstances:

(*a*) In the cases of civilian witnesses who are beyond the reach of compulsory process which the judge advocate is authorized to issue. In such cases it should appear that subpenas intended to secure voluntary attendance of such witnesses have been forwarded to the Secretary of the Navy, as provided in Naval Courts and Boards (sec. 124), and that such action has for any reason failed to produce their appearance at the trial.

(*b*) In the cases of persons in the Naval or Military service whom the judge advocate is not authorized to summon (Naval Courts and Boards, sec. 123). In such cases it should appear that summons for such witnesses have been forwarded to the Secretary of the Navy or other convening authority, as provided in Naval Courts and Boards (sec. 123), and that such action has for any reason failed to produce their appearance at the trial.

(2) Oral testimony may be regarded as unobtainable in the case of a witness who has died, or has become insane, or by the opposite party is kept out of the way, or is too ill or infirm to come to the court (2 Bishop's New Criminal Procedure, sec. 1195).

"When a fact has been sufficiently established, it is unnecessary to consume the time of the court by introduction of additional evidence which is merely cumulative" (Naval Courts and Boards, sec. 211). The court is the judge of how much evidence shall be received with reference to any particular fact, and where in any case it considers that sufficient evidence has already been introduced, it will properly hold that the case is not one in which "oral testimony cannot be obtained" as to that fact, and will accordingly refuse to admit the proceedings of a court of inquiry with reference thereto, notwithstanding that such proceedings may contain the testimony of a witness as to such fact whose personal attendance before the court cannot be obtained.

Admissibility independently of article 60, A. G. N.—"Article 60, A. G. N., was not intended to restrict the admissibility of court [P. 15] of inquiry records in evidence when such records might have been admitted under general principles of the law of evidence; but was intended to enlarge the rules of evidence by authorizing the records of courts of inquiry to be admitted in certain cases where they would otherwise have been inadmissible" (C. M. O. 51, 1914, p. 6). It follows that in cases where the proceedings of courts of inquiry are used in evidence independently of article 60, A. G. N., the limitation contained in said article as to "cases not capital, nor extending to the dismissal of a commissioned

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or warrant officer," and the limitation contained in section 390, Naval Courts and Boards, as to loss of numbers, do not apply. Instances in which the proceedings of courts of inquiry may thus be used in evidence are as follows:

(*d*) Where it is expressly agreed by the accused that the proceedings of the court of inquiry may be admitted as evidence on his trial, each party to have the privilege of introducing other evidence (*Mullan* v. *United States*, 212 U. S. 516; C. M. O. 41, 1888, pp. 5–6).

(*e*) Where the proceedings of the court of inquiry are offered in evidence by the accused in his own behalf and received by the court—for the right of the accused to be confronted with the witnesses against him at his trial is one which he may waive (*Mullan* v. *United States*, 212 U. S. 516, 519; *Diaz* v. *U. S.*, 223 U. S. 442).

(*f*) Where the accused has previously testified voluntarily before a court of inquiry, such testimony is admissible when offered by the prosecution at his trial, and it is not essential to the admissibility of his testimony that he should have been warned by the court of inquiry that what he said might be used against him (*Powers* v. *United States*, 223 U. S. 303, 313). If it appears that the accused while a witness before a court of inquiry was required to give evidence tending to criminate himself, after properly claiming his privilege against self-crimination, the testimony thus adduced cannot be given in evidence against him at his trial. The witness is thus protected from the consequences which might otherwise follow from the action of the court of inquiry in requiring him to answer incriminating questions—a right which the court of inquiry possesses to the same extent as courts martial in the cases noted in the Court-Martial Order No. 29, 1914, p. 10–15. But if the accused testified voluntarily before the court of inquiry, answers given by him within the scope of legitimate cross-examination, although under compulsion, are admissible in evidence against him at his trial (*Powers* v. *United States*, 223 U. S. 303, 314). If the accused was improperly required to testify as a witness before a court of inquiry, in disregard of the act of March 16, 1878 (20 Stat. 30, quoted below), the testimony so given cannot be used against him at his trial.

(*g*) Where a witness before the court martial has made prior inconsistent statements before a court of inquiry, the proceedings of the court of inquiry may be introduced in evidence for the purpose of impeaching the testimony of such witness, subject to the general rules of evidence requiring that a proper foundation be laid before evidence may be introduced to impeach the testimony of a witness [P. 16] by showing prior inconsistent statements (Naval Digest, 1916, p. 132–19, p. 284–10).

(*h*) Where the accused is charged with perjury or false swearing and it is necessary, in order to sustain such charge, to prove what was said by the accused as a witness before a previous court of inquiry, the proceedings of such court may be introduced in evidence against him for this purpose (C. M. O. 51, 1914, pp. 5–6).

(*i*) The proceedings of the court of inquiry may be used for the purpose of refreshing the memory of a witness before a court martial in accordance with general rules of evidence (Naval Digest, 1916, p. 132–20 (3)). Any witness testifying before a court martial may, in the discretion of the court, be permitted to refresh his memory from the record of the testimony given by him before a court of inquiry (40 Cyc., 2456, 2457, 2466). If the witness, after examining the record, testifies from his own independent recollection of the facts, the record itself cannot be introduced in evidence or read to the court, but if the witness has no independent recollection but testifies merely from his knowledge or belief in the accuracy of the record, it becomes a part of his testimony, just as if without it the witness had orally repeated the words from memory, and may therefore be read aloud by him and shown to the court, or otherwise put in evidence (40 Cyc. 2467; 1 Greenleaf, 16th ed., sec. 439).

Method of introducing court of inquiry proceedings in evidence.—Where it is decided by the court to receive the proceedings of a court of inquiry in evidence against the accused, the procedure to be followed should be substantially the same as that outlined in Naval Courts and Boards, section 182, with reference to depositions. That is to say, a proper foundation having been laid for the introduction of the proceedings, by establishing to the satisfaction of the court that conditions exist which made such proceedings admissible under article 60, A. G. N., or independently of that article (17 Ann. Cas. 76, 106; 8 id. 466), the

judge advocate should take the stand as a witness, identifying the record and stating that he desires to read therefrom so much of the proceedings as embodies the testimony of a particular witness with reference to a particular point in issue; he should then present the record to the opposite party and to the court for inspection and opportunity to interpose objection to its admission; if there be no valid objection offered, the judge advocate should proceed to read the questions and answers from the record of the witness's testimony before the court of inquiry, subject to objection in the same manner as objection might be made to a witness actually on the stand.

Inasmuch as the scope of an investigation by a court of inquiry is commonly very broad, involving the conduct of various persons as well as condition of matériel, etc., it will frequently happen that the examination of a witness before a court of inquiry will include many matters that would not be relevant upon the trial of a particular accused before a court martial, and the procedure above outlined for introducing the proceedings of a court of inquiry will serve to eliminate irrelevant evidence at the trial.

[P. 17] The testimony as read by the judge advocate should be recorded in the body of the court-martial record, together with objections and rulings of the court thereupon, in the same manner as though such testimony were given before the court martial in person by the witness who appeared before the court of inquiry.

The accused should be allowed on cross-examination of the judge advocate to require that he read any other testimony given by the same witness before the court of inquiry which might serve to explain or to affect the weight of his testimony as read on direct examination, and to proceed further in the case in the direction of contradicting the witness, impeaching his reputation for truth and veracity, etc., in the same manner as though the witness had given his testimony in person at the trial.

In the event that the proceedings of the court of inquiry are offered in evidence by the accused, the procedure should be the same as indicated above, except that the judge advocate as custodian of the record, would be called as a witness for the defense for the purpose of getting such proceedings before the court.

The fact that the testimony of a witness before a court of inquiry may be legally admissible in evidence before a court martial does not render the entire proceedings of the court of inquiry competent as evidence (C. M. O., 24–1917, April 2, 1917); and this, of course, applies with especial force to the findings of the court of inquiry (Naval Digest, 1916, p. 131–18).

Weight of court of inquiry proceedings as evidence.—The weight to be attached by the court martial to proceedings of a court of inquiry which have been received in evidence is a matter for determination by the court, the same as in the case of any other evidence. In this connection, however, the following is quoted from the case of *Mullan* v. *United States* (42 Ct. Cls. 157, 176; affirmed, 212 U. S. 516, 520):

> "The evidence adduced before a board of inquiry is surrounded by all the solemnities of evidence taken in a court of record or before a court martial. The accused is personally present and represented by counsel. The right of cross-examination prevails and every legal inhibition as to its competence or relevancy can be raised at the hearing. While it is a court of inferior jurisdiction and its findings usually advisory, its proceedings are not in anywise summary. The evidence adduced and preserved before courts of inquiry is superior in every respect to depositions. An accused thus arraigned cannot plead ignorance of testimony against him or hope by subsequent examination of the same witnesses, in the same cause, between the same parties, to materially change their testimony."

Powers of Courts of Inquiry and the Rights of Parties and Witnesses

Inasmuch as the testimony given by witnesses before courts of inquiry may, under certain conditions, as indicated above, be used against such witnesses, or by or against others, in subsequent trials [P. 18] by courts martial, it is important that courts of inquiry should fully understand the statutory powers, restrictions, and safeguards, which surround the production of evidence in cases which they are called upon to investigate.

[C. M. O. 46—1917]

While a court of inquiry has the same powers as a general court martial with reference to compelling the attendance of witnesses, punishing for contempts, taking testimony under oath, etc., at the same time defendants, interested parties, and witnesses before courts of inquiry have all the rights accorded by law to parties and witnesses before general courts martial, principal among these being the right of a defendant or interested party to be represented by counsel, to cross-examine witnesses, to introduce evidence, and in the case of a defendant only, to be privileged from testifying except at his own request; and on the part of witnesses, the right to decline answering any question which may tend to incriminate or degrade them.

While it is not legally necessary that defendants and interested parties before a court of inquiry should be warned that what they say may be used against them (paragraph (*f*), above), it is desirable that in practice this be done and that they be further informed of their rights, particularly where they are without counsel. (See Naval Courts and Boards, pp. 414, 415.)

Board of Investigation Proceedings as Evidence Before Courts of Inqury and Courts Martial

Article 60, A. G. N., has no application to the proceedings of boards of investigation. Accordingly, testimony of witnesses before such boards may be used in evidence before courts of inquiry or courts martial, where such action is permitted by general rules of evidence.

If the testimony before the board of investigation was not given under oath, such testimony should not be received in evidence by a court of inquiry or a court martial, except in the cases noted above in paragraphs (*f*), (*g*), (*h*), and (*i*).

If the testimony before the board of investigation was given under oath, it may be received in evidence in all of the cases noted above under "admissibility independently of article 60, A. G. N." (paragraphs (*d*) to (*i*), inclusive). Also, if the accused was afforded opportunity to cross-examine the witnesses before the board of investigation, either in person or by counsel, their testimony may be received against him before a subsequent court martial or court of inquiry in certain additional cases, viz, where the witnesses have since died (*Mattox* v. *U. S.*, 156 U. S. 237; *U. S.* v. *Macomb*, 26 Fed. Cas. No. 15702; *U. S.* v. *White*, 28 Fed. Cas. No. 16679; *U. S.* v. *Wood*, 28 Fed. Cas. No. 16756), or where the witnesses are absent by the procurement of the accused, "or when enough has been proved to cast upon him the burden of showing, and he, having full opportunity therefor, fails to show, that he has not been instrumental in concealing them or in keeping them away" (*Reynolds* v. *U. S.*, 98 U. S. 145); but such testimony cannot be so received in evidence [P. 19] where the witnesses are absent otherwise than through the connivance or by the procurement of the accused, even though they are beyond the jurisdiction of the court (*U. S.* v. *Angell*, 11 Fed. Rep. 34; *Motes* v. *U. S.*, 178 U. S. 458; *State* v. *Wing* (Ohio), 64 N. E. 514, followed, *State* v. *Huffman* (Ohio), 99 N. E. 295).

Where it is decided by the court to receive in evidence the testimony of a witness before a board of investigation, the procedure to be followed should be the same as that indicated above as to the "method of introducing court of inquiry proceedings in evidence." (See *People* v. *Qualey*, 210 N. Y. 202; 104 N. E. 138, 39 Ann. Cas. 1108, 1111; 16 Cyc. 1106–1110; 2 Bishop's New Criminal Procedure sec. 1199.)

Board of Inquest Proceedings as Evidence Before Courts of Inquiry and Courts Martial

The proceedings of boards of inquest may be used in evidence before courts of inquiry and courts martial under the same circumstances as are set forth above with reference to the use of testimony before boards of investigation not given under oath. If, in the future, boards of inquest should be authorized to administer oaths to witnesses, the subsequent use of testimony so given under oath would be governed by the same principles as those stated above with reference to the use of testimony before boards of investigation given under oath.

[C. M. O. 46–1917]

LOSS OF PAY: MITIGATION OF SENTENCE INVOLVING, SHOULD HOLD IN ABEYANCE LOSS OF PAY.

The reviewing authority in acting on a recent case, reduced the loss of pay fixed by the sentence to two hundred dollars, remitted the confinement and dishonorable discharge awarded, upon condition, however, that the accused maintain a satisfactory record for a period of six months, otherwise sentence to be carried into effect at any time during that period. The foregoing action creates a possibility that this man may be confined for misconduct within the period of six months; the loss of pay, however, is in a fixed amount and will have been checked, and further checkage would not be lawful. We are then confronted with the anomalous condition of a man undergoing sentence of confinement on full pay. Such a situation is contrary to the policy of the Department and consequently any action which holds in abeyance a term of confinement should be made to affect similarly the loss of pay involved (File No. 26262–3076, J. A. G., 20 July 1917).

MEMBERS OF SUMMARY COURT MARTIAL: STATUS OF AS TO VOTES ON FINDING AND SENTENCE.

In its review and disapproval of the proceedings, sentence and action thereon, in a recent case, the Department made the remarks hereinafter set forth, in commenting upon the following statements contained at page 8 of C. M. O. 42, 1915, viz:

[P. 20] "'The oath administered to members of summary courts martial contains no prohibition against divulging the vote of a particular member, and his vote may be officially ascertained without judicial proceedings.

"'Nevertheless the Department desires it to be understood that notwithstanding the absence of any law or regulation on the subject, in the matter of secrecy, it regards members of summary courts martial as governed by the same principle which applies to members of general courts martial. Considered solely as a matter of propriety and official decorum, it is as pernicious for members of summary courts martial, as it is for members of general courts martial, to disclose the sentence of the court prior to its approval, or at any time to divulge or disclose the vote or opinion of any particular member of the court, unless officially required to do so by the proper authority.

"'Briefly stated, the Department considers the confidential nature of the vote or opinion of each member of a summary court martial to be sacred in all cases except where official inquiry is made by the convening or high authority. In case of general courts martial the statute protects this secrecy against any other than a judicial investigation; in the case of a summary court martial the Department, in the absence of any statute or regulation on the subject, will sanction a modification of this rule only to the extent of allowing the vote or opinion of members to be disclosed, as above stated, upon official inquiry by the convening or higher authority (File 27675–9–10–11, Sec. Navy, Oct. 28, 1915).

"Although from the foregoing citation, the conclusion has been established that under certain circumstances the members of a summary court martial may be required to divulge their votes to proper higher authorities, a case justifying disciplinary action of any nature against any such member on account of the finding or sentence of the court would have to show in a convincing manner that he had not been guided properly by the evidence adduced or by the laws for the Government of the Navy, these requirements being imposed by his oath equally with the mandates of his conscience. There is no thought conveyed that a court martial, in the course of its deliberations, under any circumstances could be openly threatened with disciplinary action; most emphatically is this true in a case such as the one under consideration, where the necessary elements are by no means apparent to warrant disciplinary action in the case of any member of the court." (File 26287–4045, Sec. Nav., July 28, 1917).

ACTING CHAPLAINS: ALLOWANCES OF.

Acting Chaplains in the Navy are not entitled to rations or commutation thereof (File No. 26254–2333, J. A. G., July 23, 1917).

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[P. 21] COAST GUARD: DESERTION FROM DEFINED BY NAVY REGULATIONS.

The Navy Regulations are controlling in determining at what time a straggler from the Coast Guard in time of war should be regarded as a deserter after the tenth day of his unnauthorized absence (File No. 28762–136, J. A. G., July 7, 1917).

It is to be noted, however, that one absent without leave, with a manifest intention to desert, should be regarded as a deserter and the necessary action should be taken forthwith.

COMMISSIONS: SIGNATURE OF.

It is lawful for the Secretary of the Navy to sign commisions issued to officers, but it is proper that the commission should declare the act to be the act of the President performed by the head of the Department as his representative (22 Op. A. G., 82, 28 Ct. Cls. 392). Accordingly, all commissions to officers not above the rank of commander in the Navy and Lieutenant colonel in the Marine Corps will be so signed (File No. 22724–34, J. A. G., July 28, 1917).

DENTAL SURGEON: TEMPORARY APPOINTMENT AS.

A properly qualified Chief Pharmacist Mate may be temporarily appointed a dental surgeon with the rank, pay, and allowances, of lieutenant (junior grade) in accordance with the provisions of the act of May 22, 1917 (File No. 27213–12, J. A. G., July 20, 1917).

DEPOSITS OF ENLISTED MEN: WHEN TEMPORARILY ADVANCED TO COMMISSIONED OFFICERS.

In case of enlisted men temporarily advanced to the grade of warrant or commissioned officers under the provisions of the act of May 22, 1917, their deposit accounts should be closed and they should be paid principal and interest thereon up to, but not including, the date that they receive such appointment (File No. 26524–2020: 1. Sec. Navy, July 13, 1917).

GENERAL COURT-MARTIAL PRISONERS: RATIONING OF.

On July 10, 1917, the Department took the following action:

> "General court-martial prisoners will receive a ration in kind, except at those naval prisons where the Secretary of the Navy has authorized a commutation of the rations."

Such authority has been granted to naval prisons at Portsmouth, N. H., Port Royal, S. C., Mare Island, Calif., and Cavite, P. I. (File No. 26267–175: 2. Sec. Navy, July 10, 1917).

JURISDICTION OVER LANDS: HOW ACQUIRED BY UNITED STATES.

No private person has the power to surrender to the United States or to any other nation or person by lease of lands, any part of the political jurisdiction of the State in which the lands are located. Exclusive jurisdiction can be obtained by the United States only by purchase of the land for purposes enumerated in the Constitution "by consent of the legislature of the State in which the same may be" (*U. S.* v. *Tierney*, Fed. Cas. No. 16517) or by express cession of the State (File No. 28787–6, J. A. G., July 17, 1917).

[P. 22] LOSS OF NUMBERS: HOW CALCULATED.

A sentence to loss of numbers has particular application to cases where promotion goes by seniority, and is intended to operate so as to delay the promotion of the officer so sentenced. The promotion by selection of an officer who stood,

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on the lineal list, below the officer so sentenced is a reward personal to the officer receiving it. Any effect which it may have on other officers is incidental and does not affect one officer over whom the promotion is made more than another. By a parity of reasoning it follows that it cannot operate as a pro tanto execution of the sentence to loss of numbers, of one of the officers over whom the promotion is made and who happens to be subject to such a loss, so imposed (File No. 26521–100: 1, J. A. G., July 28, 1917).

MANUAL FOR THE GOVERNMENT OF U. S. NAVAL PRISONS, ETC.: ACTION UNDER PARAGRAPHS 114 TO 122 THEREOF.

In order that paragraphs 114 to 122, inclusive, of the above-mentioned manual as amended may become operative without special action of the Navy Department, it is directed that, in addition to any action taken in mitigation of a sentence, the following action also be taken, when it is considered that the circumstances of the case warrant:

> "The foregoing sentence is mitigated (or further mitigated) in accordance with articles 114 to 122, inclusive, of the Manual for the Government of U. S. Naval Prisons" (File No. 26267–178, Sec. Nav., June 28, 1917).

MARINE CORPS: STATUS OF TEMPORARY WARRANT OFFICERS AND CLERKS.

The Secretary of the Navy is authorized to make as many permanent and temporary appointments as may be necessary to complete the authorized number of warrant officers and clerks to assistant paymasters in the Marine Corps, and in the event of any of the appointees being temporarily commissioned he is authorized to make temporary appointments to fill their places. The appointments to fill their places must of necessity be temporary, for the reason that the warrant officers and clerks to assistant paymasters of the permanent Marine Corps are entitled, on the expiration of their temporary commissions, to revert to the positions from which they were commissioned, and the places of the eight temporary clerks to assistant paymasters and authorized only "for the war."

The eight clerks to assistant paymasters holding temporary places authorized by the act of May 22, 1917, while eligible for appointment as temporary second lieutenants, are not entitled to revert to the grade of clerk to assistant paymaster on the expiration of their temporary commissions. If, however, they are appointed second lieutenants the vacancies thus created may be filled by temporary appointments for the period of the war (File No. 17789–30, J. A. G., July 24, 1917).

[P. 23] NAVAL RESERVE FLYING CORPS: TRANSFERS TO.

There is no authority of law for the transfer of enlisted men (aviation detail), United States Navy, to warrant or commissioned grades in the Naval Reserve Flying Corps (File No. 7657–454, J. A. G., July 9, 1917).

OFFICERS: STATUS OF ACTING ASSISTANT SURGEONS, ASSISTANT SURGEONS, MEDICAL RESERVE CORPS, ASSISTANT DENTAL SURGEONS, DENTAL RESERVE CORPS AND DENTAL SURGEONS, U. S. NAVY, UNDER THE ACT OF MAY 22, 1917.

Acting assistant surgeons, U. S. N., are eligible for temporary appointment as additional assistant surgeons under the act of May 22, 1917, as are other citizens of the United States properly qualified. They do not, however, by operation of law, revert to the position of acting assistant surgeon upon the termination of the temporary appointments; but there is nothing in the act to prevent their reappointment as acting assistant surgeons.

Assistant surgeons, Medical Reserve Corps and assistant dental surgeons, Dental Reserve Corps, are eligible for temporary appointments as additional assistant surgeons, U. S. N. (with rank not above lieutenant), and assistant

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dental surgeons, U. S. N. (with rank not above lieutenant (junior grade)), respectively, as are other citizens of the United States, properly qualified; and by their acceptance of such appointments they do not forfeit their commissions in said Medical and Dental Reserve Corps.

The act of May 22, 1917, does not authorize the advancement of dental surgeons, U. S. N., having less than five years' service in the grade, to the rank of lieutenant (File No. 15229–13, J. A. G., July 14, 1917).

PAY: INCREASE OF UNDER ACT OF MAY 22, 1917, NOT EXTRA PAY UNDER C. M. O. 24.

The increase of pay authorized by the act of May 22, 1917 for the enlisted personnel of the Navy is not to be considered as extra pay within the meaning of Court-Martial Order No. 24 of July 1, 1909. Said increase is a part of the actual pay for the different ratings and should be included in computing loss of pay by both summary and deck courts (File No. 26287–4008, J. A. G., 2 July, 1917).

PENSIONS: AUTHORITY OF SECRETARY OF NAVY OVER, IN ACCORDANCE WITH SEC. 4756, R. S.

Section 4756, R. S., as ameneded, by the act of December 23, 1886, provides:

> "There shall be paid out of the naval pension-fund to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted person or as an appointed petty officer, or both, in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly, under the direction of the Commissioner of Pensions; and application for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify [P. 24] the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized."

The above section authorizes the Secretary of the Navy to determine whether an applicant is entitled to the payments therein referred to; the Commissioner of Pensions in making such payments acts only in a ministerial capacity and is in no way responsible for the correctness of such rulings (Op. A. G., June 12, 1917).

PROBATION: MODIFIED FORM OF.

1. The Department has recently come to the conclusion that a modified form of probation for men convicted by general courts martial is desirable in many cases. It is felt that a salutary effect on discipline would be produced if, in some cases, the confinement were held in abeyance while a man was on probation instead of being remitted as at present. In view of the above, the following form of action is authorized, additional and as an alternative to that now prescribed in General Order 110:

> "The proceedings, findings, and sentence, in the foregoing case of _____ are approved; the sentence is remitted on condition that _____ during a period of one year from this date, conducts himself in such a manner as, in the opinion of his commanding officer, warrants his further retention in the service; otherwise, at the discretion of his commanding officer, the foregoing sentence will be carried into effect at any time during the said period and _____ will be transferred to the nearest receiving ship for further transfer to a naval prison, a certified copy of this action accompanying such transfer."

2. The above action cannot be taken in cases of men convicted of desertion in time of war who cannot, under the law, be restored to duty.

3. This action in no way precludes the trial by subsequent court martial of a man on such probation (File No. 26267–120: 1, Sec. Nav., July 31, 1917).

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SELECTION FOR PROMOTION: DATE FIXING ELIGIBILITY THEREFOR UNDER THE FOUR YEARS' SERVICE CLAUSE.

Captains, commanders, and lieutenant-commanders who will have served four years in their present grade by November 30 next after the convening of the board for selection for promotion, are eligible for consideration, thereby, notwithstanding the fact that at the time of such consideration they shall not have served four years in their present grade (Op. Atty. Gen., July 14, 1917).

SUCCESSION TO COMMAND.

Officers designated for permanent engineering duty are not available for succession to command afloat or to the duties of executive officer in the absence of the executive officer and other intervening officers (File No. 28441–227, J. A. G., July 20, 1917).

C. M. O. 53—1917

[P. 12] CHIEF CARPENTER: ELIGIBILITY TO APPOINTMENT AS ASSISTANT NAVAL CONSTRUCTOR (T).

There is no legal objection to the temporary appointment of a chief carpenter who is over fifty years of age to the grade of assistant naval constructor with the rank of lieutenant (junior grade), the act of May 22, 1917, confining its prohibition to the appointment of commissioned warrant officers, warrant officers, and enlisted men who are over fifty years of age, to the grade of ensign (File No. 5038–25, J. A. G., August 11, 1917).

COAST GUARD: DEATH GRATUITY.

A retired officer of the Coast Guard on active duty and serving with the Navy in time of war as a member of his organization is not included within the terms of the provision authorizing payment of death gratuity to certain dependent members of the family of persons who die while on the "active list" as a result of perilous service, wounds received, or disease contracted in the line of duty (File No. 28762–197, J. A. G., August 23, 1917).

COAST GUARD: PRECEDENCE OF OFFICERS OF.

Precedence between officers of the Navy and of the Coast Guard, of corresponding grades, is determined by the dates of their respective commissions in those grades (File No. 28762–115: 1, J. A. G., August 29, 1917).

[P. 13] ENLISTMENT: WHEN COMPLETED.

One is an enlisted man in the Navy from the date he is examined and passed and enters upon duty (File No. 7657–465, J. A. G., August 1, 1917).

NAVAL RESERVE FORCE: PROVISIONAL APPOINTMENTS IN.

One holding a provisional rank or rating in the Naval Reserve Force may lawfully have his present rank or rating changed, for adequate reason, to a different provisional rank or rating, there being nothing in the law which prevents the proper administrative officers from correcting the provisional enrollment of an officer by assigning him a new provisional rank shown by his service or facts subsequently ascertained, to be more appropriate to his qualifications (File No. 28550–123, J. A. G., August 16, 1917).

PENSION: NAVY SERVICE, UNDER SECTION 4757, REVISED STATUTES.

An enlisted man who has had 11 years creditable service prior to the enlistment from which he was discharged for bad conduct, and who has completed

[C. M. O. 54—1917]

an enlistment of four years and received an honorable discharge therefrom since the date of his bad-conduct discharge, may lawfully be granted the relief provided by section 4757, Revised Statutes (File No. 26510–1347, J. A. G., August 11, 1917).

SUMMARY COURT MARTIAL: MEMBERSHIP OF.

It is decidedly improper, though not illegal, for a convening authority who is senior officer present to order himself as senior member of a summary court martial even under the circumstances that there are not a sufficient number of other officers present to constitute the court (File No. 26287–4130, J. A. G., August 10, 1917).

The detailing of himself by such senior officer present as recorder of the summary court martial under the conditions predicated would not be open to the same objections.

C. M. O. 54—1917

[P. 1] Captain William W. Phelps, United States Navy, was tried by general court martial, September 4, 1917, on board the U. S. S. *Louisiana*, by order of the senior officer present commanding the United States Atlantic Fleet, on the following charges:

Charge I.—Through inattention and negligence, suffering a vessel of the Navy to be run upon a submerged wreck and hazarded (one specification).

Charge II.—Culpable inefficiency in the performance of duty (one specification).

FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the charge; the specification of the second charge "proved, but without culpability," the accused "not guilty" of the charge, and the court, accordingly, did fully acquit the accused of the second charge.

SENTENCE

"The court therefore sentences him, Captain William W. Phelps, U. S. Navy, to lose ten (10) numbers in his grade."

ACTION OF CONVENING AUTHORITY

On September 9, 1917, the senior officer present commanding United States Atlantic Fleet placed the following endorsement upon the record in the foregoing case:

> "The proceedings, findings, and sentence of the general court martial in the foregoing case of William W. Phelps, captain, U. S. Navy, are approved, and he will be released from arrest and restored to duty.
>
> "It is noted from an examination of the record in this case that the accused was fully acquitted of the charge of 'Culpable inefficiency in the performance of duty,' the finding upon the specification under this charge being 'Proved, but without culpability.' Naval Digest, 1916, Findings No. 69, reads as follows and would appear to have a bearing on this case:
>
> "'A finding of "proved, but without criminality," is not to be encouraged in any case. It is virtually a form of acquittal, being a determination that the accused is not guilty in law. It will [P. 2] therefore be more legally accurate, as well as more military and more just to the accused, to express and record the findings simply as "not guilty."'"

ACTION OF SECRETARY OF THE NAVY

The Department concurs in the remarks and the action of the convening authority as above set forth.

C. M. O. 57—1917

[P. 1] Ensign Birney O. Halliwill, United States Navy, was tried by general court martial, August 16, 1917, on board the U. S. S. *Baltimore*, by order of the Commander, Mine Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Assaulting his superior officer while in the execution of the duties of his office (one specification).

Charge II.—Disobeying the lawful order of his superior officer (two specifications).

Charge III.—Treating with contempt his superior officer and being disrespectful to him in language and deportment while in the execution of his office (one specification).

Findings

The court found the specification of the first charge "not proved," the accused "not guilty" thereof, and the court acquitted the accused of said charge; the specifications of the second charge "proved" and the accused of said charge "guilty"; the specification of the third charge "proved in part" and the accused of said charge "guilty."

Sentence

"The court therefore sentences him, Ensign Birney O. Halliwill, U. S. Navy (T), to lose thirty (30) numbers in his grade."

Action of Convening Authority

"In the opinion of the reviewing authority, a more searching cross-examination by the judge advocate would have elicited further evidence in support of the first charge; and even on the evidence that was adduced a finding of guilty on that charge would have been justified. A large amount of testimony was irrelevant and should not have been admitted. This could not fail to obscure the matter at issue and prevent a finding more in keeping with the discipline and dignity of the Navy. The exigencies of the service, however, do not permit reconvening the court for reconsideration of its finding.

"Subject to the foregoing comment, the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Birney O. Halliwill, U. S. Navy (T), are approved, and he will be released from arrest and restored to duty."

[P. 2] Action of the Judge Advocate General

On September 18, 1917, the foregoing record was referred to the Chief of the Bureau of Navigation for comment as to disciplinary features and with the following remarks:

> "1. Respectfully referred to the Chief of Bureau of Navigation for comment as to disciplinary features.
>
> "2. With reference to the second charge 'Disobeying the lawful order of his superior officer,' the first specification thereunder alleges, in effect, that the accused while in command of the U. S. S. *Ontario*, having been ordered by Lieutenant Damon E. Cummings, U. S. Navy, his superior officer, to consider himself under arrest and to turn over his command to Boatswain Swisher, U. S. Navy, did refuse to do so; and the second specification thereunder alleges that the accused, having been ordered by Lieutenant Cummings, his superior officer, to anchor his ship, did refuse to obey the said lawful order.
>
> "3. The following facts, so far as pertinent to the second charge, appear to have been established:
>
> "Lieutenant Cummings, the executive officer of the *Dubuque*, with a *Dubuque* working party, boarded the *Ontario* early in the morning of July 28, 1917, under verbal orders issued to him the evening before by Commander Thomas L. Johnson, the commanding officer of the *Dubuque* to take the *Patapsco* or *Ontario* and 'take charge of the net-laying opera-

[C. M. O. 58—1917]

tions the following day' (Record, p. 7, Ans. 3; p. 12, Ans. 4). Lieutenant Cummings had no written orders concerning his duties and he failed to inform the commanding officer of the *Ontario* of his orders or authority in the premises. The commander, Mine Force, Captain Reginald R. Balknap, U. S. Navy was present on board the *Dubuque* from sometime prior to midnight, July 27–28, until after the offenses are alleged to have occurred.

"4. There was no evidence introduced to show that Commander Johnson had any authority, either as senior officer present or otherwise, to issue orders which would, in effect, place his executive officer in command or in charge of the *Ontario*. Lieutenant Cummings did not report to the commanding officer of the *Ontario* on coming aboard nor inform him of his orders assumed authority in the premises. There is nothing to indicate that any serious emergency existed, and the conclusion of the medical officer that the commanding officer of the *Ontario* was not unfit for duty appeared to carry no weight, so far as indicated by the evidence. I am of the opinion that the orders issued by Lieutenant Cummings to the accused, as alleged in the first and second specifications of the second charge, were not the lawful orders of the superior officer of the accused within the meaning of article 4, paragraph 2 of the Articles for the Government of the Navy.

"5. Lieutenant Cummings, although the superior officer of the accused, was not vested with authority to issue the orders in question. Even had he been a superior officer so vested, he [P. 3] must have been known to be such by the accused to constitute the specific offense of disobedience of orders, as alleged (Winthrop, 2d ed, p. 891). 'No officer can place himself on duty by virtue of his commission or warrant alone' (R. 1047). 'The commanding officer is always responsible for the safe conduct of the ship' (R. 2081–5; C. M. O. No. 26–1916, p. 3). 'Officers entrusted with command of a vessel must have full command and precedence over all other officers' (R. 1062–a).

"6. In view of the above, it is recommended that the finding of the court on the second charge and the specification thereunder be set aside.

"7. Subject to the foregoing remarks the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Birney O. Halliwill, temporary, U. S. Navy, are in my opinion, legal."

ACTION OF THE BUREAU OF NAVIGATION

On September 24, 1917, the Bureau of Navigation placed the following endorsement on the record in the foregoing case:

"1. The Bureau concurs in the endorsement of the Judge Advocate General hereon.

2. The Bureau has carefully considered this case and is of the opinion that Ensign (T) Birney O. Halliwill (B) U. S. N., acted under great provocation and therefore recommends that the loss of numbers be remitted.

3. The Bureau concurs in the action taken by the Commander, Mine Force, sending a letter of reprimand to Lieutenant D. E. Cummings, U. S. N., for his conduct in the premises."

ACTION OF THE SECRETARY OF THE NAVY

"The foregoing endorsement of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, is approved; and in accordance with the recommendation of the Chief of the Bureau of Navigation the loss of numbers is remitted."

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[P. 10] ALIEN ENEMY: STATUS OF, FOR ENLISTMENT.

There is nothing in the laws of the United States or the regulations for the government of the naval service which prohibits the reenlistment into the Marine Corps of an alien who has declared his intention to become a citizen of the United States but whose naturalization may not, under the law, be consummated

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by reason of the fact that the country of which such alien is a subject is at war with the United States.

It is to be borne in mind in this connection, that whatever may be the desire and intention of such alien as to severing his relations with the country of his nativity (Germany) he is not a citizen of the United States; if captured by German forces while in arms against them he might be dealt with as a traitor; should he refuse battle when confronted by the enemy and thereupon be tried by a United States general court martial for such failure to engage the enemy, his resultant punishment might be made the basis of a legitimate complaint, at the close of the war, by the nation of which he is a subject (File No. 7657–488, J. A. G., Sept. 20, 1917).

ARREST: AUTHORITY OF ARMED GUARDS OF RADIO STATIONS TO MAKE.

It is lawful for an armed guard on duty at a naval radio station to arrest one who uniawfully photographs a naval radio station but does not enter upon such reservation, such arrest being made in order that the offender may not escape capture. An offender so arrested should be turned over to the Federal civil authorities (United States marshal or his representative) for further action by them. It would be not only entirely lawful but a part of the duty of him who makes such arrest to take possession of the photograph films, camera, and other things which are evidence of the commis [P. 11] sion of the offense, and to turn them over with the prisoner to the civil authorities aforesaid. This course is not only just as lawful but it is equally as necessary as it is for one arresting a burglar to seize the tools which are peculiarly the implements of his trade. In the performance of this duty it is proper and lawful for the guard making the arrest to use as much force, and no more, as may be necessary to accomplish the duty to be performed (File No. 12479–1000, J. A. G., Sept. 13, 1917).

CHIEF PETTY OFFICER: MAY BE PLACED IN CHARGE OF RECRUITING STATION.

It is lawful to place a chief gunner's mate in charge of a recruiting station of the Navy to which is attached an assistant surgeon, Medical Reserve Corps, and to hold such chief gunner's mate responsible for the discharge of all duties outside of the duties of the medical examining officer (File No. 11130–45, J. A. G., Sept. 7, 1917).

COMMISSION: EFFECT OF, AS TO VESTING OFFICE.

A second lieutenant in the Marine Corps is nominated by the President and confirmed by the Senate as a temporary first lieutenant in that corps under the act of May 22, 1917; his commission is duly signed, and is forwarded to, and is received by the appointee's commanding officer; subsequently to his appointment as a first lieutenant, as aforesaid, but prior to his receipt of notification of appointment and acceptance thereof, the appointee commits an alleged offense and is brought to trial by general court martial.

Upon the above stated facts, the conclusion is drawn that inasmuch as the appointment was to an office from which the appointee could be removed at the will of the President, the same, though complete when signed and sealed, may nevertheless be withheld and revoked by the Secretary of the Navy acting for the President. A case such as the foregoing is to be distinguished from one as to which the incumbent is not removable at the will of the President (File No. 26260–4837:1, J. A. G., Sept. 13–15, 1917).

DECORATIONS OF FOREIGN GOVERNMENTS: NOT TO BE WORN.

A person in the naval service of the United States may not wear "publicly exposed upon his person" a foreign decoration conferred upon him prior to his entry into such service (File No. 19245–57, Sec. Nav., Sept. 19, 1917).

Should a bill now pending before Congress be enacted, the wearing of a decoration as above mentioned would become lawful.

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MARINE CORPS RESERVE: AVAILABILITY FOR SERVICE IN GENDARMERIE.

Enlisted men of the Marine Corps Reserve, while in the active service of the United States pursuant to the call of the President, may be detailed to duty with the Haitien Gendarmerie if such [P. 12] detail is considered administratively desirable; their eligibility, however for such duty ceases when they are relieved or discharged from the active service of the United States (File No. 5526–33: 1, Sec. Nav., Sept. 18, 1917).

NATIONAL NAVAL VOLUNTEERS: POWER TO ADMINISTER OATHS BY OFFICERS OF.

An officer of National Naval Volunteers, commanding a vessel of the Navy, may lawfully administer oaths for purposes of the administration of naval justice and for other purposes of naval administration (File No. 19037–64. J. A. G., Sept. 7, 1917).

NAVAL AUXILIARY RESERVE: STATUS OF OFFICERS OF.

In case a vessel commanded by a lieutenant in the Regular Navy falls in with a vessel commanded by a lieutenant commander in the Naval Auxiliary Reserve the duties and responsibilities of senior officer present would devolve upon the lieutenant (commanding) in the Regular Navy, this situation growing out of the provision of the act of August 2, 1916, which limits the exercise of military command by officers of the Naval Auxiliary Reserve to ships to which they are attached "and in the Naval Reserve Auxiliary Service."

Visits exchanged between such officers under the conditions above predicted are of two kinds and are to be governed, under the law and regulations, by quite different rules. If the visit to be made is one of a ceremonial character only, it should be made by the junior (lieutenant, Regular Navy) upon the senior (lieutenant commander Naval Auxiliary Reserve): if, however, the visit is one made in conformity with the spirit of article I 1007 (3) it should be made by the subordinate (as to command status), viz, the lieutenant commander, Naval Auxiliary Reserve, upon the senior officer present (lieutenant, Regular Navy).

The Naval Auxiliary Reserve is a part of the Naval Reserve Force. Any lieutenant commander in the Naval Auxiliary Reserve, ranking as he does with lieutenant commanders of the Navy, is of superior rank to any lieutenant in the Navy. Inasmuch as the junior of two officers meeting is required to salute his senior first (R–1173), it follows that a lieutenant in the Regular Navy is obligated to salute first a lieutenant commander in the Naval Auxiliary Reserve (File No. 11130–44, J. A. G., Sept. 5, 1917).

RETIRED LIST: ENLISTED MEN, STATUS OF.

Enlisted men who have been transferred to the retired list and who have been called to active service under the provisions of the act of August 29, 1916, continue "on the retired list," although performing active duty, and they should not therefore be discharged from the enlistment in which they were serving when placed upon the retired list (File No. 7657–467: 1, Sec. Nav., Sept. 13, 1917).

[P. 13] SELECTIVE SERVICE LAW: OPERATION OF AS TO VOLUNTARY ENLISTMENT.

One who has been posted by his local board under the operation of the selective service law, but who enlists into the naval service subsequently to such posting, but prior to receiving actual notification of the same, will be discharged from the naval service in order that he may satisfy his obligations under such law (File No. 28798–125, J. A. G., Sept. 18, 1917).

C. M. O. 60—1917

[P. 1] Chief Gunner Charles B. Babson, United States Navy, was tried by general court martial, August 4, 1917, at the naval training station, Newport, R. I., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (four specifications, the third of which not proven).

Charge II.—Falsehood (one specification).

Sentence

"The court therefore sentences him, Chief Gunner Charles B. Babson, U. S. Navy, to be dismissed from the United States Naval Service."

Recommendation to Clemency

The following recommendation to clemency signed by four of the five members of the court was spread upon the record:

> "In consideration of his long length of service in the United States Navy, his efficiency reports, and the fact that in this service of nearly thirty-one years, he has never been convicted of any previous offense, we recommend Chief Gunner Charles B. Babson, U. S. Navy, to the clemency of the revising power."

Recommendation of the Judge Advocate General

The Judge Advocate General placed the following endorsement on the record in the foregoing case:

> "Respectively submitted with the information that this record and the three accompanying briefs in behalf of the accused, have received my most careful consideration and have been the subject of deep study in this office. As a result thereof, having in mind all the evidence and the statement of the accused, I am of the opinion that the proceedings, the findings on the second and third specification of the first charge, the finding on the first charge, and the sentence are legal. I recommend the approval thereof.
>
> "I am of the opinion that the evidence does not sustain the findings on the first specification of the first charge, on the [P. 2] specification of the second charge, and on the second charge; I therefore recommend that these findings be disapproved.
>
> "From a careful analysis of all the evidence, I am of the opinion that, although the act alleged in the fourth specification of the first charge is proven, the intent to defraud set forth therein is not established by the evidence, and I therefore recommend that the finding on this specification be also disapproved. However, in my opinion an intent to deceive by the act alleged therein is established from all the circumstances disclosed by the evidence.
>
> "Referred to the Chief of the Bureau of Navigation for comment as to disciplinary features."

Recommendation of Chief of the Bureau of Navigation

The Chief of the Bureau of Navigation placed the following endorsement on the record in the foregoing case:

> "Forwarded, concurring in the endorsement of the Judge Advocate General.
>
> "The Bureau recommends that the sentence of dismissal be mitigated to loss of $50.00 pay per month for a period of 12 months."

Action of Secretary of the Navy

The foregoing recommendations of the Judge Advocate General are approved. In view of the recommendation of the Bureau of Navigation the sentence of

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dismissal is mitigated to the loss of $50.00 pay per month for a period of twelve months.

C. M. O. 61—1917

[P. 1] Second Lieutenant Edward S. Chandler, United States Marine Corps, was tried by general court martial, August 29, 1917, at Port au Prince, Haiti, by order of the commanding officer First Provisional Brigade, United States Marine Corps, and acquitted of the following charge:

Charge I.—Conduct unbecoming an officer and a gentleman (three specifications).

Action in Revision

On September 13 the convening authority returned the case to the court for reconsideration of the findings and acquittal. The court, however, decided to adhere to its former finding and acquittal.

Action of the Convening Authority

The convening authority on September 18, 1917, approved the proceedings but disapproved the findings and acquittal in the foregoing case.

Recommendation of the Judge Advocate General

The Judge Advocate General of the Navy placed the following indorsement on the record in the foregoing case:

> "Respectfully referred to the Major General Commandant, U. S. Marine Corps, for comment, with the information that, in the opinion of this office, the proceedings, findings, and acquittal of the general court martial in the foregoing case of Second Lieutenant Edward S. Chandler, U. S. Marine Corps, are legal.
>
> "This office concurs in the action of the convening authority, believing that sufficient evidence was adduced to have justified a finding of guilty on the charge."

Recommendation of the Major General Commandant

[P. 2] The Major General Commandant of the Marine Corps, on October 5, 1917, returned the record in this case to the Department with the following endorsement:

> "1. This office concurs in the opinion of the Judge Advocate General that sufficient evidence was adduced in this case to have justified the finding of "Guilty" on the charge.
>
> "2. Lieutenant Chandler was appointed a second lieutenant in the Marine Corps for a probationary period of two years from August 30, 1916, and accepted this appointment, which is revocable at any time by the Secretary of the Navy during said period, October 20, 1916.
>
> "3. In view of the fact that this officer has been legally acquitted of the charge brought against him, it is not recommended that his appointment be now revoked, but I do recommend that he be reminded by the Department of the probationary nature of his present commission, and of the fact that ethically his actions which resulted in his court martial, were not such as is expected of an officer holding a commission in the Marine Corps."

Action of the Secretary of the Navy

The foregoing endorsement of the Judge Advocate General, concurred in by the Major General Commandant, U. S. Marine Corps, is approved.

The Major General Commandant is directed to prepare a letter for the signature of the Secretary and addressed to Lieutenant Edward S. Chandler, U. S. Marine Corps, reminding him of the facts set forth in paragraphs 2 and 3 of the Major General Commandant's first endorsement.

C. M. O. 63—1917

[P. 1] Gunner Richard J. Cosman, United States Navy, was tried by general court martial, on August 30, 1917, at the Navy Yard, Mare Island, Vallejo, Calif., by order of the Secretary of the Navy and found guilty of the following charge:

Charge I.—Scandalous conduct tending to the destruction of good morals (one specification).

SENTENCE

"The court therefore sentences him, Richard J. Cosman, gunner, United States Navy, to be dismissed from the United States naval service."

ACTION IN REVISION

The convening authority, on September 28, 1917, returned the record of the proceedings in the foregoing case to the court and directed that it reconvene for the purpose of reconsidering its sentence, which was regarded as totally inadequate for the offense found proved. The court thereupon substituted the following in place of the foregoing sentence:

> "The court therefore sentences him, Richard J. Cosman, gunner, United States Navy, to be dismissed from the United States naval service, and to be confined for a period of ten (10) years."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General, on October 16, 1917, recommended that the proceedings, finding, and sentence of the general court martial in the foregoing case be approved, but that the period of confinement be reduced to five years, which recommendation was concurred in by the Chief of the Bureau of Navigation.

ACTION OF THE SECRETARY OF THE NAVY

"The foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record is respectfully submitted to the President of the United States with the recommendation that the sentence, as mitigated, of the general court martial in the foregoing case of Gunner Richard J. Cosman, U. S. Navy, be confirmed."

ACTION OF THE PRESIDENT

On October 24, 1917, the President of the United States confirmed the sentence of the court as mitigated.

C. M. O. 64—1917

[P. 1] Assistant Paymaster Fred C. Craig, United States Navy, was tried by general court martial, April 13, 1917, at the Naval Station, Cavite, P. I., by order of the Commander in Chief, United States Asiatic Fleet, and found guilty of the following charges:

Charge I.—Embezzlement, in violation of article 14 of the Articles for the Government of the Navy (one specification).

Charge II.—Making false and fraudulent official reports in violation of article 14 of the articles for the Government of the Navy (two specifications).

SENTENCE

"The court therefore sentences him, Assistant Paymaster Fred C. Craig, United States Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of five (5) years, and to perform hard labor during said imprisonment."

[C. M. O. 64—1917]

ACTION IN REVISION

The convening authority on May 2, 1917, returned the record in the foregoing case, with the direction that the court reconvene for the purpose of correcting clerical errors and omissions and typographical errors in the record. On May 3, 1917, the court reconvened and complied with the directions of the convening authority.

ACTION OF THE CONVENING AUTHORITY

On May 15, 1917, the proceedings, findings, and sentence, and proceedings in revision, in the foregoing case were approved by the convening authority, but the period of imprisonment was reduced to three (3) years, and the record was referred, in conformity with article 53 of the Articles for the Government of the Navy, to the Secretary of the Navy for transmittal to the President.

[P. 2] RECOMMENDATION OF THE PAYMASTER GENERAL

On August 27, 1917, the Paymaster General of the United States Navy placed the following endorsement on the record in the foregoing case:

"1. The proceedings in this case have been given most careful consideration, and the testimony on both sides has been critically analyzed.

"2. The charges on which the accused was convicted were embezzlement of $10,000 Government money and knowingly rendering false and fraudulent returns.

"3. The proceedings were to some extent simplified by the acknowledgment of the accused that he did in fact receive the money for which he has failed to properly account, and this acknowledgment is substantiated by documentary evidence in the form of the accused's cashbook, check stubs, certified statement of his account with the United States Depository at Manila, and other miscellaneous papers admitted in evidence during the trial.

"4. There was left for determination by the court martial, therefore, the person or persons responsible for the theft. According to his own statements, the accused disclaimed any knowledge of the loss of this money until the charges were actually brought against him, repeatedly stating that he balanced the money in his charge up to and including the date on which he turned over the supply department of the *Monadnock* to his relief, P. A. Paymaster J. D. P. Hodapp, October 1, 1916.

"5. It is impossible to reconcile his statements disclaiming all knowledge of a shortage in his accounts with his statements made orally and in writing to Mr. Hodapp to the effect that he forgot to transfer $10,000 of Government funds to him on the date of his relief from duty on the *Monadnock*, stating further that he believed this money to be on deposit with the U. S. Depository at Manila. When upon inquiry of that depository he found that he did not in fact have this money to his credit, it must have been a strange attitude of mind which made him infer that he had correctly made transfer of all funds due his relief and conclude that everything was as it should be.

"6. He did not satisfactorily explain (or attempt to) what led him to say to Mr. Hodapp that he thought that he had short-transferred $10,000, and it can only be inferred that the basis for this statement was a guilty knowledge that his accounts were in fact short the amount in question.

[P. 3] "7. To further show that he must have known of this discrepancy in his accounts, there were introduced and admitted in evidence his cashbook, check stubs, and quarterly account current rendered for the first quarter (July 1 to September 30) 1917, the period during which the funds were stolen. By comparison of his cashbook and check stubs with the account current signed and rendered by him as a correct statement of his account, it is shown that, whereas checks Nos. 725517 and 725525 were drawn and cashed for ₱14,500 and ₱15,000 (exchanged for cash), but ₱4,500 and ₱5,000, respectively, was taken up on his account current, leaving $10,000 (for which he has been convicted of embezzlement) unaccounted for.

"8. At this juncture the complicity of Chief Yeoman Rohling forms a part of the proceedings and must be given consideration, because the accused in explanation of the false returns which he rendered stated that the account current rendered by him was made up without checking by him from the rough account current made for him by Rohling.

"9. If it could have been shown conclusively that the accused did without reference to another prepare this fraudulent account current, his guilt would have undoubtedly been established to the satisfaction of all concerned without further consideration of facts subsequently brought out. The proceedings were prolonged, however, on account of the interjection of this dead man's acts into the case; and, as his death precluded any statement found him, it becomes necessary to weigh the statements of the accused that the deceased was in fact responsible for the false figures appearing on the returns.

10. Months before the theft of the funds actually took place, the accused had repeated evidence of the unstable character of Chief Yeoman Rohling. Not only of his own knowledge but by direct statements to that effect made to him in person by Pay Clerk Flynn, was he made aware of the erratic mental attitude of this member of his office force who is shown on repeated occasions to have demonstrated his professional unfitness for the discharge of the routine duties assigned to him—so much so in fact that Pay Clerk Flynn stated to the accused that he had constantly to check all of his work, in which gross errors frequently occurred, to insure even ordinary accuracy.

"11. It must be assumed that the accused possessed at least average intelligence; and, from an experience of many years [P. 4] as an enlisted man and later as a commissioned officer known to be well qualified in the knowledge of his profession as a responsible officer of the Pay Corps, he must have acquired at least ordinary prudence. It is not logical to suppose that he could have delegated the most responsible part of his duties to a known incompetent in the person of Chief Yeoman Rohling, and it would be an absurd reflection on the accused's intelligence to accept his statement that he did in fact permit Rohling to make up the account current and that he used the figures without any check whatever. This procedure would not of course relieve the accused from absolute responsibility for the accuracy of the returns, but could be considered only as an effort to explain what in the light of the facts amounts to a self-indictment.

"12. Assuming that Rohling did have something to do with the preparation of these returns, it is pertinent to here invite particular attention to a phase of this case which appears to have escaped consideration in the proceedings. All acts, as contemplated in this case, must spring from preconceived motives; and it is but proper to inquire what possible reason could have influenced Rohling to deliberately falsify the rough return he is alleged to have made up for the accused. He certainly could not have known that his figures would be accepted without check; and, in view of the fact that the cashbook and check stubs of the accused did correctly record the amounts of all moneys received from Paymaster Orr by the accused and the two checks for ₱14,500, and ₱15,00, exchanged for cash by him, he (Rohling) must have known that a most casual examination would have detected the falsification. On the other hand, he well knew that the accused was responsible for the returns, and he accordingly had nothing to gain by endeavoring to have a false return rendered, since the records already in the possession of the accused amply attested the deficiency in cash when compared with the money on hand in his safe. Stated in a few words: *No amount or degree of mere paper falsification could possibly profit anybody anything*—the fact being, that, to actually accomplish a misappropriation of funds, there must be a physical withdrawing of the money itself; in view of which facts it is unthinkable that anybody who simply handled the papers without access to the funds could have any reason whatever for making a false return.

[P. 5] "13. If Rohling had taken any part in this defalcation, it would have plainly been to keep all knowledge from the accused rather than from the authorities who received the returns; and to successfully do this he had

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only to change the figures in the cashbook and check stubs so that when the accused balanced the cash from his records the shortage would not have been apparent.

"14. Nothing further would appear necessary to conclusively refute the statement of the accused to the effect that Rohling prepared the false return, and it must therefore appear that this was deliberately done by the accused for reasons that are obvious.

"15. Insofar as relates to Rohling's unusual and worried state of mind which ultimately led to his death by suicide, it seems but proper to emphasize (as is so clearly indicated in the record) that this condition of mind on his part, so well known to his associates in the supply office to exist, antedated the embezzlement of this money by a great many months; and the record shows that this abnormal mental condition was due to other causes, either fancied or real, and in no way connected with money matters.

"16. The money in the custody of the accused was kept in a safe, the combination of which was not even alleged in the proceedings to have been known to any other. While the safe was stated to have been left unlocked on two different occasions, each time the accused declared that he balanced the cash and found it correct.

"17. Embezzlement is difficult to prove by other than circumstantial and documentary evidence, as the conditions of theft are not conducive to proof by witnesses to the act; and, were guilt required to be otherwise proved, few indeed would pay the just penalty of violated and misplaced confidence.

"18. The evidence adduced in these proceedings in my opinion amply proves the charges, and I can see no reason why the findings should not be approved and the sentence of the court carried out as adjudged."

Action of the Secretary of the Navy

The Judge Advocate General referred the record in the foregoing case to the Chief of the Bureau of Navigation, with the opinion that the proceedings, findings, and sentence were legal. [P. 6] The Chief of the Bureau of Navigation recommended the approval of the proceedings, findings, and sentence in the foregoing case.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Assistant Paymaster Fred C. Craig, U. S. Navy, was respectfully submitted to the President of the United States, with the recommendation that the sentence be confirmed. The California State Prison at San Quentin, Calif., was designated as the place for the execution of so much of the sentence as relates to confinement at hard labor.

Action of the President

On October 25, 1917, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 66—1917

[P. 1] Assistant Surgeon Portor Norton, United States Naval Reserve Force, was tried by general court martial on September 7, 1917, on board the U. S. S. *Minnesota*, by order of the Commander of Battleship Force One, United States Atlantic Fleet, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Neglect of duty (one specification).

Sentence

"To lose fifty (50) numbers in his grade."

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RETURNED FOR REVISION

The convening authority, on September 18, 1917, returned the record of proceedings in this case to the court, with the following statement:

"The sentence of the court is incorrect in form as given by the Forms of Procedure, 1910, page 42, C. M. O. No. 1, 1913.

"The court after accepting the plea of guilty to the specification of the charge 'Drunk and unfit for duty,' permitted evidence to be introduced tending to show that he was not in the condition as stated in the specification (Q. 5, p. 3); the court was in error in admitting this evidence as the accused by his plea deprived himself of the benefit of a regular defense and could call witnesses and introduce evidence only as to previous good character or in extenuation of his conduct. (See Naval Digest, p. 222, par. 60.)

"In the written defense of Dr. Norton, he states that he received the telegram directing him to return at about 1 a. m., Sunday, August 26, which according to the specification was duly transmitted to the address left by him, at about 3.15 p. m., Saturday, August 25; that he intended taking the 10 a. m. train Sunday, and, certain stress is laid by him upon missing this train; no attention seems to have been given to the important fact that, having left an address for the purpose of permitting his immediate recall, he did not receive the message [P. 2] recalling him which was sent to that address until 10 hours after it was transmitted. This is an essential feature in the neglect of duty which he was charged with, and even had he succeeded in catching a train at about 10 a. m., Sunday, his neglect of duty would have been of too serious a nature under the conditions, to have been overlooked.

"The Force Commander after careful consideration is unable to concur with the court in the sentence of the loss of 50 numbers. The specification charged that the accused, an assistant surgeon in the United States Naval Reserve Force, having been granted two days' leave, subject to telegraphic recall, the United States then being in a state of war, the travel time between the address given by him and Base Ten, where the *New Hampshire* was at this time, being approximately three hours, on being recalled by telegram at or about 3 p. m., August 25, 1917, directing his immediate return, he not only failed to return until 28 hours after the telegram was transmitted (such time being approximately the expiration of the leave originally granted him), but when he did return he was drunk and unfit for duty.

"The court found that the accused was guilty of the above offenses, both of which are serious military offenses, even in time of peace. This sentence, even for an officer whose promotion depended on seniority, would be inadequate under existing conditions, but the sentence is manifestly inappropriate in the case of an officer on the reserve list. There is nothing in the law governing the promotion of reserve officers by which they are advanced by reason of seniority, therefore the sentence is of practically no effect (G. O. 231).

"The convening authority considers that an officer who, in time of war, thus disregards his obligations of duty and of decorum, and who in the face of important immediate orders, neglects to obey promptly a summons to return, and who returns drunk and unfit for duty, has proved himself too unreliable to be trusted to perform the important duties which his commission imposes, either in peace or in war.

"The court will reconvene for the purpose of reconsidering its sentence, as in the opinion of the Force Commander, it is entirely inadequate for the offense to which the accused has been found guilty.

[P. 3] "The further proceedings will be conducted in accordance with the provisions of articles 837 and 838, Navy Regulations, and upon the conclusion of such proceedings, the record will be returned."

SENTENCE IN REVISION

The court decided to revoke its former sentence, and to substitute therefor the following:

"The court therefore sentences him, Assistant Surgeon Portor Norton, United States Naval Reserve Force, to be dismissed from the United States naval service."

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ACTION OF THE CONVENING AUTHORITY

The convening authority on September 27, 1917, took the following action in the foregoing case:

"The proceedings and findings, subject to the remark made in the order of revision, are approved. The sentence is approved and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

ACTION OF THE SECRETARY OF THE NAVY

The record of this case was referred to the Chief of the Bureau of Navigation, who concurred in the action taken by the convening authority.

In conformity with article 53 of the articles for the Government of the Navy (section 1624 of the revised Statutes), the record of proceedings of the general court martial in the foregoing case of Assistant Surgeon Portor Norton, United States Naval Reserve Force, was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On October 26, 1917, the President of the United States confirmed the sentence of the court in the foregoing case.

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[P. 14] FRAUD: ESSENTIAL ELEMENTS OF.

In a case recently tried before a general court martial the department set aside as null and void the finding upon a charge of fraud, and upon the specification of said charge, because the latter contained no allegation that the transaction was fraudulent or involved the necessary element of an intent to deceive. In its review of the case the following comments were made:

"The general rule governing the essential element of fraud is 'that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. A maxim announced in an early English case, and ever since recognized as correct, is that fraud without damage or damage without fraud is not actionable, but where both concur an action of deceit will lie' (Cyclopedia of Law and Procedure, Vol. XX, p. 13).

"Under title of 'Fraudulent intent' the same authority recites: 'Moreover, the rule is well settled in most jurisdictions that an intent to deceive—or, as commonly expressed, a fraudulent intent—is an essential element of every actionable fraud, and that to support an action of deceit the existence of this intent must in some way be made manifest.'

"Paragraph 7 of article 14 of the Articles for the Government of the Navy recites: 'Who, being authorized to make or deliver · [P. 15] any paper certifying the receipt of any money or other property of the United States, furnished or intended for the naval service thereof, makes, or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, and with the intent to defraud the United States * * *'

"It is therefore apparent from the foregoing that 'intent to defraud' is the gravamen of the offense. Without it no criminality is attached, and, such being the case, it should be so set forth in the specification. Without this essential ingredient the specification is fatally defective" (File No. 26262–3281, Sec. Nav., Oct. 3, 1917).

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ACTING PAY CLERKS: REVOCATION OF APPOINTMENTS OF.

The Secretary of the Navy has power to terminate at will the appointments of acting pay clerks. The law provides the method of appointment, but does not attempt to control the tenure of office, except insofar as to give them the same status as other acting warrant officers, whose appointments are subject to revocation by the appointing power (File No. 6460–118, J. A. G., Oct. 23, 1917).

BAD-CONDUCT DISCHARGE: CONDITIONAL REMISSION OF.

A sentence of a summary court martial to a bad-conduct discharge was remitted by competent authority "on condition that the accused maintain a record satisfactory to his commanding officer for a period of six monhs." At the expiration of the six months, in the absence of any act on the part of the commanding officer indicating a revocation of the remission, it became final (File No. 26838–357, J. A. G., Oct. 20, 1917).

CHIEF PHARMACIST.

A chief pharmacist over 50 years of age is ineligible for appointment to the grade of assistant surgeon under the act of May 22, 1917, which specifically provides "that in making appointments authorized herein the maximum age limit shall be 50 years for * * * candidates for assistant surgeon * * *" (File No. 27213–13, J. A. G., Oct. 20, 1917).

[P. 16] COMMAND: SUCCESSION TO.

In a squadron of three vessels, of which one is commanded by a commander, National Naval Volunteers, and each of the other two is commanded by a captain, United States Coast Guard, the commander National Naval Volunteers should in contemplation of law, be ordered to command (File No. 28762–115: 4, J. A. G., Oct. 24, 1917).

DENTAL CORPS: PROMOTION OF ACTING ASSISTANT DENTAL SURGEONS.

The act of August 29, 1916, does not, of its own vigor, vest in an acting assistant dental surgeon, appointed under the act of August 22, 1912, the office of dental surgeon (permanent) with the right of advancement to the rank of lieutenant after five years' service (including service as an acting assistant dental surgeon). The power of appointment was left where it would have been without the specific provision made in this case, namely, in the President (File No. 13707–65: 1, Sec. Nav., Oct. 19, 1917).

ENLISTMENT: EXTENSION OF, WHEN TO BE COMPLETED.

A written agreement of extension of enlistment made by a marine who is held in service under section 1422, Revised Statutes, after his enlistment has expired, because such action is essential to the public interests, such agreement having been executed prior to the expiration of the time he is so held in service and of consequent discharge, but subsequent to the expiration of the four-year term of enlistment is valid and becomes effective from the expiration of the period during which he is so held in service and not from expiration of the four-year term (File No. 7657–505, J. A. G., Oct. 29, 1917).

ENSIGNS: AD INTERIM APPOINTMENTS OF TEMPORARY.

There is no legal objection to the issuance of ad interim appointments as temporary ensign to commissioned warrant officers, and others appointed under the act of May 22, 1917, during the recess of the Senate. Persons so appointed

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may be included in any redistribution of the commissioned personnel in the various ranks and grades as authorized by the acts of Congress approved August 29, 1916, and May 22, 1917 (File No. 26521–221, J. A. G., Oct. 12, 1917).

ESCAPE OF CIVIL PRISONER.

A prisoner lawfully confined by a military government may be held by the use of such measures as may be reasonable and necessary. The imposition of punishment, as a result of trial for escaping or attempting to escape, is a measure recognized by the United States Army (Manual of Interior Guard Duty. [P. 17] U. S. Army, 1914, par. 279) and also by the Navy. It is a matter within the sound discretion of the proper officers of the military government whether that government will punish prisoners properly within its custody through the intervention of a judicial tribunal for attempting to escape, or whether it will punish them by more summary proceedings for such attempt, or whether it will award no punishment whatever, but instead will depend upon the deterrent effect of the risk of injury while in flight, all or any of these measures being resorted to only in connection with jurisdiction acquired by lawful custody and to the end of preserving custody through the effect of example or as an adjunct to the enforcement of internal discipline. The head of a military government may establish provost courts and confer jurisdiction as he deems proper (File No. 16870–47: 90, J. A. G., 3 Oct., 1917).

FLEET NAVAL RESERVE: SERVICE INCLUDED FOR TRANSFER TO.

Under the act of May 22, 1917, enlisted men of the Navy and Marine Corps who have served as temporary warrant or commissioned officers, upon reverting to enlisted status, are entitled to count the time they have served as temporary commissioned or warrant officers in computing the service required under the act of August 29, 1916, to entitle them to transfer to the Fleet Naval Reserve (File No. 7657–445: 2, Sec Nav., Oct. 5, 1917).

GENERAL COURT-MARTIAL PRISONERS: RESTORATION TO DUTY ON PROBATION.

The Department has issued the following instructions to commanding officers of naval prisons:

1. The attention of commanding officers of all naval prisons is directed to article 121 of the "Manual for the Government of United States Naval Prisons," as amended by the change of June 16, 1917, providing as follows:

> "* * * In the case of men allowed to return to duty on probation the remainder of the prison sentence and the dishonorable discharge will be held in abeyance to be executed by their commanding officers at any time within the probationary period, provided their conduct is not satisfactory in every respect. * * *"

2. In order that men who are restored to duty on probation in accordance with the article quoted may not, upon reconfinement in case of misconduct while on probation, be deprived of the "good-time allowance" to which they became entitled under article 126 of the prison manual, commanding officers of prisons are directed to keep a careful and accurate conduct record of prisoners, to the end that such record may be noted by appropriate entry in current enlistment record showing the total [P. 18] period of approved confinement and the total period actually served in confinement together with good-time allowance forfeited, if any. If a prisoner has earned "a restoration" of any "portion of lost good time," the amount thereof will also be shown. In other words, it is desired that probationers who misconduct themselves and are returned to a naval prison will serve in confinement not longer than would have been the case had the confinement in the first instance been continuous and unbroken, it being the Department's intention that, where the conduct in prison is excellent, the prisoner should serve not longer that two-thirds of the approved confine-

ment. Accordingly, should a prisoner who has served with excellent conduct two-thirds of his approved confinement be restored to duty on probation, notation will be made upon the current enlistment record in such a case to show that his sentence has been fully executed so far as confinement is concerned.

3. The foregoing instructions are issued for the information and guidance of commanding officers in order that the cases of prisoners who are restored to duty on probation may, in case of reconfinement for misconduct, be uniformly dealt with in the administration of the article first above quoted (File No. 26267–178: 20, Sec. Nav., Nov. 7, 1917).

NAVAL DIGEST, 1916: ERROR IN.

Naval Digest, page 547, subparagraph 28, headed "Laws relating to retirement of officers of the Navy," cites an incorrect reference. The citation should be File No. 5460–32: 17, J. A. G., February 7, 1912, instead of File 26260–874, J. A. G., June 3, 1910, page 5.

The matter set forth under this heading is an excerpt from an opinion of the Judge Advocate General and must, in order to insure a complete understanding, be read in conjunction with the remainder of the context. The excerpt in question was quoted as being a part of an argument advanced to support the proposition that the laws "do not require that an officer must have served 45 years before he can be retired for age, but, on the contrary, indicate that there may be retirement for the single reason that an officer has attained the age of 62 years."

It is unfortunate that the excerpt from the above opinion which appears in the digest, standing by itself, would appear to support the further proposition that 45 years' service is, in itself and irrespective of age, a sufficient requirement for retirement.

The latter proposition was not sustained and is not sustainable.

It is regretted that Naval Digest, 1916, conveys an erroneous conclusion in the premises.

[P. 19] NAVAL RESERVE FORCE: PROMOTION WITHOUT EXAMINATION.

An enrolled member of the Naval Reserve Force who has been given a provisional rank may thereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination. While the provisions of the act of August 29, 1916, requiring a particular kind of formal examination for those "appointed or commissioned" as officers of the Naval Reserve Force, or "promoted" to a higher rank therein, might, if standing alone, be broad enough to cover provisional assignments, yet when read in connection with the other provisions they clearly connote only permanent appointments (Op. Atty. Gen., Oct 20, 1917; File No. 28550–123: 4, Sec. Nav., Oct 23, 1917).

PROBATION: MEN RESTORED FROM PRISON ON.

An action restoring a man to duty on probation with his return to prison to serve the unexecuted part of his sentence, or his summary dishonorable discharge, or both, hanging over him, does not preclude the man's trial by court martial for an offense committed while on probation, in case such appears preferable. Attention invited to C. M. O. No. 46, 1917, page 24.

PROMOTION: TEMPERAMENTAL QUALIFICATIONS FOR.

The fitness reports of an officer recently examined for promotion indicated that he "is irritable," that he "scolds and nags enlisted men," and that in dealing with enlisted men he "habitually expresses ill temper in his speech and manner." The Department took occasion to remark, in its action on the record of the examining board as follows:

> "Such temperamental characteristics are most seriously detrimental to success and efficiency, both of the individual and of the organization to

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which attached. They are regarded by the Department as strong evidence of disqualification for promotion, unless subsequent reports indicate their correction by the officer."

Inasmuch as the latter situation appeared to the Department to be true in the case of the officer being examined, the findings and recommendations of the board (that he be promoted) in this case were approved (File No. 26269–5156).

QUARTERS: ASSIGNMENT OF.

Article 4511 (1), Navy Regulations, requires that the quarters permanently designated in accordance with its terms be occupied by the officers specified. The regulation is to be construed in the light of service conditions and admits of a temporary shift of duties or an assignment to an acting office, as the exigencies of the service may require, without necessitating confusing and impractical changes of quarters (File No. 26806–147, J. A. G., Oct. 23, 1917).

[P. 20] RETIRED NAVAL OFFICER: EMPLOYMENT OF, BY COMPANY MAKING NAVAL SUPPLIES.

A retired officer of the Navy may not act as director of a company furnishing naval supplies or war material to the Government, such employment coming within the prohibition of the act of June 10, 1896, 29 Stat. 361 (File No. 9736–70, Sec. Nav., Oct. 19, 1917).

SELECTIVE SERVICE LAW: EXEMPTION UNDER, CEASES WHEN.

One who, having been posted by the local board of the community in which he registered under the selective service law of May 18, 1917, secures exemption in due form because of his employment at the time of posting as a mechanic in the Naval Gun Factory, and who thereafter quits his employment in said factory and enlists in the Navy, will be discharged therefrom and will be instructed to report to his local board in order that he may fulfill his obligations under the law aforesaid, his said exemption ceasing to be effective when the cause therefor is removed (File No. 28798–202, J. A. G., Oct. 31, 1917).

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[P. 1] Ensign Timothy F. O'Keefe, United States Naval Reserve Force, was tried by general court martial, on October 15, 1917, at the United States Navy Aeronautic Station, Pensacola, Fla., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (three specifications).

Charge II.—Drunkenness (three specifications).

Charge III.—Absence from station and duty without leave (three specifications).

SENTENCE

"The court therefore sentences him, Ensign Timothy F. O'Keefe, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In view of his inexperience in the service and of the need of trained officers in time of war, we recommend Ensign Timothy F. O'Keefe, U. S. Naval Reserve Force, to the clemency of the revising authority, and further

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recommend that sentence be suspended for a period of one year, depending on his good conduct."

ACTION IN REVISION

The convening authority, on October 20, 1917, returned the record in the foregoing case with the statement that the findings of the court were not properly recorded in that the entire findings were not in the handwriting of the judge advocate, and directed that the court reconvene for the purpose of properly completing the record. On October 27, 1917, the court reconvened and complied with the directions of the convening authority.

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who recommended the approval of the proceedings, findings, and sentence.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Timothy F. O'Keefe, [P. 2] U. S. Naval Reserve Force, were approved, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 2, 1917, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 69—1917

[P. 1] Assistant Surgeon Edward K. Tullidge, United States Naval Reserve Force, was tried by general court martial on September 4, 1917, on board the U. S. S. *Sacramento*, by order of the Commander Patrol Force, United States Atlantic Fleet, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (nine specifications).

Charge II.—Conduct to the prejudice of good order and discipline (two specifications).

FINDINGS

The court found the first, second, third, and fourth specifications of the first charge "proved in part"; the fifth and ninth specifications of the first charge "not proved"; the sixth, seventh, and eighth specifications of the first charge "proved"; and the accused "guilty" of the first charge; the first specification of the second charge "not proved"; the second specification of the second charge "proved"; and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Assistant Surgeon Edward K. Tullidge, United States Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of five (5) years, and to perform hard labor during such confinement."

ACTION OF THE CONVENING AUTHORITY

On September 26, 1917, the convening authority placed an endorsement on the record, mentioning irregularities in the record as follows: (1) That in three instances it failed to affirmatively show that "neither the court, judge advocate, nor [P. 2] the accused (counsel) had any further questions to ask the witness." (2) That it did not state for which party a member of the court was

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called as a witness, but that, not having been called as the first witness and the record sufficiently guaranteeing that he was a witness for the defense, this error lay in the keeping of the record and not in the actual facts of the case. (3) That it did show that one of the witnesses was asked to identify the accused. The endorsement of the convening authority further stated:

"Although the instances above are irregular they are not illegal. Under other circumstances the record might properly be returned to the court for proceedings in revision to correct the above-mentioned minor errors to conform with standard instructions for the keeping of the record. The errors do not indicate a carelessly kept record, however, as in such a long trial there were many chances to err, and the percentage of errors is agreeably small. In view of the small number of irregularities, in view of the importance of the case, and in view of the seriousness of the facts found proved the convening authority is of the opinion that every effort consistent with law and justice should be made to speedily bring these proceedings to the attention of the reviewing authority.

"The proceedings, findings, and sentence in the foregoing case of Assistant Surgeon E. K. Tullidge, United States Naval Reserve Force, are approved and in conformity with the provisions of article 53, Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

ACTION OF THE SECRETARY OF THE NAVY

The Judge Advocate General referred the record in the foregoing case to the Chief of the Bureau of Navigation, with the opinion that the proceedings, findings, and sentence were legal. The Chief of the Bureau of Navigation concurred in the action taken by the convening authority.

On November 8, 1917, the proceedings, findings, and sentence of the general court martial in the foregoing case of Assistant Surgeon Edward K. Tullidge, United States Naval Reserve Force, were approved, and the New Hampshire State Prison, at Concord, N. H., was designated as the place for the execution [P. 3] of so much of the sentence as relates to confinement at hard labor. In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) the record was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 10, 1917, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 71—1917

[P. 1] Assistant Surgeon Roscoe C. Carnal, United States Naval Reserve Force, was tried by general court martial on October 19, 1917, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Drunkenness on duty (one specification).

SENTENCE

"The court therefore sentences him, Roscoe C. Carnal, assistant surgeon United States Naval Reserve Force, to be put at the foot of the list of assistant surgeons of the United States Naval Reserve Force on the date of the approval of this sentence, and to lose fifty (50) dollars of his pay each month for a period of six (6) months."

RETURNED FOR REVISION

The convening authority on November 7, 1917, returned the record of the proceedings in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its sentence, which in the Department's opinion was totally inadequate for the very serious nature of the offense found proved.

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SENTENCE IN REVISION

The court decided to revoke its former sentence and to substitute therefor the following:

"The court therefore sentences him, Roscoe C. Carnal, assistant surgeon United States Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who recommended the approval of the proceedings, findings, and sentence in revision.

[P. 2] The proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Assistant Surgeon Roscoe C. Carnal, U. S. Naval Reserve Force, were approved, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 Revised Statutes) the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 22, 1917, the President of the United States confirmed the sentence of the court in the foregoing case.

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[P. 15] CHARGES AND SPECIFICATIONS:

(1) DESERTION IN TIME OF WAR.

(2) NEGLECT OF DUTY.

(3) STEALING AND SELLING GOVERNMENT PROPERTY ARE DISTINCT OFFENSES, AND MAY BE SEPARATELY CHARGED.

1. Although there is some authority for considering desertion as a continuing offense, yet, as a matter of policy and without reference to the legal aspects of the question, it is not desired that the offense of desertion be charged as having been committed in time of war unless the absence of the man so charged began after the declaration of war (G. C. M. Rec. No. 34963).

2. A specification drawn under the charge of neglect of duty, which avers simply that an accused "having (at a certain time) been regularly posted as a sentinel (on a certain post) did then and there neglect and fail to perform his duty as sentinel on said post," without setting forth the material facts constituting the alleged neglect, is fatally defective (see sec. 62, Naval Courts and Boards; G. C. M. Rec. No. 35544).

3. Article 14 of the Articles for the Government of the Navy, section 8, specifies "stealing" property of the United States, furnished and intended for the naval service thereof, as a separate and distinct offense from "wrongfully and knowingly selling" same. The preferring, therefore, of a charge of "selling" in conjunction with a charge of "stealing" the same articles of property of the United States does not involve a duplication of charges (G. C. M. Rec. No. 35291).

CRIMINAL INTENT: IN CASE INVOLVING THE STEALING OF PROPERTY.

The contention of an accused, charged with stealing Government property, to the effect that he had appropriated the property in question in good faith as the equivalent of a sum he had previously contributed [P. 16] out of his personal funds to make good a supposed shortage in accounts which did not in fact exist, does not negative the criminal intent necessary to sustain the charge, even though such contention is supported by the evidence. While there is authority for holding that when a person takes goods in the bona fide belief that he has a claim thereto, whether he has any claim either in law or in fact,

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the felonious intent necessary to constitute a crime is lacking, yet, in order to benefit from this principle of law, it is necessary that the claim under which a party acts must be a claim of ownership or right to possession to the specific thing, the appropriation of which is charged (18 A. and E. Encyc. of Law, pp. 523, 524; G. C. M. Rec. No. 35291).

VENEREAL DISEASE: CONCEALMENT OF.

In several recent summary court-martial cases, involving the offense of concealment of venereal disease, great diversity of wording of specifications has been noted.

The following form, containing all allegations essential to charging this offense, will promote uniformity, and it is desired that it hereafter be followed:

Specification.—In that A. B., seaman, U. S. Navy, serving on board the U. S. S. ------, well knowing that he, the said A. B., was suffering from a contagious venereal disease, did, on or about November 9, 1917, on board said ship, conceal the presence of the said disease by failing to report same to the medical officer of the said ship, and did continue to so conceal said disease until on or about November 19, 1917, when the presence of said disease was disclosed by examination of the said A. B. for transfer (or as the case may be) (File 7657–390:16).

FILIPINOS: NATURALIZATION OF.

Engracio Bautista, a Mestizo, who was *born an alien* with respect to the United States, on the island of Luzon in 1888, served two enlistments in the United States Navy with honorable discharge in each case, and then, while serving under a third enlistment, filed a petition for naturalization in the United States District Court for the Northern District of California, Southern Division, which was granted by Hon. William W. Morrow, circuit judge, in a well-considered decision holding, in substance, as follows:

[P. 17] Section 30 of the naturalization act of June 29, 1906 (34 Stat. 596, 606), extends the applicable provisions of the naturalization laws of the United States to all persons not citizens "*who owe permanent allegiance to the United States.*"

On the passage of this act there were only two classes of Filipinos who *owed permanent allegiance to the United States*, viz: (1) Peninsula Spaniards, that is to say, *natives of Spain*, who within one year from the date of the treaty which ceded the Philippine Islands to the United States had not elected to preserve their allegiance to the Crown of Spain; and (2) natural-born Filipinos. The first of the above were eligible to citizenship in the United States under section 2169, Revised Statutes, but the second were not, and it was to make them eligible that the above act was passed. The government of the islands never had authority to naturalize aliens. Therefore, the aliens who resided in the islands at the date of that treaty continued to owe their permanent allegiance to the country of which they were subjects, and owed only temporary allegiance to the United States. The permanent allegiance they owed to their respective countries was not dissolved by the treaty ceding the Philippines to the United States as was the case of the natural-born Filipinos, and they were therefore not included in the provisions of section 30 above referred to. In other words, the limitation of the right of naturalization in the United States under section 30 to those only who owe permanent allegiance to the United States, excludes aliens born elsewhere than in Puerto Rico and in the Philippine Islands, unless eligible under section 2169, Revised Statutes, which provides that "the provisions of this title (naturalization) shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent."

The act of June 30, 1914 (38 Stat. 392), under which this petition for naturalization as an alien was filed, provides:

> "Any alien of the age of twenty-one years and upward who may, under existing law, become a citizen of the United States, who has served or may hereafter serve for one enlistment of not less than four years in the United States Navy * * *, and who has received therefrom an honor-

able discharge * * * with recommendation for reenlistment, * * * shall be admitted to become a citizen of the United States upon his petition without any previous declaration of his intention to become such, and without proof of residence on shore, and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof from naval * * * sources of such service: *Provided*, That an honorable discharge from the Navy, * * * with recommendation for reenlistment, shall be accepted as proof of good moral character: *Provided further*, That any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions."

[P. 18] If the laws of naturalization are to be construed in accordance with the uniform rule required by the Constitution of the United States, we must hold that Congress intended the foregoing act of June 30, 1914, to apply to *aliens by birth* who, possessing the other necessary qualifications of age, character, and service, may under existing law become citizens of the United States (File 26252–124: 1).

OFFICERS FOR ENGINEERING DUTY ONLY: WHEN ADDITIONAL NUMBERS IN GRADE.

Officers assigned to engineering duty only, under the act of August 29, 1916, do not, upon promotion to a grade below that of commander, become additional numbers in grade. It is only upon promotion to the grade of commander that they become additional numbers in grade and are thereafter to be carried as additional numbers (File 28687–24, J. A. G., Nov. 16, 1917).

RECEIVING MILITARY EQUIPMENT IN PLEDGE: A PUNISHABLE OFFENSE.

In a recent case in the United States District Court for the Western District of Washington, Northern Division, the proprietors of a pawnshop received in pawn the overcoats issued to certain privates in the United States Marine Corps. They were indicted, tried, and convicted under section 5438, Revised Statutes of the United States, which provides as follows:

"* * * every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars" (File 26804–10).

SURGICAL OPERATIONS: WHEN COMPELLABLE.

In reply to questions presented by the Bureau of Medicine and Surgery as to the propriety of ordering a person in the naval service to submit to an operation and as to the consequences of a refusal to comply with such an order, the opinion of the Judge Advocate General was as follows:

"One in the naval service may not, against his will, be ordered to submit to an operation which is dangerous to life or limb, whereas he may be ordered to submit to an operation which would correct a condition which destroys his usefulness, when such operation may [P. 19] fairly be said, by a responsible medical officer, to be of such a character as not to endanger the life or limb of the patient, under the conditions existing at the time of the operation or under the conditions which were believed then to exist and which an experienced medical officer would, in the exercise of due care, be justified in believing to exist. If, as a matter of fact, a disability results from an incident of the service, and is of such serious character that, under

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the circumstances indicated above, a person in the service may properly decline to be operated upon, it would seem to follow obviously that such person is entitled to a finding of 'in line of duty.' It seems to follow equally clearly that where one may properly be ordered to submit to operation, as above set forth, and is punishable for failure so to submit, the notation of record 'not in line of duty, due to his own misconduct,' correctly reflects the facts. Should the disability in question be a 'sickness or disease' continuing to exist as a result of his failure to submit to operation, then it would appear that the loss of pay prescribed by the act of August 29, 1916, would properly attach" (File 7036–382, J. A. G., Nov. 9, 1917).

TEMPORARY AND PERMANENT ADVANCEMENTS: STATUS OF STAFF OFFICERS OF PERMANENT TENURE IN RELATION THERETO, UP TO AND INCLUDING THE RANK OF LIEUTENANT COMMANDER.

As there is no fixed number in the lower ranks of the staff corps, Congress, in the act of August 29, 1916 (39 Stat. 576), provided that they "shall be advanced in rank up to and including the rank of lieutenant commander with the officers of the line with whom or next after whom they take precedence under existing law." There appears to be no legal authority for not applying this rule with equal force to both permanent and temporary officers, since the only difference between the permanent and temporary officers of the Navy is in their tenure of office. Accordingly, a staff officer, below the rank of lieutenant commander, whether permanent or temporary, is entitled to advancement in rank with the line officer with whom or (if no line officer was appointed on the same day) next after whom he was appointed, irrespective of whether such line officer holds a permanent or temporary appointment. If, however, a staff officer of permanent tenure, below the rank of lieutenant commander, is given a temporary appointment in the next higher grade, his permanent office is none the less preserved and he is entitled, under the act of May 22, 1917, to receive the "rank, pay, and allowances" that he would have received except for the passage of said act. Accordingly, he would be entitled to permanent advancement in rank with the permanent officer of the line with or next after whom he was appointed (File 28687–23, J. A. G., Nov. 19, 1917).

[P. 20] TEMPORARY APPOINTMENT: OF OFFICER OF NATIONAL NAVAL VOLUNTEERS.

An officer of the National Naval Volunteers may be given a temporary appointment as an ensign of the Regular Navy, under the act of May 22, 1917, without being required to sever his connection with the National Naval Volunteers upon the acceptance of such temporary appointment. However, an officer of the National Naval Volunteers, appointed a temporary ensign in the Navy, can receive no compensation except under his appointment as a temporary officer in the Navy (File 26521–221:1, J. A. G., Nov. 22, 1917).

TEMPORARY APPOINTMENT: OFFICER HOLDING SAME DOES NOT LOSE RANK UPON RECEIVING PERMANENT COMMISSION.

An officer of the Navy holding a temporary appointment in a certain grade will, upon being found qualified and given a permanent commission in such grade as of a later date, take rank in such grade as from the date of his temporary commission in same, and not from the date of his later permanent commission (File 11130–47, J. A. G., Nov. 28, 1917).

TEMPORARY APPOINTMENT IN REGULAR NAVY: OF MEMBER OF NAVAL RESERVE FORCE.

In the case of a chief pharmacist's mate in the Fleet Naval Reserve, who was appointed a pharmacist (temporary) in the Regular Navy under the act of May

[C. M. O. 73—1917]

22, 1917, the Judge Advocate General was of the opinion that he should be discharged from the Naval Reserve Force, and that he is not entitled to retainer pay after the date of his appointment as pharmacist (temporary) in the Regular Navy (File 28550-169, J. A. G., Nov. 13, 1917).

C. M. O. 73—1917

[P. 1] Paymaster John W. Morse, United States Navy, was tried by general court martial on October 15, 1917, at the Navy Yard, New York, by order of the Secretary of the Navy, on the following charges:

Charge I.—Embezzlement, in violation of article 14 of the Articles for the Government of the Navy (three specifications).

Charge II.—Culpable negligence and inefficiency in the performance of duty (eight specifications).

Findings

The court found the specifications of the first charge "proved," and the accused "guilty" of the first charge; the first, second, third, fifth, sixth, seventh, and eighth specifications of the second charge "proved," the fourth specification of the second charge "not proved," and the accused "guilty" of the second charge.

Sentence

"The court therefore sentences him, Paymaster John W. Morse, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following recommendation to clemency, signed by four of the seven members of the court, was spread upon the record:

> "In consideration of the fact that the Government suffered no financial loss, and believing the accused to have been the victim of unscrupulous subordinates, we recommend Paymaster John W. Morse, United States Navy, to the clemency of the revising power."

Recommendation of the Chief of the Bureau of Supplies and Accounts

The record of the proceedings in the foregoing case was referred to the Chief of the Bureau of Supplies and Accounts, who recommended that clemency be shown if the sentence of the court could be mitigated so as to operate to retain the accused in his present grade with a substantial loss of numbers.

[P. 2] Recommendation of the Chief of the Bureau of Navigation

The Chief of the Bureau of Navigation, on November 26, 1917, recommended that the sentence of the court be mitigated to a loss of fifty (50) numbers in the grade of the accused in view of the fact that the charges on which the accused was found guilty involved technical embezzlement and carelessness only.

Action of the Secretary of the Navy

The proceedings and findings of the general court martial in the foregoing case of Paymaster John W. Morse, U. S. Navy, are approved; but in view of the recommendation of the Chief of the Bureau of Supplies and Accounts and of the Chief of the Bureau of Navigation, the sentence is mitigated to a loss of fifty numbers in the grade of paymaster, and, as thus mitigated, is approved. He will be released from arrest and restored to duty.

Remarks

It was noted in the foregoing case that the court found the fourth specification of the second charge "not proved." The said specification alleged that the accused did "neglect and fail to properly supervise and inspect the keeping of the accounts for the said stores by the office force under his * * * charge,

[C. M. O. 77—1917]

through which neglect and failure, false and fraudulent entries and overcharges on account of the stores alleged to have been furnished to members of the crew of said ship, amounting to one thousand two hundred twenty-five dollars and twenty-three cents, or thereabouts, were made on the pay roll of the said ship for the fourth quarter of the fiscal year nineteen hundred and seventeen * * *."

If, as seems probable, the court based its finding, as aforesaid, upon the fact, as shown by the evidence, that the false and fraudulent entries were made upon the rough pay roll, when the specification simply alleged that such entries were made on the pay roll, and therefore concluded that entries made on the rough pay roll were not entries on the pay roll as alleged, the court erred in its conclusion. The rough pay roll is the pay roll up to the end of the quarter, when what is known as the smooth pay roll is prepared for forwarding to the Auditor. The false and fraudulent entries upon the rough pay roll, therefore, were false and fraudulent entries upon the pay roll, as alleged.

C. M. O. 74—1917

[P. 1] Lieutenant (junior grade) John D. Edwards, United States Navy, was tried by general court martial on November 12, 1917, on board the U. S. S. *Montana*, by order of the Commander, Cruiser Force, United States Atlantic Fleet, on the following charge:

Charge.—Conduct unbecoming an officer and a gentleman (three specifications).

Findings

The court found the first specification of the charge "proved"; the second specification "proved in part"; the third specification "not proved"; and the accused "guilty" of the charge.

Sentence

"The court therefore sentences him, Lieutenant (junior grade) John D. Edwards, U. S. Navy, to be dismissed from the United States naval service."

Action of the Convening Authority

The convening authority, on November 26, 1917, approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and in conformity with article 53 of the Articles for the Government of the Navy referred the record to the Secretary of the Navy for transmission to the President.

Recommendation of the Chief of the Bureau of Navigation

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on December 8, 1917, recommended that the sentence be held in abeyance for one year, with the object of the final remission of the sentence, provided that during this time the accused makes proper and satisfactory adjustment of his financial difficulties.

[P. 2] Action of the Secretary of the Navy

On December 12, 1917, the Secretary of the Navy placed the following endorsement on the record in the foregoing case:

> "In accordance with the recommendation of the Bureau of Navigation further action in this case is withheld for a period of one year, with a view to remitting the sentence, provided Lieutenant Edwards makes proper and satisfactory adjustment of his financial obligations during said period.
>
> "He will be released from arrest and restored to duty."

C. M. O. 77—1917

[P. 1] Lieutenant Commander Frank C. Martin, United States Navy, was tried by general court martial on November 26, 1917, on board the U. S. S. *Minnesota*, by order of the Commander in Chief, United States Atlantic Fleet, and found guilty of the following charge:

Charge.—Culpable inefficiency in the performance of duty (five specifications).

[C. M. O. 78—1917]

SENTENCE

"The court therefore sentences him, Lieutenant Commander Frank C. Martin, U. S. Navy, to lose twenty-five (25) numbers in his grade."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on December 8, 1917, approved the proceedings, findings, and sentence in the foregoing case of Lieutenant Commander Frank C. Martin, U. S. Navy, subject to the remark that the sentence was considered inadequate to the offense found proved, but that, on account of the difficulty and time necessary to reconvene the court for reconsideration of the sentence, it was approved; and directed that the accused, having been released from arrest under the provisions of article 1417 (4), U. S. Navy Regulations, 1913, be unconditionally restored to duty.

CONCURRENCE OF THE SECRETARY OF THE NAVY

The record of the proceedings in the foregoing case was referred to the Chief of the Bureau of Navigation, who concurred in the action of the convening authority.

The Secretary of the Navy concurs in the action and views of the convening authority.

C. M. O. 78—1917

[P. 1] Pay Clerk Roy M. S. Hartshorn, United States Navy, was tried by general court martial, on October 6, 1917, at the Navy Yard, New York, by order of the Secretary of the Navy, on the following charges:

Charge I.—Culpable negligence and inefficiency in the performance of duty (eight specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (four specifications).

Charge III.—Knowingly and willfully misappropriating and applying to his own use and benefit money of the United States intended for the naval service thereof (three specifications).

FINDINGS

The court found the first, second, third, and fourth specifications of the first charge "proved," the fifth, sixth, seventh, and eighth specifications of the first charge "not proved," and the accused "guilty" of the first charge; and the specifications of the second and third charges "proved," and the accused "guilty" of the second and third charges.

SENTENCE

"The court therefore sentences him, Pay Clerk Roy M. S. Hartshorn, U. S. Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of five (5) years, and perform hard labor during said imprisonment."

ACTION OF THE SECRETARY OF THE NAVY

On November 26, 1917, the Secretary of the Navy placed the following endorsement on the record in the foregoing case:

> "As recommended by the Judge Advocate General, concurred in by the Chief of the Bureau of Supplies and Accounts and [P. 2] the Bureau of Navigation, the proceedings, findings, and sentence in the foregoing case of Pay Clerk Roy M. S. Hartshorn, U. S. Navy, are approved. The recommendation made to remit the hard labor adjudged in the sentence is not approved, in view of the fact that such means the usual labor which all prisoners are expected to perform.
>
> "In conformity with article 53 of the Articles for the Government of the Navy (sec. 1624 of the Revised Statutes), the record is respectfully sub-

[C. M. O. 78—1917]

mitted to the President of the United States with the recommendation that the sentence be confirmed."

ACTION OF THE PRESIDENT

On December 15, 1917, the President of the United States confirmed the sentence of the court in the foregoing case; and accordingly the Secretary of the Navy, on December 17, 1917, designated the New Hampshire State Prison, Concord N. H., as the place of confinement.

REMARKS

In proving that through the neglect and failure of the accused to properly verify and check certain entries on the pay roll, false and fraudulent entries and overcharges were made, the prosecution called two witnesses. Both testified in a very general way to the existence to shortages; the one that his audit had developed irregularities, stating the amount to the best of his recollection, and that the total amount of clothing charges on the pay roll for the various quarters differed from the total amount as shown by the clothing receipts; but in no manner was he specific.

The counsel for the accused objected and asked that this answer be stricken out on the ground that the witness has been permitted to state facts from his memory, when it can be shown that the best evidence is the pay roll, which should have been put in evidence.

The other witness testified, over objection of counsel for the accused, that he also made an audit for purpose of ascertaining the correctness of the clothing accounts, and that as result of certain comparisons and summing up of clothing receipts, and making correct entries on pay roll from clothing receipts, different methods pursued produced different conclusions; and also that investigations covering other periods were, by hurried comparisons, [P. 3] made, and when results of same were requested, counsel objected on the grounds that, witness having stated that his examination was hurried and from his own testimony was not accurate nor absolute; and therefore, the papers, accounts, and books being the best evidence, should be produced against the accused. This objection was also overruled by the court, and the witness was thus allowed to state what were no more nor less than his conclusions derived from a hurried examination.

The objections made by counsel were valid. The witnesses were permitted to express conclusions they had reached as the result of certain examinations and investigations made, substituting their judgment for that of the court, which alone was competent to reach conclusions after proper evidence had been presented. The pay rolls in this case would have been the best evidence.

One of the three principal rules governing the admission of testimony is that "the best evidence must be produced of which the case is susceptible": that is, where the evidence actually offered indicates of itself the existence of higher evidence, for which it is clearly only a substitute, the substitutional evidence is incompetent and not to be admitted if objected to. (Winthrop's Military Law and Precedents, pp. 482 and 486; Wigmore on Evidence, vol. II, sec. 1230.)

In the Department's opinion this evidence should have been excluded from the record, and the court erred in admitting it.

As, however, the competent evidence before the court, including the testimony of the accused while on the stand as a witness, clearly indicated that the accused was a party to the making of false and fraudulent entries and overcharges on the pay roll; that he had direct charge of such pay rolls and was responsible for their correctness; and that by his neglect and failure to properly check and verify the same, the aforementioned false and fraudulent entries were allowed to stand during each of the quarters mentioned, and that by reason of such he was guilty of culpable negligence and inefficiency in the performance of his duty as charged.

So far as the amounts of fraudulent entries and overcharges alleged in the first four specifications of this charge are concerned, such were, undoubtedly, not proved. To have done so would have required introduction of all the pay rolls and accounts covering the periods involved, together with their substan-

tiating vouchers, as well as an exhaustive audit, consuming [P. 4] considerable time and expense, none of which was essential, as the amount or extent of the transactions was not in issue and not material in sustaining the charge as laid.

The accused through his counsel raised the question that as his client had testified he had not profited financially by the transactions involved, such was inconsistent with his plea of guilty to the third charge and specifications thereunder.

Careful consideration was given this contention, and no inconsistency discovered which might properly be considered as being in conflict with the plea offered.

The testimony referred to is clearly contradicted and at variance with his other statements on the stand, which later showed that, as alleged in the first specification, he actually financially profited, in that the money was used to make good a shortage of his own which he would eventually have been called upon to pay, and in the others that he benefited by giving the money to another to save himself from exposure. It is therefore held that there was no just ground for the contention stated.

C. M. O. 80—1917

[P. 1] Ensign Olton R. Bennehoff, United States Navy, was tried by general court martial on November 30, 1917, on board the U. S. S. *Louisiana*, by order of the Commander, Battleship Force One, United States Atlantic Fleet, and found guilty of the following charge:

Charge.—Culpable inefficiency in the performance of duty (one specification).

Sentence

"The court therefore sentences him, Ensign Olton R. Bennehoff, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unaminous recommendation to clemency was spread upon the record:

> "In consideration of the short time that he has been in active service, to his training at the Naval Academy regarding measures taken to safeguard confidential publications, and to the fact that no proper place was available to him on board ship to safeguard the Battle Signal Book, we recommend Ensign Olton R. Bennehoff, U. S. Navy, to the clemency of the reviewing authority."

Action of the Convening Authority

The convening authority on December 9, 1917, placed the following endorsement on the record in the foregoing case:

> "The proceedings, finding, and sentence of the general court martial in the foregoing case of Ensign Olton R. Bennehoff, U. S. Navy, are approved.
>
> "In view, however, of the unaminous recommendation to clemency, the sentence is reduced to the loss of one hundred (100) numbers in his grade. He will be released from arrest and restored to duty."

C. M. O. 81—1917

[P. 1] Assistant Surgeon Franklin T. Bower, United States Navy, was tried by general court martial on October 16, 1917, on board the U. S. S. *Brooklyn* by order of the Commander in Chief United States Asiatic Fleet, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (one specification).

Charge II.—Assaulting and striking his commanding officer while in the execution of the duties of his office (one specification).

Charge III.—Resisting arrest (one specification).

[C. M. O. 82—1917]

FINDINGS

The court found the specification of the first charge "proved" and the accused "guilty" of the first charge; the specification of the second charge "proved in part" and the accused "guilty" of the second charge; and the specification of the third charge "proved" and the accused "guilty" of the third charge.

SENTENCE

"The court therefore sentences him, Assistant Surgeon Franklin T. Bower, U. S. Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on November 1, 1917, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Assistant Surgeon Franklin T. Bower, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

[P. 2] OPINION OF THE JUDGE ADVOCATE GENERAL

On December 11, 1917, the Judge Advocate General placed an indorsement on the record in the foregoing case that the proceedings, findings, and sentence were legal, subject to the opinion that the court erred in deciding to act contrary to the rulings laid down in the Naval Digest, 1916, page 643, articles 11, 12, and 13, in allowing the wife of the accused to testify in his behalf. The findings indicated, however, that the court was not influenced by the improper testimony.

ACTION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The Chief of the Bureau of Navigation, on December 20, 1917, concurred in the action taken by the convening authority.

ACTION OF THE SECRETARY OF THE NAVY

On December 21, 1917, the Secretary of the Navy approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Assistant Surgeon Franklin T. Bower, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On December 25, 1917, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 82—1917

[P. 1] Assistant Surgeon Samuel S. Markell, United States Naval Reserve Force, was tried by general court martial on October 26, 1917, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charges:

Charge I.—Leaving station before being regularly relieved (two specifications).

Charge II.—Conduct to the predjudice of good order and discipline (one specification).

Charge III.—Disrespectful in language and deportment to his superior officer while in the execution of his office (one specification).

FINDINGS

The court found the specifications of the first charge "proved" and the accused "guilty" of the first charge, the specification of the second charge "proved" and the accused "not guilty" of the second charge, and the specification of the third charge "proved" and the accused "guilty" of the third charge.

[C. M. O. 82—1917]

SENTENCE

"The court therefore sentences him, Assistant Surgeon Samuel S. Markell, U. S. Naval Reserve Force, to be dismissed from the United States Naval Reserve Force and from the United States naval service."

ACTION IN REVISION

The Department, on November 14, 1917, returned the record of the proceedings in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its findings upon the second charge and specification. The court having gone on record as finding the charges in due form and technically correct, it thereby asserted that the facts alleged in the specification of the second charge supported the second [P. 2] charge, and the finding of the specification proved and the accused not guilty of the charge was therefore inconsistent. When an accused is found not guilty of a charge, the explicit statement should immediately follow that the court acquits the accused of the charge (Naval Digest, 1916, p. 242, par. 63).

The court reconvened on November 17, 1917, and decided to revoke its former finding upon the second charge and substituted therefor a finding of the specification of the second charge "proved" and the accused "guilty" of the second charge.

The Department, on November 21, 1917, again returned the record of proceedings in the foregoing case to the court and directed that the court reconvene for the purpose of correcting the record if the following error was merely clerical: The record failed to indicate whether or not two documents which modified the precept, one appointing three officers as members of the court vice three relieved, and the other designating a new judge advocate, were read as a part of the proceedings by the judge advocate, although copies of these documents were properly attached to the record.

The court reconvened on November 23, 1917, and complied with the direction of the Department.

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on December 14, 1917, recommended the approval of the proceedings, findings, and sentence.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Assistant Surgeon Samuel S. Markell, U. S. Naval Reserve Force, were approved on December 20, 1917, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On December 25, 1917, the President of the United States confirmed the sentence of the court in the foregoing case.

REMARKS

It was noted in the foregoing case that during the cross-examination of the principal witness for the prosecution the court [P. 3] ruled to exclude evidence tending to show bias or prejudice of the witness against the accused on the ground that prejudice of the witness had nothing to do with the charges and specifications. It is well settled that such evidence is admissible, and the court in its ruling committed a grave error. If the prosecution had been dependent for a conviction upon the testimony of this witness, the error would have been fatal.

A Department telegram relieving one judge advocate and appointing another merely designates the latter to act in the capacity named. It is a modification of the precept, but does not carry with it any authority to make an erasure and substitution in the original document.

[C. M. O. 87—1917]

C. M. O. 84—1917

[P. 1] Boatswain Anthony E. Freitas, United States Naval Reserve Force, was tried by general court martial on November 28, 1917, at the Naval Station, Newport, R. I., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Culpable inefficiency in the performance of duty (one specification).

Charge II.—Neglect of duty (one specification).

Charge III.—Leaving station before being regularly relieved (one specification).

Charge IV.—Conduct to the prejudice of good order and discipline (one specification).

Sentence

"The court therefore sentences him, Boatswain Anthony E. Freitas, U. S. Naval Reserve Force, to be dismissed from the United States Naval Reserve Force and from the United States naval service."

Recommendation of the Judge Advocate General

The Judge Advocate General, on December 20, 1917, recommended that the proceedings, findings, and sentence in the foregoing case be set aside, and that Boatswain Anthony E. Freitas, U. S. Naval Reserve Force, be released from arrest and restored to duty, the court having fatally erred. When the court met on the second day of the trial, a member who had been absent on the first day was duly sworn, the record of the preceding day was read and approved, and the trial continued without the witnesses who had previously testified being recalled and having their testimony read and verified, as required by Naval Courts and Boards, 1917, section 246.

Action of the Secretary of the Navy

The record in this case was referred to the Chief of the Bureau of Navigation and returned with the concurrence of the bureau in the endorsement of the Judge Advocate General.

[P. 2] The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved. Boatswain Anthony E. Freitas, U. S. Naval Reserve force, will be released from arrest and restored to duty.

C. M. O. 87—1917

[P. 1] Lieutenant Commander Francis B. Driscoll, United States Naval Reserve Force, was tried by general court martial on October 29, 1917, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness on duty (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (three specifications).

Charge III.—Scandalous conduct tending to the destruction of good morals (one specification).

Findings

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of that charge; the first specification of the second charge "proved in part," the second specification of the second charge "not proved," the third specification of the second charge "not proved," and the accused "guilty" of the second charge; the specification of the third charge "not proved," the accused "not guilty" of the third charge, and acquitted the accused of the third charge.

Sentence

"The court therefore sentences him, Francis B. Driscoll, lieutenant commander, United States Naval Reserve Force, to be publicly reprimanded by the Secretary of the Navy."

[C. M. O. 88—1917]

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by three of the five members of the court, was spread upon the record:

"In consideration of the peculiar circumstances of this case; of the fact that the accused has been in the service a very short time, that the error in judgment which caused him to commit the offense of which the court has found him guilty was, in our opinion, due to his possessing in excess two qualities very de- [P. 2] sirable in a naval officer, namely, zeal and initiative, we strongly recommend Lieutenant Commander Francis B. Driscoll, United States Naval Reserve Force, to the clemency of the revising power."

RETURNED FOR REVISION

On December 13, 1917, the Department returned the record of the proceedings in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering its finding upon the first specification of the second charge. It appeared that the important feature which presented itself to the court was that involving the exercise of proper judgment, which was also clearly evident from the recommendation to clemency. In time of war, when it often happens that speedy and decisive action is or may be essential or imperative, the matter of exactness of judgment, when no material consequences are involved, does not appear to warrant a conviction of an officer of conduct to the prejudice of good order and discipline.

FINDING IN REVISION

The court revoked its former finding on the first specification of the second charge, substituted therefor a finding of "not proved," found the accused "not guilty" of the second charge, and acquitted the accused of that charge.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General, on December 29, 1917, recommended that the proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant Commander Francis B. Driscoll, U. S. Naval Reserve Force, be approved, and that he be released from arrest and restored to duty.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendations of the Judge Advocate General are approved, and Lieutenant Commander Francis B. Driscoll, U. S. Naval Reserve Force, will be released from arrest and restored to duty.

[P. 3] REMARKS

It was noted in the foregoing case that the record was extended beyond reason by the recording of much unnecessary matter. Considerable incompetent and irrelevant testimony, particularly having reference to the actions and table manners of a witness for the prosecution, and to conversations between various people, was admitted over the objection of the judge advocate, and several requests that this testimony be stricken from the record were improperly overruled. It is proper to briefly set forth in the record the reasons for the objection to the admission of evidence, but not the argument thereon (Naval Courts and Boards, 1917, sec. 317).

C. M. O. 88—1917

[P. 14] FINDINGS: OF "PROVED" OF SPECIFICATION ALLEGING ESSENTIAL DATE.

Where a specification alleges that the accused surrendered himself on or about August 31, 1917, and the evidence clearly shows that the date was the 28th of that month, the court should properly find the date "not proved" and substitute there-

[C. M. O. 88—1917]

for the date established by the evidence. This irregularity, however, is not so serious as to invalidate the proceedings (File 26251–14552, J. A. G., Dec. 27, 1917).

MEMBER OF COURT MARTIAL: ABSENCE OF, UPON LEAVE GRANTED BY COMMANDING OFFICER.

A member of a general court martial may not absent himself from the said court upon leave granted by his immediate commanding officer. A member or judge advocate is relieved as such only by lawful order of the convening authority. (See Naval Courts and Boards, 1917, sec. 225; File 26262–3714, J. A. G., Dec. 21, 1917.)

MEMBER OF COURT MARTIAL: UNAUTHORIZED ABSENCE OF.

A telegram from the convening authority temporarily assigning an officer as member of a general court martial is not sufficient to warrant the court in excusing another member. (See Naval Courts and Boards, 1917, sec. 242; File 26251–14396, J. A. G., Dec. 14, 1917.)

MEMBER OF COURT MARTIAL: VALID CHALLENGE OF.

Where the trial of an accused for disobeying the orders of his superior officer is recommended by such superior officer and said superior officer is a member of the general court martial before whom the accused is ordered for trial, the accused may validly challenge said member (See Naval Courts and Boards, 1917, sec. 222; File 26251–14396, J. A. G., Dec. 14, 1917).

ADMINISTRATION OF NAVAL DISCIPLINE: BY OFFICER OF THE NATIONAL NAVAL VOLUNTEERS WHEN SECTION COMMANDER.

The section commander of a section of a naval district, when a commander of the National Naval Volunteers, or other officer of the Navy, has authority to administer discipline upon the persons of the various services under his command operating as a part of the Navy, in accordance with the laws and regulations for the government of the Navy, subject to any specific restrictions of law, regulations, or orders applying to any particular case.

He has also all the necessary authority to order summary and deck courts within his command subject only to the restrictions of General Order No. 296 (revised) as to the constitution of courts martial ordered upon enlisted men of the Regular Navy or of any of the services acting with the Navy under the order of the President (File 28762–278, J. A. G., Dec. 10, 1917).

[P. 15] COAST GUARD: PROMOTION OF COMMISSIONED OFFICERS IN.

The act of April 16, 1908, chapter 145, sections 1 and 3 (35 Stat. 62), authorizes six senior captains and thirty-one captains in the Coast Guard. The requirements of the law would not be satisfied by fixing these numbers at five senior captains and thirty-two captains. Where, therefore, a vacancy occurs in the grade of senior captain and it is desired to suspend the appointment of the ranking captain to fill the vacancy, the situation may not be relieved by promoting the ranking first lieutenant to the grade of captain before an actual vacancy occurs in that grade (File 28762–277, J. A. G., Dec. 10, 1917).

CLOTHING AND SMALL STORES: ISSUANCE OF.

Under Naval Instructions I–1823 (2), clothing and small stores may be issued to persons in debt to the Government or against whom a checkage is pending, upon written authority of the commanding officer with a statement upon the requisition that the issue is necessary for the health and comfort of the person

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requiring it. It is therefore evident that the issuance of clothing and small stores under the foregoing circumstances is not affected by the cancelation of I–4893 (2) (b) by Alnav Message No. 94 (File 26806–131:54, Sec. Nav., Dec. 14, 1917).

COMMUNICABLE DISEASES: RESPONSIBILITY OF NAVAL MEDICAL OFFICERS TO STATE AUTHORITIES AS TO REPORTING.

Neither naval medical officers nor persons in the Medical Corps of the U. S. Navy may be required by State officials to furnish information to said officials concerning the physical condition as to communicable diseases of candidates for enlistment in the Navy, or of those discharged from the naval service, even though discharged by reason of such disease (File 7657–458:1, J. A. G., Dec. 13, 1917).

COURT MARTIAL: JURISDICTION OF, TO COMPEL ATTENDANCE OF CIVILIAN WITNESSES.

The president of a general court martial sitting within any State has power to compel the attendance of civilian witnesses who reside within the State, and willful neglect or refusal to appear renders such witnesses liable to civil prosecution. Where a person residing without the State is willing to appear as witness and it is desirable to have him so appear, he may be tendered his fees and mileage (Naval Courts and Boards, 1917, sec. 124; File 28025–524:3, J. A. G., Dec. 26, 1917).

EMPLOYEE OF U. S. SHIPPING BOARD: MAY BE TRIED BY COURT MARTIAL.

In a recent habeas corpus proceeding before the Hon. Augustus N. Hand, district judge of the U. S. District Court for the Southern District of New York, the following case was presented:

One Charles E. Gerlach, an employee of the U. S. Shipping Board, went to Europe as a mate of a vessel apparently in use as a military transport, though this fact was not definitely proved. He was there discharged and sent back to New York on an Army transport. He volunteered to stand watch and did so stand watch for some time, but finally refused so to do. For this disobedience to the order of an Army officer he was tried by court martial, and sentenced to five years' imprisonment.

[P. 16] The judge held that Gerlach was subject to the Articles of War, the second article (R. S. 1342, as amended by the act of Aug. 29, 1916, 39 Stat. 651) whereof, reads as follows:

> "The following persons are subject to these articles:
>
> * * * * * * *
>
> "(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers, and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States though not otherwise subject to the Articles of War."

And that, therefore, the said Gerlach was subject to the jurisdiction of a court martial, and that the aforesaid act subjecting him to such jurisdiction was within what are commonly known as the war powers of Congress and constitutional (247 Fed. 616).

MEMBERS OF THE NURSE CORPS (FEMALE): AMENABILITY OF, TO NAVAL DISCIPLINE.

Members of the Nurse Corps (Female) created by the act of May 13, 1908 (35 Stat. 127, 146), are amenable to naval discipline, subject to such laws, naval regulations, instructions, etc., as are applicable to said corps (File 26477–80, J. A. G., Dec. 20, 1917).

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OATHS: ADMINISTERING OF, BY OFFICERS OF THE MARINE CORPS.

The act of March 4, 1917 (39 Stat. 1168, 1171), provides:

> "That * * * the adjutant and inspector, assistant adjutant and inspector, commanding officers, recruiting officers of the Marine Corps, and such other officers of the Regular Navy and Marine Corps, of the Naval Reserve Force, of the Marine Corps Reserve, and of the National Naval Volunteers as may be hereafter designated by the Secretary of the Navy, be, and they are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration."

A commander of an advance base force, being a commanding officer of the Marine Corps, has power to administer oaths for the purposes set forth; and the decision of the question as to whether or not an oath to be administered is for a purpose set forth in the act rests with the officer who is to administer the oath in each case (File 19037–67, Sec. Nav., Dec. 3, 1917).

OFFICERS OF THE NAVAL RESERVE FORCE: EMPLOYMENT OF, BY FIRMS FURNISHING SUPPLIES TO THE GOVERNMENT.

The Act of June 10, 1896 (29 Stat. 361), provides:

> "* * * That hereafter no payment shall be made from appropriations made by Congress to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed * * * by any persons or company furnishing naval supplies or war material to the Government; and such employment is hereby made unlawful after this date."

This provision applies to officers of the Naval Reserve Force during such time as they may by law be required to serve in the Navy, or when on active service at their own request or in authorized travel to or from such service (File 28550–178, J. A. G., Dec. 8, 1917).

[P. 17] OFFICERS TO COMMAND FLEETS AND SQUADRONS: ASSIGNMENT, STATUS AND PAY OF.

A recent research into the laws applicable to the subject of this heading developed the following:

(*a*) Active-list officers in the grade of commander or above may be assigned to the command of squadrons, with the rank and title of rear admiral, at any time, either in peace or in war. (While section 1434 of the Revised Statutes designates the rank and title of officers so assigned as "flag officers," this can now be only "rear admiral," as has been decided by the Department in practice.)

(*b*) In time of war, the President may assign any retired officer of the grade of commander or above to the command of a squadron with the rank and title of "rear admiral." (The comment above with reference to the rank and title of active-list officers so assigned applies equally to retired officers.)

(*c*) In time of war, the President may assign any active-list officer of the grade of rear admiral or captain to command a fleet or subdivision thereof, with the rank and pay of an admiral or vice admiral.

(*d*) In time of peace, the President may assign any active-list officer in the grade of rear admiral to the command of a fleet or subdivision thereof with the rank and pay of admiral or vice admiral.

(*e*) The President has general authority to formulate rules governing assignments to command of squadrons in peace or in war, but officers so assigned are not entitled to a higher rank except in the cases noted in paragraphs (*a*) to (*d*) above.

(*f*) In the cases noted in paragraphs (*a*) to (*d*) above, officers assigned to such command are entitled to higher rank than that conferred by their regular commissions. They do not, however, attain the grade indicated by their rank—that is to say, they do not by virtue of such assignment to command become officers of the grade of admiral, vice admiral, or rear admiral, although they acquire the rank of such grade. Accordingly, it is not necessary that there

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should be vacancies in the grade of rear admiral in order to authorize the assignment of officers to command with that rank.

(*g*) Under the Navy Regulations (R–1048) officers duly appointed to act in any grade shall, while serving under such appointment, be entitled to the same command, precedence, and honors as if they held a commission in that grade of the same date as their appointment.

(*h*) Inasmuch as the officers mentioned are given the rank stated, it would seem that they must also be entitled to the pay of such rank, yet this point has never been decided by the accounting officers, and must therefore be regarded as an open question (File 3809–756, J. A. G.).

PAY: TO MEN IN DEBT.

R–3669 (3) of the Navy Regulations is not construed as authorizing the captain to grant special requisitions for the payment of money to men in debt, and the said regulation is not considered to be affected by Alnav Message No. 94 (File 26806–131: 54, J. A. G., Dec. 14, 1917).

[P. 18] PERSONS IN THE NAVAL SERVICE: DELIVERY OF, TO CIVIL AUTHORITIES.

At the present time, when this country is in a state of war and the welfare of the country demands that its naval personnel render efficient and effective service, it is not deemed in the best interests of the service to deliver persons serving therein to the civil authorities, unless there is a reasonable showing that the charges for which such persons are wanted, are not trifling or unfounded. To this end, this Department has adopted the policy that such deliveries be not made unless the offense charged is a serious one and the charge is shown to be with proper foundation, and further that the accused will be accorded a fair and speedy trial without prejudice on account of his naval status.

In accordance with the foregoing, commanding officers will hereafter inquire fully into each case before communicating with the Secretary of the Navy for instructions as to the delivery of persons serving under them. The telegraphic report referred to in paragraph 3 of General Order No. 121 of September 17, 1914, should end with the words "Delivery recommended" or "Delivery not recommended," according to the judgment of the commanding officer sending the despatch, and be followed immediately by letter containing a statement of the facts upon which such judgment is based (File 26524–492, Sec. Nav., Dec. 28, 1917).

STAFF OFFICERS OF THE REGULAR NAVY AND NAVAL RESERVE FORCE: SENIORITY OF.

Under the act of August 29, 1916, it is provided that officers of the Naval Reserve Force shall rank with but after officers of the corresponding rank in the Navy.

Nevertheless, it is held that a passed assistant surgeon, U. S. Naval Reserve Force, with the rank of lieutenant, is senior to an assistant surgeon, U. S. Navy, with the rank of lieutenant; this because the office of passed assistant surgeon in the Medical Corps is higher than that of assistant surgeon, and it was evidently not the intention of Congress to give the word "rank" a limited and narrow meaning, thereby overturning established precedents (File 11130–40: 1, J. A. G., Dec. 20, 1917).

TEMPORARY APPOINTMENT: OF WARRANT OFFICER TO THE GRADE OF CHIEF WARRANT OFFICER.

The provisions of the act of May 22, 1917, providing for temporary appointment (and advancement) of additional commissioned officers in the Navy and Marine Corps, do not cover the temporary appointment of commissioned warrant officers, and the only remaining authority for such appointments is to be found in the law as it existed prior to the act of May 22, 1917, which authorized the appointment of warrant officers to the grade of commissioned warrant officer only after

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six years from the date of warrant, and subject to examination in accordance with regulations prescribed by the Secretary of the Navy (File 17789–46, J. A. G., Dec. 19, 1917).

C. M. O. 3—1918

[P. 1] Assistant Paymaster (T) Eugene Dann, U. S. Navy, was tried by general court martial, on January 2, 1918, on board the U. S. S. *Mercury*, by order of the Commander, Cruiser Force, United States Atlantic Fleet, and found guilty of the following charge:

Charge.—Violation of a lawful general order issued by the Secretary of the Navy (one specification).

Sentence

"The court therefore sentences him, Assistant Paymaster (T) Eugene Dann, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the testimony of the officers of his ship as to their belief in his truthfulness and loyalty, we recommend Eugene Dann, assistant paymaster (T), U. S. Navy, to the clemency of the reviewing authority."

Action of Convening Authority

The convening authority on January 4, 1918, placed the following endorsement on the record in the foregoing case:

> "The proceedings, findings, and sentence in the case of Assistant Paymaster (T) Eugene Dann, U. S. Navy, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President. In view of the long service and previous good record of the accused and the recommendation for clemency, signed by all the members of the court, the convening authority recommends that clemency be extended in this case."

[P. 2] Recommendation of the Chief of the Bureau of Navigation

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on January 10, 1918, placed the following endorsement thereon:

> "The Bureau has carefully considered this case and is of the opinion that the act committed by Assistant Paymaster Dann was more of an indiscretion, which has lead to fatal results for him, rather than a deliberate attempt to disobey the lawful order of the Secretary. While not condoning in any way the violation of a lawful order of the Secretary, the Bureau is of the opinion that Assistant Paymaster Dann's actions were not a deliberate attempt to violate orders, and, in view of the unanimous recommendation to clemency by the court and of the action taken by the convening authority in recommending clemency, and due to Assistant Paymaster Dann's long and faithful service in the Navy, the Bureau believes that the ends of justice will be reached by a mitigation of the sentence to a reprimand by the Secretary of the Navy, and so recommends."

Action of the Secretary of the Navy

The proceedings, findings, and sentence in the foregoing case of Assistant Paymaster (T) Eugene Dann, U. S. Navy, are approved, but as recommended by the Chief of the Bureau of Navigation, the sentence is mitigated to a reprimand. Assistant Paymaster Dann will be released from arrest and restored to duty.

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REMARKS

It was noted in the foregoing case that although the specification alleged that the accused wrote a certain letter which contained information prohibited by a general order of the Secretary of the Navy, neither the contents of the letter nor that portion said to be in violation of the aforementioned order were set forth in the specification. The specification was therefore defective, but not fatally so, as it otherwise sufficiently described the letter.

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[P. 15] CHARGES AND SPECIFICATIONS: (1) EFFECT OF FINDING, IN DUE FORM AND TECHNICALLY CORRECT; (2) UTTERING SEDITIOUS WORDS.

(1) Where the court finds that the charges and specifications are in due form and technically correct, it in effect finds that the specification supports the charge. When, therefore, the court finds the specification of a charge proved but the accused not guilty of the charge, the finding is inconsistent with the previous action (File 26262–3739, J. A. G., Jan. 5, 1918).

(2) (*a*) As to what constitutes seditious words. (*b*) Knowledge of their being seditious and intent with which uttered to be set forth in specification and established by evidence.

(*a*) According to Bouvier's Law Dictionary, vol. 3, p. 3033, Sedition is defined in Criminal Law as: "The raising commotions or disturbances in the State: it is a revolt against legitimate authority" (Erskine, Inst. 4. 4. 14). This same authority further states that "No act is seditious unless its full consequences are felt over considerable area or felt by a considerable number of persons. It does not include an isolated breach of the peace. It is sufficient that the acts or words tend to produce the result. An attempt to incite mutiny in the Army or Navy is seditious." The American and English Encyclopedia of Law, under the caption, "Sedition," recites as follows: "In the United States, it has been held that all publications which tend to degrade and vilify the Constitution, to promote insurrection and circulate discontent through its members, to asperse its justice and anywise impair the exercise of its functions, are seditious, and are visited with the peculiar rigor of the law" (*Republica* v. *Dennie*, 4 Yates (Pa.), 270). "Sedition is conduct tending toward treason, but wanting an overt act: Attempts made by meeting or speeches or by publications to disturb the tranquillity of the State which do not amount to treason. All contempts against the sovereign and the government, and riotous assemblies for political purposes, may be reckoned under the head of sedition."

(*b*) Seditious words necessarily mean words of a seditious character. Specification should include allegation to effect that the words were knowingly uttered and with seditious intent, i. e., intent to incite insurrection, promote discontent, or disturb the tranquillity, or that they were uttered with intent to produce contempt against [P. 16] a sovereign or government. A low, obscene, or idle expression without any intent to either vilify the United States or to promote insurrection therein, or in anyway impair exercise of governmental functions should not be regarded as seditious (File 26262–3739, J. A. G., Jan. 5, 1918).

CHARGES AND SPECIFICATIONS: PERJURY.

If based on testimony given at some previous hearing and said testimony is incorporated in the specification, it is essential to set forth the complete question and answer and not an excerpt from the latter. Both in their entirety should be alleged so that the whole may be taken together and complete purport thereof made to appear. If, however, specification alleges answer to be set forth in substance or effect exact recital not necessary but no material fact should be withheld (File 26262–3795).

CHARGES AND SPECIFICATIONS: SHOULD BE CLEAR AND EXPLICIT.

The allegation in a specification that the accused did "attempt to commit an immoral act in and upon the body of one," is not a sufficient statement of the

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material facts or particular acts as would properly describe the offense. See Naval Courts and Boards, 1917, secs. 62, 71, and 75 (File 26262–3763, J. A. G., Jan. 4, 1918).

CERTIFIED COPIES: SHOULD BE EXACT.

When an officer certifies over his signature that a document is a true copy of some other writing, it should be an exact copy of said other writing, and not a summary of the substance thereof. See Naval Digest, 1916, page 60, "Certified Copies" (1) (File 26262–3763, J. A. G., Jan. 4, 1918).

COURT MARTIAL: ADJOURNMENT OF.

The record of the proceedings of a general court martial recited that the court, at the close of the first day's session, adjourned to meet the following day. The record, however, indicated that the court did not meet for eight days and showed no authority for this suspension of proceedings. A general court martial is required to sit from day to day, Sundays excepted, until sentence is imposed, unless temporarily adjourned by the convening authority. See art. 45, Articles for the Government of the Navy (File 26251–13993).

MEMBER OF COURT MARTIAL: RECORD SHOULD AFFIRMATIVELY SHOW PRESENCE OF.

The record of a general court martial, in a recent case, for a certain day of the trial, recited as present: all the members, judge advocate, etc., and the next entry showed that a telegram had been received appointing an additional officer as member. No entry indicated his presence as such member, but his name appeared among those authenticating the record, and it was assumed therefrom that he was duly sworn with the other members of the court later in the same day. In the opinion of the Judge Advocate General, however, the record should have affirmatively shown that said member was present (File 26251–1504, J. A. G., Jan. 17, 1918).

[P. 17] PERJURY: WHAT CONSTITUTES.

Testimony on which the charge of perjury is based must have been material to the issue. Where facts sworn to are wholly foreign from the purpose and altogether immaterial to the matter in question, the oath does not amount to perjury (Bouvier's Law Dictionary, vol. 3, p. 2567).

Irrelevant testimony, although false, cannot be properly made the basis for a perjury charge, nor will a false oath as to superfluous and immaterial matter sustain an indictment for the offense. (See 30 Cyc. page 1418; File 26262–3795).

ROBBERY: WHAT CONSTITUTES.

Robbery at common law is the felonious taking, without a bone fide claim of right, of a thing of value from the person or presence of another, against his will, by force, or by putting him in fear. The taking, although wrongful and violent, does not amount to robbery if it was in good faith under a claim of right to the specific thing taken, but the claim of right must not be a mere pretext covering an attempt to steal. Therefore, when, having all the other essential elements established, an accused sets up such a claim to the specific thing, and it is not shown that he had a bona fide claim to the specific money taken by him, or that he even had reasonable grounds for entertaining such a claim, it is error to find the accused not guilty of robbery (File 26251–13993).

SELF-DEFENSE: AS DEFENSE TO CHARGE OF ASSAULT.

Mere words by a person who has a revolver which is not in his physical possession but is in a ditty box and out of commission by reason of lack of

ammunition, do not constitute sufficient grounds for a reasonable belief on the part of another that he is in such imminent danger of bodily harm that he is justified in attacking in self-defense. To invoke the doctrine of self-defense, an accused must show that there was some actual attempt or offer to do bodily harm, or that his act of self-defense was preceded by an outward or material assault. Words or threats alone are not sufficient to provoke in return an act of legitimate self-defense (File 26251–13993).

SPECIFICATIONS: FORM OF, WHERE TRIAL IS IN JOINDER.

In a recent case, the specification of a charge against a single accused was laid as set forth under the second sample specification on page 117, Naval Courts and Boards, 1917. Said form of specification should be used only when the persons accused are tried in joinder. But the use of said form when only one accused is tried, is not so irregular as to render the specification fatally defective.

The same comment applies with equal force to the first specification laid under the charge of sodomy set forth on page 123, Naval Courts and Boards, 1917 (File 26262–3850).

[P. 18] ADDITIONAL PAY: FOR PERFORMANCE OF SPECIAL DUTIES ON RECEIVING PIER.

A question arose as to whether or not an enlisted man of the Navy detailed as tailor on Commonwealth Pier, Boston, Mass., could receive the extra pay allowed a ship's tailor under article 4427, paragraph 21, U. S. Navy Regulations, and General Order No. 186 of 1905, on which said article was based. This office was of the opinion that such pay could not be allowed (File 26806–146, J. A. G., Aug. 16, 1917).

It was then suggested that the above, being Executive orders, might be changed by the President.

As the question involved pay, it was submitted to the Comptroller of the Treasury, who, on December 28, 1917 (File No. 26806–145: 5, Dec. of Comp.), decided that the act of May 13, 1908, establishing rates of pay for enlisted men, including those establishing rates of additional compensation for the performance of duties such as ship's tailors, gun pointers, etc., made said provision statutory, so that neither the rates of compensation nor the conditions under which the compensation may be paid can now be altered by Executive orders (File 26806–146: 1, J. A. G., Jan. 7, 1918).

COMPULSORY ALLOTMENT PAY: MAY NOT BE FORFEITED BY COURTS MARTIAL.

It is the opinion of the Bureau of War Risk Insurance that that portion of pay of enlisted men which is, by compulsory allotment under the amendatory act of October 6, 1917, set aside for members of class A, is beyond the power of court martial to forfeit, and that the compulsory allotment shall continue to be paid notwithstanding that the enlisted man has been sentenced by court martial to forfeit all his pay for a specified period (File 28909–64: 1).

MARINE OFFICERS: AUTHORITY OF—TO CONVENE COURTS MARTIAL WHEN EMBARKED WITH SEPARATE ORGANIZATIONS—HOW SHOWN.

The act of August 29, 1916, as set forth on page 19, General order No. 231, provides as follows:

> "When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organization were serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons embarked thereon."

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Marine officers convening courts martial in conformity with the above, shall show that they are legally empowered to convene said courts by signing themselves thus:

[P. 19] (*a*) At the beginning of the precept:
From: Commanding Officer, Provisional Brigade, embarked upon and not a part of the authorized complement of the U. S. S. ------.

(*b*) In approving the proceedings, findings, and sentence:
A ____ B ____ C ____, ------, U. S. Marine Corps, Commanding Provisional Brigade, embarked upon and not a part of authorized complement of U. S. S. ------.

(File 26287–3262, Sec. Nav., Jan. 24, 1918.)

OFFICERS OF THE PUBLIC HEALTH SERVICE: AUTHORITY OF, TO RETAIN PERSONS OF NAVY IN HOSPITAL.

The question recently arose as to the authority of officers of the Public Health Service to retain enlisted men of the Navy in a U. S. Marine Hospital, against the will of said enlisted men. It was held in accordance with the opinion of the Judge Advocate General of April 7, 1917 (File 28092–21), Court Martial Order No. 32, 1917, that persons in the naval service could not be so retained as a matter of punishment. But that where an enlisted man of the Navy has, by competent authority, been ordered to treatment in a U. S. Marine Hospital, he has no more legal right to leave that hospital without proper permission than he has to so leave any other place to which he has been lawfully assigned; and should an enlisted man under the circumstances stated, unlawfully absent himself, he would be guilty of absence without leave or desertion as the case may be; and upon full report of the facts in the case by the public health officer to the commanding officer of the offender, it is believed that said offender could be appropriately punished by his commanding officer, or by court-martial proceedings. In the ordinary case of Navy patients at a Marine hospital, it would appear desirable and proper that they be informed that any misconduct on their part, warranting disciplinary action, will be reported to their commanding officer. In any case where a person in the naval service absents himself from such hospital without permission from proper authority, immediate report of all the facts in the case should be made to his commanding officer in order that steps may be taken for his apprehension (File 28092–21:3, J. A. G., Jan. 16, 1918).

PERJURY: PUNISHMENT FOR, DURING PERIOD OF WAR.

Under article 22 of the Articles for the Government of the Navy, which provides that "all offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct," perjury may be punished without limitation during the period of the war; with the exception, of course, of the general limitation contained in article 50 of Articles for the Government of the Navy (File 26806–151, Sec. Nav., Jan. 14, 1918).

RECORDS OF COURTS MARTIAL: PARTS OF, MAY NOT BE ERADICATED.

A person who had been dishonorably discharged from the Navy, desired to have the sentence of the general court martial, by which he was convicted of absence without leave, eradicated, so that he [P. 20] might be in a position to again accept service with the United States forces, and eliminate the stain from his record.

He was informed that the Department knew of no method by which the sentence could be eradicated, but that the record had become part of the Department's records which should remain inviolate and not changed (File 24413–5). The record must correctly show the true facts of the case (File 7675–214). See also Naval Digest, 1916, page 513. But, he was also informed that, in his par-

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ticular case (he having seen service with the Allies in France), the Department knew of no bar, legal or otherwise, to his reentering the naval service (File 26282–332, Sec. Nav., Jan. 11, 1918).

STRAGGLERS AND DESERTERS: SURRENDER AND DELIVERY OF, AT RECRUITING STATIONS.

"Paragraph 5 of the notes, General Order 110 (revised July 1916), is hereby canceled and recruiting stations are authorized, under such instructions as may be issued by the Chief of the Bureau of Navigation and the Major General Commandant, to accept the surrender or delivery of stragglers or deserters and to furnish them necessary transportation and subsistence (File 26516–144: 65, Sec. Nav., Jan. 5, 1918).

C. M. O. 5—1918

[P. 1] Captain Victor Blue, U. S. Navy, was tried by general court martial on November 30, 1917, on board the U. S. S. *Minnesota*, by order of the Commander in Chief, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Through negligence suffering a vessel of the Navy to be stranded (five specifications).

Sentence

"The court therefore sentences him, Captain Victor Blue, U. S. Navy, to lose twenty (20) numbers in his grade."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his previous excellent record, we recommend Victor Blue, captain, U. S. Navy, to the clemency of the reviewing authority."

Action of the Convening Authority

The convening authority on December 8, 1917, placed the following endorsement on the record in the foregoing case:

> "The proceedings, findings, and sentence of the general court martial in the foregoing case of Captain Victor Blue, U. S. Navy, are approved.
>
> "It is apparent that there was no conscious negligence on the part of Captain Blue, as the testimony clearly indicates that he is zealous and conscientious in the performance of duty. In the case resulting in this court martial the negligence consisted principally in placing too great reliance on his navigation officer. Under present methods of promotion, a sentence of loss of numbers may be considered as merely indicative of the measure of the seriousness of the offense. The real punishment is found in the fact that the officer's record will show his court martial and sentence. In consideration of the above and the unanimous recommendation for clemency by the court, the sentence is reduced to the loss of ten numbers in his grade.
>
> "Captain Victor Blue, U. S. Navy, having been released from arrest under the provisions of article 1417 (4), U. S. Navy Regulations, 1913, is hereby unconditionally restored to duty."

Concurrence of the Secretary of the Navy

The record in the foregoing case was submitted to the Chief of the Bureau of Navigation, who, in view of the excellent record of Captain Victor Blue and the unanimous recommendation [P. 2] to clemency, concurred in the action taken by the convening authority.

The Secretary of the Navy concurs in the action taken by the convening authority and the views expressed by the convening authority and the Chief of the Bureau of Navigation.

[C. M. O. 11—1918]

C. M. O. 10—1918

[P. 1] Lieutenant-Commander James B. Gilmer, U. S. Navy, was tried by general court martial on January 30, 1918, on board the U. S. S. *Virginia*, by order of the Commander, Battleship Force One, United States Atlantic Fleet, on the following charge:

Charge.—Drunkenness (one specification).

Finding

The court acquitted the accused of the charge.

Action of the Convening Authority

The convening authority on February 4, 1918, approved the proceedings, finding, and acquittal of the general court martial in the foregoing case of Lieutenant Commander James B. Gilmer, U. S. Navy, subject to remarks concerning irregularities in the record and errors of the court. The accused having been temporarily released from arrest and restored to duty in accordance with Navy Regulations, 1913, R–1410, on February 3, 1918, in order to return to his station and duty, it was further directed that he be released from arrest and restored to duty.

Remarks

The following, among other remarks, was noted by the convening authority:

A ruling by the court that "questions by the court were not open to objection by the accused or his counsel" is erroneous (Naval Digest, 1916, p. 649, last paragraph of "Witnesses (40)").

C. M. O. 11—1918

[P. 1] Lieutenant (junior grade) Arthur H. Gould, U. S. Naval Reserve Force, was tried by general court martial on January 11, 1918, on board the U. S. S. *Panther*, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Assault (one specification).

Charge II.—Drunkenness (one specification).

Charge III.—Using abusive, obscene, and profane language (one specification).

Charge IV.—Scandalous conduct tending to the destruction of good morals (one specification).

Findings

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge; the specification of the third charge "proved in part," and the accused of the third charge "guilty in a less degree than charged, guilty of using obscene and profane language"; the specification of the fourth charge "proved," and the accused "guilty" of the fourth charge.

Sentence

"The court therefore sentences him, Lieutenant (junior grade) Arthur H. Gould, United States Naval Reserve Force, to be dismissed from the United States Naval Reserve Force and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of five (5) years."

Action of the Convening Authority

On January 15, 1918, the convening authority placed the following endorsement on the record in the foregoing case:

> "The record of proceedings of the general court martial in the foregoing case of Lieutenant (junior grade) Arthur H. Gould, United States Naval

[C. M. O. 14—1918]

Reserve Force, discloses that the trial of this officer was conducted most carefully and the accused given every opportunity for proper defense. The court found the accused guilty of 'Drunkenness,' 'Assault,' 'Using abusive and profane language,' and 'Scandalous conduct tending to the destruction of good morals.' These offenses, serious [P. 2] at any time, were most reprehensible in this case, because they were committed in a foreign country allied with our own in the conduct of a great war, and under circumstances making it incumbent upon all officers and men to avoid every possibility of criticism or friction.

"In a degree the excellent relations attending the cooperation of the two branches of our armed forces engaged on foreign service is likely to suffer by the actions of the accused, whose remarks were addressed to an officer of the United States Army, and who by his conduct has not alone demonstrated his irresponsibility and unfitness to continue as an officer in the United States naval service, but he has brought discredit upon the uniform which he was entitled to wear and lessened the good repute of our forces in a foreign land.

"The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Arthur H. Gould, United States Naval Reserve Force, are approved, and the naval prison, Portsmouth, N. H., is designated as the place for the execution of so much of the sentence as relates to confinement, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

Action of the Secretary of the Navy

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who concurred in the action taken by the convening authority.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Lieutenant (junior grade) Arthur H. Gould, U. S. Naval Reserve Force, was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

Action of the President

On February 21, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 14—1918

[P. 1] Machinist Clement S. Whittington, U. S. Naval Reserve Force, was tried by general court martial on January 18, 1918, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, on the following charges:

Charge I.—Absence from station and duty after leave had expired (one specification).

Charge II.—Absence from station and duty without leave (one specification).

Charge III.—Falsehood (one specification).

Charge IV.—Conduct to the prejudice of good order and discipline (one specification).

Findings

The court found the specification of the first charge "proved by plea," and the accused "guilty" of the first charge; the specification of the second charge "proved by plea," and the accused "guilty" of the second charge; the specification of the third charge "not proved," the accused "not guilty" of the third charge, and acquitted the accused of the third charge; the specification of the fourth charge "proved by plea," and the accused "guilty" of the fourth charge.

Sentence

"The court therefore sentences him, Clement S. Whittington, machinist, United States Naval Reserve Force, to be dismissed from the United States naval service."

[C. M. O. 15—1918]

RETURNED FOR REVISION

The Department on January 26, 1918, returned the record of the proceedings in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its sentence, which in the opinion of the Department was totally inadequate for the serious offenses of "Absence from station and duty after leave had expired," "Absence from station and duty without leave," and "Conduct to the prejudice of good order and discipline," when committed in time of war.

SENTENCE IN REVISION

[P. 2] The court decided to revoke its former sentence and to substitute therefor the following:

> "The court therefore sentences him, Clement S. Whittington, machinist, United States Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of six (6) months."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by four of the five members of the court, was spread upon the records:

> "In consideration of the fact that the accused is by profession a licensed marine engineer, and that the sentence in revision will undoubtedly make it very difficult, if not impossible, for him to pursue his habitual means of livelihood, we recommend Clement S. Whittington, machinist, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who recommended the approval of the proceedings, findings, and sentence.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Machinist Clement S. Whittington, U. S. Naval Reserve Force, were approved on February 23, 1918, and the naval prison at the Navy Yard, Portsmouth, N. H., was designated as the place for the execution of that portion of the sentence involving confinement. In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On February 25, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 15—1918

[P. 15] ACCUSED: RIGHT OF, TO COUNSEL.

The accused, in a recent case, stated that he desired counsel. The record then recites "the matter was referred to the convening authority by telephone, who denied the request of the accused for counsel on the ground that they have no officer available for the purpose."

It is the constitutional right of an accused being tried before a criminal court to have the assistance of counsel, and naval courts, though not bound by the letter, are within the spirit of this provision. Therefore it is held that only in extreme cases might this right be denied an accused without committing a fatal error. Furthermore if that right is denied it certainly devolves more than ever upon the judge advocate to protect the interests of the accused. The Judge Advocate General was of the opinion that in the case in question, a fatal error had been committed by denying him the counsel requested (File 28762–11:80).

[C. M. O. 15—1918]

OFFICERS NAMED IN PRECEPT: DUTIES OF.

It is incumbent upon an officer having official knowledge of his having been named in a precept convening a general court martial to report to the president of said court for that duty even though he may not have received specific orders so directing. The latter are usually made out by the Bureau of Navigation, Major General Commandant of the Marine Corps, or Captain Commandant of the Coast Guard, and not by the convening authority. Such are not orders authorizing an officer to sit upon a court, but for him to report to the president thereof for that purpose; the precept or the modifications signed by the proper authority convening the court is the document authorizing an officer to take part in the proceedings thereof (File 28762–11:80).

[P. 16] ENLISTED MEN ON "DETACHED DUTY": STATUS OF.

An enlisted man attached to a receiving ship was assigned to "Detached duty" at the marine barracks at the navy yard where said receiving ship was. His pay accounts and service record were carried by the receiving ship.

He was punished for an offense by the commanding officer of the marine barracks. The contention was raised that the commanding officer of the marine barracks had acted without the jurisdiction of his office in inflicting said punishment, and that the case should have been referred to the commanding officer of the receiving ship for disciplinary action.

The Judge Advocate General concurred in the views of the Major General Commandant of the Marine Corps, to the effect that the man in question, being detached from the receiving ship for duty at the marine barracks, was part of the command of the commanding officer of said marine barracks, and that the case came within article 4182, Navy Regulations, 1913 (File 7657–552, J. A. G., Feb. 12, 1918).

ELIGIBILITY FOR REENTRANCE INTO NAVY: EFFECT OF PARDON UPON.

In a recent opinion of the Acting Attorney General it was held that—

(*a*) An officer of the Navy who has been dismissed by sentence of court martial, and subsequently pardoned for the offense for which dismissed, is not eligible for reappointment to the Navy or to membership in the Fleet Naval Reserve, in view of section 1441, Revised Statutes (1); section 21 of the act of February 16, 1914 (28 Stat. 283, 290) (2); and act of August 29, 1916 (39 Stat. 589) (3).

(*b*) An enlisted man who has incurred the penalties prescribed by section 1998, Revised Statutes (4), and section 1996, Revised Statutes (5), as amended by the act of August 22, 1912 (6), and who has been pardoned, is eligible to hold an office of trust or profit in the Navy or to serve as an enlisted man in the Navy insofar as ineligibility in the absence of a pardon depends upon these sections of the Revised Statutes as amended. But it was also held that—

(*c*) A person who has deserted in time of war from the naval or military service of the United States is not eligible after pardon, for reenlistment in the naval service, in view of the provisions of sections 1420 (7) and 1624 (8) of the Revised Statutes, as amended by the act of August 22, 1912 (File 26282–326:2, Feb. 15, 1918).

[P. 17] (1) *Revised Statutes, section 1441.*—No officer of the Navy who has been dismissed by the sentence of a court martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer of the Navy.

(2) *Act of February 16, 1914, section 21 (38 Stat. 283, 290).*—That the President may also commission or warrant as of the highest rank formerly held by him, or the present equivalent of such former rank in case the nomenclature or some of the specific duties of the same may have been changed, any person who having been formerly a commissioned or warrant officer of the United States Navy shall have been honorably discharged from the service * * *.

(3) *Act of August 29, 1916 (39 Stat. 556, 589.)*—All former officers of the United States naval service, including midshipmen, who have left that service under honorable conditions, and those citizens of the United States who have

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been, or may be entitled to be, honorably discharged from the naval service after not less than one four-year term of enlistment or after a term of enlistment during minority, and who shall have enrolled in the Naval Reserve Force shall be eligible for membership in the Fleet Naval Reserve.

(4) *Section 1998, Revised Statutes.*—Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six.

(5) *Section 1996, Revised Statutes.*—All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

(6) *Act of August 22, 1912 (37 Stat. 356).*—That section 1998 of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

> "SEC. 1998. That every person who hereafter deserts the military or naval service of the United States, or who being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeiture of section nineteen hundred and ninety-six of the Revised Statutes of the United States: *Provided*, That the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time [P. 18] of peace: *And provided further*, That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interest * * *."

(7) *Section 1420, Revised Statutes, as amended by act of August 22, 1912 (37 Stat. 356).*—No minor under the age of fourteen years, no insane or intoxicated person, and no person who has deserted in time of war from the naval or military service of the United States, shall be enlisted in the naval service.

(8) *Section 1624, Revised Statutes, article 19, as amended by act of August 22, 1912 (37 Stat. 356).*—Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of 14 and 18 years, without the consent of his parents or guardian, or any minor under the age of 14 years, shall be punished as a court martial may direct.

FRAUDULENTLY ENLISTED MINOR: RIGHTS OF GUARDIAN TO CUSTODY OF.

A minor under the age of 18 years, having no legally appointed guardian, swore falsely on enlistment that his age was over 18 years, and was enlisted in the Navy.

A person, who had stood in loco parentis of the minor from childhood, was thereafter legally appointed his guardian and demanded his discharge from the Navy.

It was held that in accordance with the case of *Doane* v. *Burkeman et al.*, 190 Fed. 541, said guardian was entitled to have the minor restored to his custody and control, unless the Government could show just and legal right to such minor's services and custody.

As there were no disciplinary proceedings commenced against the minor, it was further held, in this case, that there was nothing by which the Government could show just and legal right to the custody of the minor (File 7657–559, J. A. G., Feb. 16, 1918).

[C. M. O. 15—1918]

LETTER OF ADMONITION OR REPRIMAND: MAY BE PLACED ON FITNESS REPORT.

It has been held that a senior reporting officer may place a letter of admonition or reprimand, written by said senior to a subordinate officer upon whom the senior reports, on the fitness report of said subordinate officer.

When such a letter is placed on said report, the report must be referred to the subordinate in accordance with I–707 (8) in order that the subordinate may make a statement in regard to said unfavorable matter, thus putting the Department in a position to judge the case [P. 19] upon its merits and, should such action be deemed warranted, to express its disapproval of the action of the reporting senior, the record of the junior officer concerned showing such disapproval (File 28612–2, J. A. G., Feb. 9, 1918).

LINE OFFICERS: TEMPORARY AND PERMANENT PROMOTION OF.

An ensign was appointed as such in the permanent Navy on July 7, 1917, with rank next after the last temporary ensign appointed on July 1, 1917. The permanent ensign next above him on the list was appointed June 29, 1917.

It was held that if promotions are in accordance with the rule of seniority, he would become entitled to temporary promotion after the last temporary ensign dating from July 1, 1917. In order to preserve his place on the list of officers of the permanent Navy, to which he can revert upon the termination of any temporary appointment he may receive, his position is fixed in the permanent service next after the last permanent ensign dating from June 29, 1917; and he is entitled, if promotions are by seniority, to advancement in the permanent Navy next after the last permanent ensign dating from June 29, 1917 (File 26521–243, J. A. G.).

OFFICERS OF THE NAVY AND NAVAL RESERVE FORCE: RELATIVE RANK OF.

It is held that an ensign (temporary) of the U. S. Navy is senior to an ensign of the U. S. Naval Reserve Force (File 11130–40:3, J. A. G., Feb. 23, 1918).

RECOMMENDATIONS FOR TEMPORARY PROMOTION: LAWS GOVERNING SELECTION BOARD IN MAKING.

It has always been the view of the Judge Advocate General that the statutory provisions regulating permanent promotions in the Navy have no application to the temporary promotions authorized by the act of May 22, 1917, and that the procedure to be followed in making such temporary promotions is a matter "to be regulated by the President in his discretion" (File 28687–22). The fact that the Secretary of the Navy has established a procedure with reference to temporary promotions to the grades of commander, captain, and rear admiral, somewhat similar to that required by the act of August 29, 1916, for permanent promotions to these grades, does not give to the adopted procedure the binding force of law (File 26521–230:5, J. A. G., Feb. 1, 1918).

[P. 20] SENTENCES: ACTION OF CONVENING AUTHORITIES UPON.

The following action is prescribed for convening authorities upon sentences of general courts martial of the form set forth in section 348, Naval Courts and Boards, 1917, when it is desired that the accused serve confinement at his station rather than in prison. (This cannot apply in cases of men convicted of desertion in time of war.)

The proceedings, findings, and sentence, in the foregoing case of A. B. C_____, seaman, U. S. Navy, are approved, but that portion of the sentence which involves confinement is reduced to _____ months, all the other accessories of said sentence except loss of pay are remitted, and said loss of pay is reduced to _____ dollars and _____ cents ($_____) (and as thus reduced is remitted

[C. M. O. 16—1918]

subject to the conditions prescribed in I–4893, Naval Instructions, 1913). The dishonorable discharge is remitted on condition that C_____ maintain a record satisfactory to his commanding officer during said confinement (during a period of _____), otherwise he is to be dishonorably discharged at the discretion of his commanding officer at any time during said period.

The U. S. S. _____ is designated as the place for the execution of so much of the sentence as relates to confinement.

J. B. R_____,
Vice Admiral, U. S. Navy,
Commander, Battleship Force One,
U. S. Atlantic Fleet.

Convening and reviewing authorities of both general and summary courts martial, in acting upon sentences involving loss of pay, will give careful consideration to the effect of Alnav Message 94 as modified by Alnav Message 22 of Feburary 7, 1918, and by such other instructions as may be hereafter issued.

For the information of the Department, convening authorities, when acting on all sentences of both general and summary courts martial involving loss of pay will attach to the record a memorandum statement of the amounts of compulsory allotment and Government insurance premium that are being checked against the pay accounts of the accused, as well as the monthly rate of pay when the same is not included in the record of proceedings (File 26504–326, Sec. Nav., Feb. 14, 1918).

STAFF OFFICERS: PERMANENT AND TEMPORARY PROMOTION OF.

An assistant paymaster was appointed as such in the permanent Navy with the rank of ensign from July 21, 1917. For the purpose of fixing his permanent status, and for promotion on the permanent list, he takes rank after the last permanent ensign dating from June 29, 1917. His temporary running mate is the last temporary [P. 21] ensign dating from July 1, 1917. His permanent running mate has been advanced to temporary lieutenant (junior grade) and his temporary running mate has not been so advanced.

It was held that the last temporary ensign appointed from July 1, 1917, is his running mate for the purpose of temporary promotion, and that he is entitled to permanent advancement with the last permanent ensign appointed from June 29, 1917. His position on the permanent list being next after the permanent ensign appointed next ahead of him, he is entitled to revert to this position upon the termination of any temporary appointment he may receive (File 26521–234, J. A. G.).

C. M. O. 16—1918

[P. 1] Lieutenant Christopher Culver, U. S. Naval Reserve Force, was tried by general court martial on November 22, 1917, at the naval station, Newport, R. I., by order of the Secretary of the Navy, on the following charges:

Charge I.—Disobeying the lawful order of his superior officer (one specification).

Charge II.—Conduct unbecoming an officer and a gentleman (three specifications).

Findings

The court found the specifications of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the first, second, and third specifications of the second charge "proved in part," the accused "not guilty" of the second charge, and acquitted the accused of the second charge.

Returned for Revision

On December 15, 1917, the Department returned the record of the proceedings in the foregoing case to the court, and directed that the court reconvene for the purpose of correcting irregularities in the record, the entry of the findings being entirely at variance with the form set forth in Naval Courts and Boards, 1917, page 360, and the notation of the court's adjourning on the conclu-

sion of the proceedings not having been authenticated by the president of the court; and also for the purpose of reconsidering its findings on the specifications of the second charge, as in the opinion of the Department the evidence adduced established as proved the facts alleged in the three specifications under this charge.

ACTION IN REVISION

The court reconvened on January 3, 1918, and decided "respectfully to adhere to its former findings."

RETURNED FOR REVISION

[P. 2] On January 9, 1918, the Department again returned the record of the proceedings in the foregoing case to the court.

In the record of proceedings in revision, a new page, containing the findings, rewritten, together with the authentication thereof, and the notation relative to the court's adjournment on the conclusion of the proceedings, properly authenticated, was inserted immediately preceding the page of the original record on which the irregularities occurred. This method of procedure was irregular and contrary to that set forth in Naval Courts and Boards, 1917, section 377. The decision of the court, in its proceedings in revision, to adhere to its former findings, was an adherence to findings which the Department had declared defective.

The Department directed that the court reconvene for the purpose of reconsidering and properly recording its findings, and correcting its record in revision; and directed further that, in case the court adhered to its former conclusions, it spread upon the record its reasons for reaching the findings recorded.

ACTION IN REVISION

The court reconvened on January 18, 1918, revoked its former findings, and substituted therefor findings to the same effect, properly recorded, but failed to set forth its reasons therefor, the record stating:

> "The court find it impossible to spread upon the record its reasons for reaching the findings, inasmuch as the conclusion of the court was not unanimous, and in order to obtain the reasons for conclusion reached by the majority, it would have been necessary to reveal how each member voted, which would be in direct violation of paragraph 807, U. S. Navy Regulations, 1913."

RETURNED FOR REVISION

On January 26, 1918, the Department again returned the record of the proceedings in the foregoing case to the court, stating that paragraph 807 of the Navy Regulations, 1913, was no longer in force, having been superseded by Naval Courts and Boards, 1917 (G. O. No. 325, of Sept. 21, 1917); and that the grounds stated by the court relative to its inability to ascertain the reasons for its findings, were erroneous. The [P. 3] court was directed to reconvene for a reconsideration of its former action, and, if it adhered to its previous findings, to spread upon the record its reasons therefor.

ACTION IN REVISION

The court reconvened on February 18, 1918, "respectfully decided to adhere to its former findings," and spread upon the record its reasons for its findings upon the specifications of the second charge. These reasons were to the effect that the credibility of one witness for the prosecution was shaken by proof of animus against the accused; that another witness was discredited by the testimony of the accused, and that the attitude of this witness appeared vindictive and certain of his answers evasive; and that the testimony of the third witness referred to was indefinite and vague, that he was unable to repeat specific statements on the part of the accused nor could he assert that the accused had actually made the statements specified against him, and his manner of testifying was hesitating and uncertain.

[C. M. O. 16—1918]

Recommendation of the Judge Advocate General

The Judge Advocate General on February 27, 1918, placed an endorsement on the record in the foregoing case in part as follows:

"Recognizing the fact that the court sees the witnesses, notices their manner and appearance while testifying, and that the impression made upon the members by their frankness or hesitancy has often much to do with the weight accorded their evidence, I cannot concur with the court in this case that the testimony of the three witnesses referred to should count for naught and that of the accused accorded entire credence as appears to have been done in this case, thereby disregarding the well-recognized principle governing the credibility of the accused as a witness (Naval Courts and Boards, p. 177, sec. 210).

"Referring to the aforementioned three witnesses, an attempt was made to discredit two of them; but the third, who was second in command to the accused, and one on whose part no prejudice was in any manner shown, testified fully to the facts alleged in the third specification and gave even further evidence tending to show the actual commission of the act on which the alleged conversation was based.

[P. 4] "The court in adhering to its acquittal in this case, notwithstanding the evidence presented and the conclusive character thereof having been twice brought to its attention has, in my opinion, exhibited a tendency to condone an offense which it was bound to recognize and adjudge a commensurable punishment therefor, and by its action it has signally failed in performance of the duty devolving upon it.

"In view of the above, I have to recommend that, subject to the comments made thereon, the proceedings and proceedings in revision in the foregoing case of Lieutenant Christopher Culver, U. S. Naval Reserve Force, be approved, the findings and acquittal on Charge I and specification thereunder, be approved, but that the findings and acquittal on Charge II and specifications thereunder be disapproved."

Recommendation of the Chief of the Bureau of Navigation

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on March 1, 1918, placed the following indorsement thereon:

"The Bureau further concurs in the indorsement of the Judge Advocate General hereon, and recommends approval thereof.

"The Bureau is unable to understand how the court arrived at its findings."

Action of the Secretary of the Navy

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved, and Lieutenant Christopher Culver, U. S. Naval Reserve Force, will be released from arrest and restored to duty.

Remarks

It was noted in the foregoing case that the court excused a member from attending because he was engaged in other important duty. This action was highly irregular and censurable. A court is not empowered to excuse the absence of one of its members for any reason other than those set forth in regulations, and the record in each case should show the authority therefor (Naval Courts and Boards, 1917, p. 187, secs, 241, 243, and 244).

[P. 5] The oath taken by the members of a general court martial, and set forth in article 40 of the Articles for the Government of the Navy, forbids the disclosure of the vote or opinion of any particular member of the court. That this refers to disclosures outside of court, and not among the members themselves, is clearly evident from the procedure adopted in reaching a finding and sentence as set forth in sections 318 and 336, Naval Courts and Boards, 1917. Under the former section, each member subscribes his name to the decision reached by him and hands the same to the president of the court; and under the

latter, in addition to following a similar course to that pursued in arriving at a finding, the court, when a majority fail to concur upon the nature and degree of the punishment, proceeds viva voce to determine upon a sentence. The reasons for a court reaching the findings it does can be ascertained from the members, even without revealing to each other the votes on the questions involved, by pursuance of a similar method to that outlined in these sections.

C. M. O. 20—1918

[P. 1] Lieutenant (junior grade) Charles F. Chambers, U. S. Naval Reserve Force, was tried by general court martial, on January 28, 1918, on board the U. S. S. *Anderton*, by order of the Commander, Squadron Four, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Through negligence suffering a vessel of the Navy to be run upon a rock and stranded (two specifications).

Charge II.—Neglect of duty (two specifications).

Sentence

"The court therefore sentences him, Lieutenant (junior grade) Charles F. Chambers, United States Naval Reserve Force, to be placed at the foot of the list of ensigns, United States Naval Reserve Force."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "It appears that at the time of the enrollment of the accused he stated that he was qualified for engineering or construction work; that he had practically no experience as a mariner. The accused is evidently fitted for many important construction or engineering assignments, and his services could be used advantageously.
>
> "In view of the above facts and his patriotism and his willingness to serve his country in time of war we recommend him to the clemency of the convening authority."

Action of the Convening Authority

The convening authority on January 31, 1918, approved the proceedings, findings, and sentence in the foregoing case of Lieutenant (junior grade) Charles F. Chambers, U. S. Naval Reserve [P. 2] Force, and directed that he be released from arrest and restored to duty.

Recommendation of the Judge Advocate General

The Judge Advocate General, on March 8, 1918, placed an endorsement on the record in the foregoing case in part as follows:

> "The sentence is incongruous in that by the wording of the sentence this officer is not reduced in rank. A sentence should be construed with exactness, nothing implied or read into it, and the sentence adjudged in this case does not provide for the reduction or even disenrollment of this officer from the rank of lieutenant (junior grade) to that of ensign, but places him at the foot of the list of ensigns. He would, therefore, still hold the provisional enrollment of a lieutenant (junior grade) and be entitled to the pay thereof but for the purposes of precedence would be at the foot of the list of ensigns.
>
> "The sentence is to a certain extent indeterminate, in view of the fact that at the present time there appears to be no list maintained showing the relative rank or position of officers serving under provisional enrollment in the Naval Reserve Force, and consequently being placed at the foot of a nonexisting list is without effect.
>
> "I have, therefore, to recommend that the proceedings and findings in the foregoing case of Lieutenant (junior grade) Charles F. Chambers, U. S.

[C. M. O. 22—1918]

Naval Reserve Force, be approved, but in view of the facts set forth above that the sentence be disapproved. By action of the convening authority in this case he has been released from arrest and restored to duty."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on March 9, 1918, concurred in the endorsement of the Judge Advocate General and recommended approval thereof; and further recommended that the sentence be disapproved, and that the provisional enrollment of Lieutenant (junior grade) Chambers be changed to that of ensign.

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, in the case of Lieutenant (junior grade) Charles F. Chambers, U. S. Naval Reserve Force, are approved.

The Secretary of the Navy, as a separate and entirely distinct action, directed that the provisional enrollment of Lieutenant (junior grade) Chambers be changed to that of ensign.

C. M. O. 22—1918

[P. 1] Ensign Patrick J. Ford, U. S. Naval Reserve Force, was tried by general court martial on February 2, 1918, on board the U. S. S. *Douglas* by order of the Commander, Squadron Four, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Neglect of duty (three specifications).

Charge II.—Through negligence suffering a vessel of the Navy to be stranded (one specification).

SENTENCE

"The court therefore sentences him, Ensign Patrick J. Ford, United States Naval Reserve Force, to be placed at the foot of the list of boatswains, United States Naval Reserve Force."

ACTION OF THE CONVENING AUTHORITY

On February 2, 1918, the convening authority approved the proceedings, findings, and sentence in the foregoing case of Ensign Patrick J. Ford, U. S. Naval Reserve Force, and directed that he be released from arrest and restored to duty.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General on March 12, 1918, placed an endorsement on the record of the foregoing case in part as follows:

"From a review of this case it is noted that the first specification of Charge I alleges in effect among other neglects a failure on the part of the accused, as provided by the U. S. Navy Regulations, to cause the patent log to be used, or cause soundings to be taken, or proper lookouts to be stationed low in the bow. As Navy Regulations do not appear to provide that the navigator as such of a ship shall perform, or provide for the performance of these particular duties, unless ordered so to do by his commanding officer (article 2403, Navy Regulations), the specification is, in my opinion, defective in that the words [P. 2] 'as provided by the U. S. Navy Regulations' have without warrant been included therein. The words 'as was his duty so to do' would have been the proper averment in this case if such duties had in fact been those the accused was required to perform. As, however, the closing allegation that he did neglect and fail to obtain the position of the ship by cross bearings and that he, the accused, did therein and thereby neglect his duty as navigator, supports the charge and permits striking out the aforementioned objectionable words without invalidating the specification, I am of the opinion that though defective, the specification is not fatally so, and especially since no objection was made thereto by the accused.

[C. M. O. 23—1918]

"This sentence as adjudged is clearly objectionable, in that it is incongruous and to a certain extent indeterminate in character, and furthermore its approval would establish a precedent of doubtful expediency.

"It is incongruous in that by the wording of the sentence this officer is not reduced in rank. A sentence should be construed with exactness, nothing implied nor read into it, and the sentence adjudged in this case does not provide for the reduction or even disenrollment of this officer from the rank of ensign to that of boatswain, but places him at the foot of the list of boatswains. He would, therefore, still hold the provisional enrollment of an ensign and be entitled to the pay thereof, but for the purposes of precedence would be at the foot of the list of boatswains.

"The sentence is to a certain extent indeterminate in view of the fact that at the present time there appears to be no list maintained showing the relative rank or position of officers serving under provisional enrollment in the Naval Reserve Force, and consequently being placed at the foot of a nonexisting list is of no effect.

"Subject to the foregoing remarks, I have, therefore, to recommend that the proceedings, and findings, in the foregoing case of Ensign Patrick J. Ford, U. S. Naval Reserve Force, be approved, but in view of the facts set forth above that the sentence be disapproved."

ACTION OF THE SECRETARY OF THE NAVY

The record of the proceedings in the foregoing case was referred to the Chief of the Bureau of Navigation, who on [P. 3] March 13, 1918, concurred in the endorsement of the Judge Advocate General and recommended approval thereof.

The foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved.

As an entirely separate and independent action, it was ordered, by the Department, that the rank of Ensign Ford be changed to that of boatswain.

C. M. O. 23—1918

[P. 1] Ensign (T) Thomas W. Mather, U. S. Navy, was tried by general court martial on January 31, 1918, on board the U. S. S. *Vestal*, by order of the Commander, Train, U. S. Atlantic Fleet, on the following charges:

Charge.—Through negligence suffering a vessel of the United States Navy to be lost by fire (four specifications).

FINDINGS

The court found the first, second, and fourth specifications of the charge "proved in part," the third specification of the charge "not proved" and the accused "guilty" of the charge.

SENTENCE

"The court therefore sentences him, Ensign (T) Thomas W. Mather, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his inexperience in the naval service, we recommend Ensign (T) Thomas W. Mather, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

The convening authority on February 21, 1918, placed the following endorsement on the record in the foregoing case:

"The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign (T) Thomas W. Mather, U. S. Navy, are approved, and in conformity with article 53 of the Articles for the Govern-

[C. M. O. 23—1918]

ment of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President.

"The convening authority notes the reference of the court to the inexperience of the accused and the consequent unanimous recommendation to clemency, but punishment is largely a warning [P. 2] to others and it appears to the convening authority that for temporary or reserve officers, loss of numbers amounts to so little in the way of punishment, that there is no practicable mitigation of the sentence of dismissal, except that of entire remission and this step the convening authority is not willing to take."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 14, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case in part as follows:

"The charge as laid in this case, to wit, 'Through negligence suffering a vessel of the United States Navy to be lost by fire,' is not one recognized in naval procedure, not having been specially provided for in the Articles for the Government of the Navy, but should have been laid under 'Culpable inefficiency in the performance of duty,' or 'Neglect of duty.' This error, however, in itself is not considered sufficient to invalidate the proceedings, at least in time of war when the limitation of punishments prescribed by the President do not apply to sentences of general courts martial.

"Considering, however, the charge as actually preferred, it is noted there are four specifications under the charge 'Through negligence suffering a vessel of the United States Navy to be lost by fire,' each of which specifications alleges a different neglect or failure on the part of the accused as the cause of the ship's loss. In other words, it is alleged that the ship was lost because of (*a*) failure to make out a fire bill immediately upon placing ship in commission and exercising crew thereat; (*b*) failure and neglect to obey an order to hold weekly fire drills; (*c*) failure to pump engine-room bilges after getting under way; and (*d*) failure to have a bucket filled with sand on board. It is obvious from the findings that, in the opinion of the court, none of said causes by itself was sufficient to cause the loss of the ship, although each of them, except the third, may have contributed to the disaster. It is a well-established rule that each specification standing alone should contain sufficient allegations to support the charge under which it appears (Naval Digest, 1916, p. 67, par. 92), and each specification should set forth facts sufficient to constitute the particular offense charged (Naval Courts and Boards, 1917, p. 80, sec. 71).

[P. 3] "It is obvious that none of the above-mentioned neglects, standing alone, could have caused the destruction of the ship by fire. It is unreasonable to believe that, for example, the failure to have a bucket filled with sand on board the ship resulted in the ship's destruction by fire. It is possible, however, that all of the neglects and failures combined might have been responsible for the fact that the ship was not saved from destruction after the fire broke out. And it seems to have been the opinion of the court that three of the alleged causes prevented adequate measures from being taken to save the ship after the fire broke out, although the court did not find that the loss of the ship was the direct or indirect result of any or all of the alleged neglects and failures on the part of the accused. The charge and specifications, as drawn, are bad in that they allege the offense in the alternative. In effect they charge the accused that, if he did not commit the offense in the manner stated in one of the specifications, he committed it in the manner stated in one of the other specifications, which form of charging the offense is equivocal, and lacks the certainty required in alleging an offense (Bishop's New Criminal Practice, 2d ed., vol. 1, p. 279, sec. 323).

"The court in its findings upon the first, second, and fourth specifications apparently recognized the technical errors in the specifications and endeavored to correct them by excepting certain words and substituting other words. This was error on the part of the court. The court is not permitted to correct technical errors in charges and specifications without the consent of the convening authority, obtained before hearing the evidence in the case (Naval Courts and Boards, 1917, sec. 56 (2)). The error should

have been discovered when the court examined the charges and specifications and the attention of the convening authority called thereto in order that he might correct them. For the court to proceed to trial on charges and specifications which were technically incorrect and, after hearing the evidence, to endeavor to correct the specifications so as to make them meet the evidence is illegal. It is equivalent to trying the man on one specification and finding him not guilty of such specification but guilty of another and entirely different specification.

"It is noted that the accused in this case was tried on the charge of 'Through negligence suffering a vessel of the United States Navy to be lost by fire,' and, by reason of the substitution [P. 4] by the court of other words for those contained in the specifications, he was found guilty of failures and negligence, or neglect, as a consequence of which 'adequate measures were not taken to prevent the spread of flames and the consequent destruction of the ship' (Naval Digest, 1916, p. 239, par. 27). The substitutions, therefore, made by the court in the specifications resulted in rendering the specifications inadequate to support the charge on which the accused was tried. The findings of the court are therefore illegal. A substitution must not so modify the specifications as to render them inappropriate or inadequate to support the charge of which the accused is found guilty (C. M. O. No. 27, 1896, 2).

"In view of the foregoing, it is my opinion that the proceedings, findings, and sentence in the case of Ensign (T) Thomas W. Mather, U. S. Navy, are illegal, and it is recommended that the proceedings be set aside and the accused released from arrest and restored to duty."

Action of the Secretary of the Navy

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on March 15, 1918, concurred in the endorsement of the Judge Advocate General and recommended approval thereof.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved.

Remarks

It was noted in the foregoing case that two letters which were used as modifications of the precepts and were prefixed as exhibits, were orders to individual officers, relieving one and appointing the other a member of the court. These letters were supplementary orders and are not considered as modifications of the precept. The latter are addressed to the president of the court and should not be confused with orders directing officers to perform the duties set forth in the precept (Naval Courts and Boards, 1917, sec. 228).

C. M. O. 25—1918

[P. 1] Boatswain Fred H. Dodge, U. S. Naval Reserve Force, was tried by general court martial on October 24, 1917, on board the U. S. S. *Panther*, by order of the Commander, U. S. Patrol Squadrons Operating in European Waters, and found guilty of the following charges:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Breaking arrest (one specification).

Sentence

"The court therefore sentences him, Boatswain Fred H. Dodge, U. S. Naval Reserve Force, to be reduced to the rating of seaman, second (2d) class, U. S. Naval Reserve Force, and to be confined in such place as the convening authority may designate for a period of six (6) months."

Returned For Revision

The convening authority on October 31, 1917, returned the record of the proceedings in the foregoing case to the court and directed that the court re-

[C. M. O. 25—1918]

convene for the purpose of correcting certain errors and reconsidering its sentence, which in the opinion of the convening authority was not appropriate to the offenses found proved.

SENTENCE IN REVISION

The court reconvened on November 2, 1917, corrected the errors noted by the convening authority, and decided to revoke its former sentence and substitute therefor the following:

> "To be reduced to the rating of seaman, second (2d) class, U. S. Naval Reserve Force, and to be discharged from the U. S. Naval Reserve Force with a dishonorable discharge."

ACTION OF THE CONVENING AUTHORITY

The convening authority on November 18, 1917, placed the following endorsement on the record in the following case:

> "The proceedings, findings, and sentence in the foregoing case of Boatswain Fred H. Dodge, U. S. Navy Reserve Force, are [P. 2] approved and respectfully forwarded to the Secretary of the Navy for presentation to the President of the United States for approval.
>
> "Boatswain Dodge will be sent home by the first available Government transportation, with orders to report aboard the receiving ship at the port of entry and to report by telegraph to the Bureau of Navigation for orders."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General on March 9, 1918, placed an endorsement on the record in the foregoing case in part as follows:

> "Charge 2 in this case 'breaking arrest' alleges that the accused 'having been restricted' to his ship, the U. S. S. *Anderton* for a period of ten days by lawful order of his commanding officer, did, 'break his arrest' and leave said ship *Anderton*.
>
> "The reading of this specification clearly shows that it cannot support the charge of 'breaking arrest' as 'before the charge of breaking arrest can be proved, it must appear that the accused was actually placed under arrest' (Naval Digest, 1916, p. 54, par. 9), which arrest in this case is not even alleged in the specification.
>
> "The accused in this case not having been placed under arrest, but on the contrary having merely been 'restricted' to his ship, the specification alleging such restriction cannot in my opinion support the charge of 'breaking arrest.'
>
> "In view of the foregoing I am of the opinion that the finding on the second charge and the specification thereunder should be disapproved."

ACTION OF THE SECRETARY OF THE NAVY

The record of the proceedings in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on March 12, 1918, concurred in the action taken by the convening authority, and further concurred in the endorsement of the Judge Advocate General and recommended approval thereof.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of [P. 3] Navigation, were approved on March 14, 1918, and in accordance with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence of the general court martial in the foregoing case of Boatswain Fred H. Dodge, U. S. Naval Reserve Force, be confirmed.

ACTION OF THE PRESIDENT

On March 22, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 27—1918

[P. 1] Lieutenant Howard H. J. Benson, U. S. Navy, was tried by general court martial on February 11, 1918, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, at Lorient, France, and found guilty of the following charges:

Charge I. Culpable inefficiency in the performance of duty (one specification).

Charge II. Through negligence, suffering a vessel of the Navy to be stranded (one specification).

Sentence

"The court therefore sentences him, Lieutenant Howard H. J. Benson, U. S. Navy, to lose ten (10) numbers in his grade."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In view of the weather conditions on the day upon which the U. S. S. *Guinevere* was grounded, and the apparently unusual current conditions then existing, which conditions, in our opinion, made it almost impossible accurately to judge the run of the ship and largely contributed to her grounding; and in view of his excellent reputation for careful, conscientious, and painstaking performances of duty, we recommend Lieutenant Howard H. J. Benson to the clemency of the reviewing authority."

Action of the Convening Authority

The convening authority on February 16, 1918, placed the following endorsement on the record of the proceedings in the foregoing case:

> "It has been clearly established that the loss of the *Guinevere* was brought about by an erroneous estimate of the ship's position. It also appears that while this error was primarily that of the commanding officer, there were other facts existing which, [P. 2] in the opinion of the reviewing authority, are entitled to consideration in determining the gravity of the offenses charged, though in no way relieving the commanding officer of the responsibility.
>
> "The members of the court were unanimous in their recommendation for clemency, basing such recommendation on the adverse weather conditions under which the vessel was being navigated and on the excellent reputation of the accused for careful, conscientious, and painstaking performance of duty.
>
> "The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Howard H. J. Benson, U. S. Navy, are approved. However, in view of the foregoing remarks and of the unanimous recommendation to clemency by the members of the court, the sentence is reduced to five (5) numbers in his grade. The accused having been released from arrest under the provisions of article 1417 (4), U. S. Navy Regulations, 1913, is hereby unconditionally restored to duty."

Remarks

It was noted in the foregoing case that the accused objected to the charges and specifications on the ground that each charge and the specification thereunder was based upon the same allegations. He submitted that the gravamen of the specifications of both charges was precisely the same, and requested the court to strike out charge I, as the specification thereunder was practically the same as the specification under charge II. The court overruled the objection. The Department's policy with reference to "multiplicity or plurality" of charges is set forth in the Naval Digest, 1916, page 66.

C. M. O. 29—1918

[P. 1] Lieutenant Walter S. Carrington, U. S. Navy, was tried by general court martial on March 18, 1918, on board the U. S. S. *Powhatan*, by order of the Commander, Cruiser Force, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Violation of a lawful general order issued by the Secretary of the Navy (one specification).

Sentence

"The court therefore sentences him, Lieutenant Walter S. Carrington, U. S. Navy, to lose five (5) numbers in his grade."

Recommendation to Clemency

The following recommendation to clemency, signed by one of the five members of the court, was spread upon the record:

> "In consideration of his previous good record, and the attending circumstances, I recommend Lieutenant Walter S. Carrington, U. S. Navy, to the clemency of the reviewing authority."

Action of the Convening Authority

The convening authority, on March 20, 1918, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Walter S. Carrington, U. S. Navy, and directed that he be released from arrest and restored to duty.

Action of the Judge Advocate General

The Judge Advocate General, on March 28, 1918, placed an endorsement on the record in the foregoing case in part as follows:

> "After a careful review of this record and consideration of the brief filed by counsel in connection therewith, I am of the opinion that the proceedings, findings, and sentence in this case are legal.
>
> "Counsel has laid stress on two features—to wit, that as the statement made by Lieutenant Carrington regarding the sailing of the *Huron* the first of the week with troops was untrue, there was no information conveyed in the words used, and that even did it turn out to be true he did not have knowledge of its truthfulness, and therefore he could not be guilty of willfully and knowingly violating the order mentioned.
>
> "The purpose of General Order No. 300, as set forth in the title thereof, was the taking of precautions against the dissemination [P. 2] of military information, and the directory portion of said order reads as follows:
>
> " 'Officers, enlisted personnel, and civilian employees are therefore directed not to discuss any question relating to the disposition, movements, or proposed movements of naval or military forces (including personnel) at any time, except officially, either among themselves or with any persons outside the naval service.'
>
> "It is quite clear, therefore, from the above that this was a prohibition against discussions, or the making of comments, relative to the matters set forth therein, and should be broadly considered and not restricted exactly to what was actually and positively taking place; it included, in my opinion, even speculation as to probable dispositions or movements of naval or military forces.
>
> "In order that the words uttered be in violation of General Order No. 300, it is not essential that such words be entirely true; their truthfulness is immaterial, for the language of the order prohibits any discussion of questions relating to the disposition, movements, or proposed movements of naval or military forces (including personnel), except as provided. The contention, therefore, of the accused that his statement, in reply to a question, to wit, 'I am on the U. S. S. *Huron* and we are sailing for Europe the first of the week with troops,' was not a discussion of matters such as described, is without proper foundation, and cannot be sustained."

[C. M. O. 30—1918]

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on March 29, 1918, concurred in the action taken by the convening authority.

The foregoing remarks of the Judge Advocate General are approved.

C. M. O. 30—1918

[P. 17] ABBREVIATIONS IN FINDINGS AND SENTENCE: IMPROPER USE OF.

Where the rating of the accused is that of chief boatswain's mate, it is improper to indicate same either in the findings or sentence of the court by using the abbreviation C. B. M. The proper form is to spell the rating in full (File 26262–4093, J. A. G., Mar. 16, 1918; G. C. M. Rec. No. 37258).

ADMISSIONS IN OPEN COURT.

Shortly after the accused in a recent case had pleaded "not guilty" to the charges and specifications preferred against him, his counsel made the following statement to the court: "The accused, * * * would have entered a plea of guilty, if, in the judgment of his counsel, a conviction here on the charge as alleged would have been his protection against, in later years, a charge brought against him for the actual occurrence. He is charged, if you will notice in the specifications, with having forged a certain instrument in the name of T____ S. K____, an instrument demanding the payment to him of the sum of $45. If you will follow me, we will make these admissions: The defendant will admit," etc. Counsel then proceeded to admit every allegation contained in the specification, substituting the amount of $75 for $45 and the name G. S. K____ for that of T____ S. K____.

While the subject of admission pertains rather to civil suits than to criminal proceedings, still the fact appears established that admissions properly made by either party to a court proceeding are to regarded as being as much in the case as if they had been expressly proved. It is essential, however, that in a criminal proceeding such must be made by the defendant or else that he indicate in some manner his assent thereto if made by his counsel:

> [P. 18] "A plea of guilty is a judicial confession and dispenses with evidence to prove the facts set forth in a specification. To a lesser extent an admission in open court of any material fact set forth in a specification when such admission is voluntarily made by the accused or by his counsel in his presence *and with his express or implied authority*, is a judicial confession of such fact and dispenses with the necessity of evidence to establish same" (C. M. O. No. 5, 1917, p. 6).
>
> "A conviction of larceny cannot be predicated on the admissions of counsel, and it is an error to charge that counsel have admitted the stealing with felonious intent, and the only question is as to the value of the property" (*People* v. *Hall*, 48 N. W. 869).
>
> "Where, in a criminal case, the counsel for the prisoner made certain admissions, it was held that the jury ought not to give to them the slightest weight" (14 Cent. Dig., sec. 1254 (c)).
>
> "No admissions by accused's counsel of material averments are evidence against him, or a proper subject for the consideration of the jury" (*Clayton* v. *State*, 4 Tex. App. 515; 14 Cent. Dig., sec. 897 (n)).
>
> "Statements contained in an unsworn petition, plea, or answer filed by defendant in a civil case, and signed by counsel only, would not in a criminal trial, be admissible against him as incriminating admissions, unless it affirmatively appeared that the counsel referred to was authorized to represent him in the civil case, *and also authorized to make in his behalf the particular statements in question*" (*Farmer* v. *State*, 28 S. E. 26; 100 Ga. 41; 6 Amer. Dig., Dec. Ed., sec. 410 (c)).

In some cases where the admissions made by counsel are not of so material and extensive a nature, it might be held that the accused being present and

[C. M. O. 30—1918]

making no objection to such action of his counsel, the consent or authorization may be implied, yet in a case such as the one under consideration, where the admissions cover the allegations set forth in the specifications in their entirety, it was the opinion of the Acting Judge Advocate General that no such implication should be inferred, but that it should be affirmatively indicated by the accused.

Counsel for the accused is not competent to plead for his client; such must be the personal act of the accused.

> "A plea confessing himself to be guilty of crime should not be entered except with the express consent of the defendant given by him personally in direct terms in open court. Nothing should be left to implication, and his confession of guilt should be explicitly made by himself in person in the presence of the court" (*People* v. *McCrory*, 41 Calif. 458).

[P. 19] The aforementioned extensive and material admissions, made by counsel, are a judicial confession of the facts included therein, and in this case equivalent to a plea of guilty to the specifications, and being made by counsel without any indicated authority therefor are a nullity, and it was error on the part of the court, under the circumstances set forth, to have accepted and considered the same without the expressed assent thereto of the accused (File 26251–15817; G. C. M. Rec. No. 37417).

ADVERSE COMMENT: ON FAILURE OF ACCUSED TO BECOME WITNESS.

The reference of the judge advocate in his closing remarks to the fact that the accused failed to take the stand as witness in his own behalf is improper and contrary to the spirit of the act of March 16, 1878 (20 Stat. 30), which provides as follows:

> "That in * * * proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in * * * courts martial, and courts of inquiry, * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

But where the proofs of guilt are so clear and conclusive that the cause of the accused could not have been harmed by such reference, the proceedings need not be set aside. (See Naval Digest, 1916, p. 647, sec. 11; File 26251–14575; G. C. M. Rec. No. 36585.)

IMMEDIATE SUPERIOR IN COMMAND: RETURN OF RECORD OF PROCEEDINGS OF SUMMARY COURT MARTIAL BY, FOR REVISION.

The immediate superior in command returned the record of proceedings in a summary court martial case to the convening authority with the direction to reconvene the court for a reconsideration of the sentence, and upon the conclusion of proceedings in revision, to revoke his (the convening authority's) action upon the proceedings, finding, and sentence, substitute therefor a new action, and return the entire record of proceedings to the immediate superior in command.

The immediate superior in command may not properly return a record of a summary court martial directly to the court for revision, as such power lies only in the convening authority. It has been held by the Department, however, that somewhat the same effect can be realized by a return of the record to the commanding officer, with the views of the superior expressed thereon. The above attitude was expressed in a letter of March 22, 1906, which is quoted below, in which the term "commander in chief" is to be regarded as "immediate superior in command." Page 508, section 16, [P. 20] Naval Digest, 1916, is possibly somewhat misleading unless read in connection herewith:

File 2214–13 M1

NAVY DEPARTMENT,
Washington, March 22, 1906.

SIR: The Department is in receipt of your letter of the tenth instant, in which you state that it not infrequently happens that, "as commander in

chief and in reviewing the records of summary courts martial," you are of the opinion "that the sentence is entirely inadequate" and ask whether or not, in such cases, you can "legally refer the record of proceedings back to the convening authority directing that he reconvene the court for revision or reconsideration of the sentence."

In reply you are advised that the Department considers that you have substantially the power suggested. Approval by the commander in chief of the proceedings and sentence of a summary court being essential to their validity, it is the right of that officer, if he does not approve, to return the record to the convening authority, with a statement of the grounds of disapproval and with the suggestion that the action formerly taken on the record be reconsidered, and, in appropriate cases, that the court be reconvened.

In so disapproving and returning the record, however, the commander in chief acts not strictly in a military but in a judicial capacity. The action does not take the complexion of a military order. The officer who convened the court and the court itself, have, likewise, distinctively judicial duties and responsibilities. The person accused, and the service, are entitled to the benefit of the individual judgment of the members of the court, of the convening authority, and of the commander in chief. In case of a record so returned, the court and the convening authority may, and if their sense of duty dictates, should, adhere to the action originally taken in the premises.

Further, the general trend and effect of the statutes and of the regulations on the subject (arts. 32 and 33 of the Articles for the Government of the Navy; arts. 1829, 1830, and 1831 of the Navy Regulations) are in the direction of conferring upon higher authority the power to mitigate or remit, but in no case to increase or render more severe, sentences imposed by summary courts. In view of this, the Department considers that while, as above indicated, the commander in chief doubtless has the legal power to return the records of summary court martial for the purpose stated in your letter of inquiry, the power is one to be carefully exercised. It should be invoked only for the purpose of preventing flagrant [P. 21] failure of justice of a character clearly prejudicial to the interests of the service.

Very respectfully,

CHARLES J. BONAPARTE,
Secretary.

SWBD.

The COMMANDER IN CHIEF.
United States Atlantic Fleet.
(Nav.)

The Department still considers that in such cases the procedure outlined above should be followed (File 26287–4487, Sec. Nav. Mar. 12, 1918; S. C. M. Rec. No. 11654).

SPECIFICATION INTENDED FOR TRIAL IN JOINDER: CONFUSION RESULTING FROM USE OF, IN CASE OF SINGLE ACCUSED.

A____ B____, chief water tender, U. S. Navy, was recently tried by general court martial for a certain offense. A form of specification intended for trial in joinder was improperly used by the convening authority.

The court recorded its findings in part, as follows:

"The specification proved in part, proved except the words 'A____ B____, chief water tender,' which words are not proved and for which the court substitutes the words 'a person unknown,' which words are proved," and acquitted the accused of the charge.

A____ B____ was the accused, and for the court to find the specification proved against some person other than the accused was most irregular. If, from the evidence adduced, the accused was innocent of the allegations set forth in the specifications, the finding upon the same should have been "not proved" (File 26262–4074, J. A. G. Mar. 12, 1918; G. C. M. Rec. No. 37193).

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SPECIFICATION INTENDED FOR TRIAL IN JOINDER: EFFECT OF USE OF, WHERE SINGLE ACCUSED IS TRIED.

In a recent case the second specification under "Charge—Scandalous conduct tending to the destruction of good morals," set forth on page 117, Naval Courts and boards, 1917, was used where only one accused was tried. It is clearly evident that this form is intended to be used only when the participants are to be tried in joinder. As, however, both participants are charged with the offense it necessarily follows that each is charged, and in view of this fact, though admittedly irregular, the specification was held not fatally defective (File 26262–3982, J. A. G. Mar. 11, 1918: G. C. M. Rec. No. 36895).

[P. 22] WITHDRAWAL AND SUBSTITUTION OF PLEA BY ACCUSED (COUNSEL): WHAT RECORD SHOULD SHOW AS TO.

The counsel for the accused in a recent case requested permission of the court to withdraw the accused's plea of "not guilty" and to substitute therefor the plea of "guilty." The record disclosed that the court announced that the request of the accused was granted, and that he was allowed to enter a plea of "guilty."

In Bishop's New Criminal Procedure (vol. 1, sec. 268) it is stated that:

> "A personal appearance and plea in person are necessary at the arraignment; this cannot be by attorney. The only exception to this rule is that in a misdemeanor punishable only by a fine without imprisonment and for special cause shown, and as a favor to the defendant, he will be permitted to plead by attorney."

Again:

> "A plea by an attorney of a party indicted for a felony is a nullity; the defendent must plead in person" (Wharton on Criminal Law, 7th Ed., par. 530).

And:

> "A plea confessing himself to be guilty of crime should not be entered except with the express consent of the defendent given by him personally in direct terms in open court. Nothing should be left to implication, and his confession of guilt should be explicitly made by himself in person in the presence of the court" (*People* v. *McCrory*, 41 Calif. 458).

In the case of *State* v. *Blake* (5 Wyo. 107; 38 Pac. 354), where counsel requested permission of the court to withdraw a plea of not guilty and substitute one of guilty of murder in the second degree, the judge of the court said, "Does the defendent withdraw his plea of not guilty, and enter a plea of guilty of murder in the second degree?" and the defendent, who was facing the judge, replied by nodding his head. It was held by the court reviewing the case that:

> "Under the circumstance of the case before us * * * it does not sufficiently appear that the defendant misunderstood the proceedings of the court or of the attorney * * * who acted for him without objection on his part, or that he was mislead, or that an attempt was made by anyone to compel him to plead guilty. His affirmative assent to the action of the attorney, although made by a sign, we think was sufficient and operated as a voluntary plea, particularly as he made no objection to the action of the attorney, or to the proceedings of the court, and as it is not made to appear that he did not understand the proceedings or the effect of his plea."

It, therefore, appears that when the request for withdrawal of a plea and substitution of another is made by counsel, it is necessary that the record clearly indicate that the consent of the accused was given to the action taken by his counsel and that it was his personal [P. 23] desire to substitute some other plea for that originally made on arraignment.

Where the substituted plea is that of "guilty," the record should show that the accused was duly warned as to the effect of such substituted plea (File 26251–15806, G. C. M. Rec. No. 37337).

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WITNESS: (A) ATTACK OF CREDIBILITY OF. (B) SELF-INCRIMINATION OF.

In a recent case it was noted that a witness for the prosecution was recalled by the defense and asked the following question by the counsel for the accused:

"Did you testify in the case of D____ that you did not know anything about how S____ was hurt?"

(*a*) The judge advocate objected on the ground that it was an attempt to transpose into the record of this court testimony given by this witness before another court, which testimony is inadmissible. Counsel for the accused replied that the question was asked to test the credibility of the witness. The judge advocate said that to answer the question might tend to incriminate the witness, and claimed for him the privilege of refusing to answer on the ground of self-incrimination. The court sustained the objection of the judge advocate.

The nature of the question and the statement of counsel for the accused as to his reason for asking it indicate an effort on the part of the defense to attack the credibility of the witness in connection with his testimony for the prosecution in this case. In other words, it was an attempt to impeach the witness, which the accused had a right to do, and it was error for the court to deny him the right (Naval Courts and Boards, 1917, pp. 164, 165, secs. 166–168; Nav. Dig., 1916, p. 284). It is probable that the court based its decision on the assumption that the defense was attempting to introduce the record of the proceedings of the general court martial in the case of D____, but there is nothing in the record to justify such assumption on the part of the court. Had the defense attempted to introduce the record of the D____ trial it would have been proper to rule it out on the ground that the accused was not a party to the previous trial, was not present thereat or represented by counsel, was not afforded an opportunity to cross-examine the witnesses, and the introduction of the record would, therefore, deprive him of his constitutional right to be confronted with witnesses against him. In this case, however, no such question was presented, as no effort was made to introduce the record of the previous trial, but the witness who testified at the previous trial was present in person, confronting the accused, and subject to cross-examination. He could, therefore, be questioned regarding any contradictory statements he may have made at the previous trial, and, if necessary, his previous testimony could be proved by the testimony of other witnesses.

[P. 24] (*b*) On the other hand, if the court's decision in sustaining the objection was based on the ground that the witness was privileged to decline to answer because his answer might tend to incriminate him, the ruling of the court was nevertheless erroneous. The privilege of a witness to decline to answer a question on the ground that his answer might tend to incriminate him is personal, and can be taken advantage of by himself alone. (Nav. Dig., 1916, p. 568, sec. 16; Naval Courts and Boards, 1917, pp. 162–165.) (File 26262–4014, Sec. Nav. Mar. 2, 1918.)

ACCEPTANCE OF PERMANENT OFFICE: EFFECT OF, UPON RIGHT TO DISCHARGE FROM ENLISTMENT.

An acting pay clerk was appointed as such from the enlisted personnel of the Navy on December 29, 1916. He requested to be informed as to whether or not he was entitled to an honorable discharge from the Navy upon September 12, 1917, the date that his enlistment would have expired had he continued an enlisted man.

The grade of acting pay clerk is a permanent institution in the Navy. It was created by the act of March 3, 1915 (38 Stat. 928, 942), and must not be confused with temporary appointments which are issued under the authority of the act of May 22, 1917.

It was held that his enlistment had ipso facto terminated upon his accepting the appointment to the permanent office of acting pay clerk in the Navy and that he was not entitled to an honorable discharge on September 12, 1917, and that he should not be given a discharge from said enlistment (File 26254–2020: 4, J. A. G., Mar. 15, 1918).

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ACTING ENSIGNS FOR ENGINEERING DUTY ONLY: STATUS OF.

The following questions concerning the operation of so much of the act of August 29, 1916 (39 Stat. 580), as provides for the appointment of acting ensigns for engineering duty only, were propounded to the Judge Advocate General for answer.

(*a*) Does the term "annually" in the act of August 29, 1916, providing for said ensigns refer to calendar or fiscal year?

(*b*) Do the three acting ensigns appointed to rank from May 26, 1917, form a part of the permanent regular Navy, and take rank and precedence next after the class of regular ensigns appointed from March 30, 1917, and next ahead of the class of regular ensigns appointed from June 30, 1917?—(no other regular ensigns or acting ensigns were appointed between said dates).

[P. 25] (*c*) Are they (said three ensigns) entitled to rank as permanent lieutenants (junior grade) in the regular line, for engineering duty only, from May 26, 1920, after passing the prescribed examination and thenceforth will they be additional numbers in grade?

(*d*) Said three acting ensigns have not heretofore been counted in the computations based upon "actual officers" for the line, for the reasons: First, they appear to be in a class intended to be in addition to the regular line; second, their present actual number would have no effect upon the authorized strength of any particular grade or grades of the line. Should they be so counted?

NOTE.—The total authorized strength of 30 acting ensigns for engineering duty only, as for the calendar year 1917, was used in computations during said year for Staff Corps computations based on total authorized strength. Should this total authorized strength be regarded as 30 for the calendar year 1916, plus 30 for the calendar year 1917, and now plus 30 for the calendar year 1918 (90 in all), or, not having made any such appointments during the calendar year 1916, and only 4 during the calendar year 1917, should the total authorized strength as for the present calendar year be counted as 0 plus 4 plus 30, or 34 in all?

(*e*) If query (*b*) is answered in the affirmative, are the three acting ensigns in question eligible for temporary promotion to lieutenant (junior grade) in due course with the permanent ensigns referred to; and, if so, will they be temporary additional numbers in grade after such promotion?

ANSWERS

(*a*) The act of August 29, 1916 (39 Stat. 556, 580), authorizes the Secretary of the Navy "to appoint annually in the line of the Navy for a period of ten years following the passage of this act, * * * thirty acting ensigns for the performance of engineering duties only." In accordance with the above provision it was held that neither calendar nor fiscal year was intended by Congress, but the year beginning August 29 of one calendar year and ending August 28 of the next.

(*b*) The latter part of this question appears to be answered by R–1048, U. S. Navy Regulations, 1913, which provides that:

> "An officer duly appointed to act in any grade shall, while serving under such appointment, be entitled to the same command, precedence, and honors as if he held a commission in that grade of the same date as his appointment."

Acting ensigns appointed for engineering duties only are officers duly appointed to act in the grade of ensign. They do not hold commissions (File 13707–38, August 20, 1914), but are for the purposes of [P. 26] rank and precedence the same as commissioned officers of the Navy. The very fact, however, that they hold only acting appointments, as well as the probationary character of their tenure of office, precludes the idea that they form a part of the permanent regular Navy. Nevertheless, they are entitled by virtue of the act of August 29, 1916, and R–1048, U. S. Navy Regulations, 1913, to rank as ensigns in the line of the Navy from May 26, 1917. Consequently, their position on the permanent Navy list is next after the class of ensigns appointed from March 30, 1917, and next ahead of the class appointed from June 29, 1917. All the class appointed from March 30, 1917, have been advanced to temporary lieutenant, and all of the class appointed from June 29, 1917, have been advanced to temporary lieutenant or lieutenant (junior grade). The acting ensigns for engineering duty only have been advanced in rank. The foregoing must therefore be con-

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sidered as applying only to the permanent rank of the above-mentioned officers.

(*c*) Unless the law is amended before May 26, 1920, acting ensigns for engineering duty only, appointed on May 26, 1917, will be entitled on the former date to rank as permanent lieutenants of the junior grade in the line of the Navy upon complying with all the conditions of the act (August 29, 1916) and passing the prescribed examination.

They are not, however, to be carried as additional numbers in grade until they have attained the rank of commander.

(*d*) Acting ensigns are not commissioned officers and should not be included in computing the number of commissioned officers in the various grades of the line (File 28687–4). They should be included, however, in computing the total authorized number of officers and enlisted men for the purpose of determining authorized number of medical officers, and in computing the total personnel for the purpose of determining the authorized number of chaplains.

The number authorized annually is not, in my opinion, cumulative, and if the whole 30 are not appointed during any year the number not appointed are lost, and should not be included in any future computations.

Four acting ensigns for engineering duty only were appointed during the year August 29, 1916, to August 28, 1917. None have been appointed for the year August 29, 1917, to August 28, 1918, and but 30 are authorized. Consequently the authorized number including those already appointed, is 34 at the present time, making 30 vacancies that can be filled before August 29, 1918.

(*e*) Acting ensigns for engineering duty only may be temporarily advanced to lieutenant (junior grade), for engineering duty only, under authority of the act of May 22, 1917, but they will not be additional numbers in grade after promotion to lieutenant (junior grade).

[P. 27] The act of May 22, 1917, provides:

> "That lieutenants (junior grade) and ensigns may be considered eligible for temporary promotions to the grade of lieutenant and lieutenant (junior grade), respectively, without regard to length of service in grade" (sec. 5).

The probationary period required by the act of August 29, 1916, as a condition precedent to the advancement of acting ensigns for engineering duty only, and the other requirements of law for their permanent advancement, are as fully waived by the act of May 22, 1917, for the purpose of their temporary advancement to lieutenant (junior grade) for engineering duty only, as is the requirement of law making three years' service a condition precedent to the permanent advancement of regular ensigns to that grade (act of Mar. 3, 1899, sec. 7, 30 Stat. 1005) (File 28687–24:1, J. A. G., Mar. 5, 1918).

COAST GUARD OFFICERS HOLDING TEMPORARY APPOINTMENT IN THE NAVY: STATUS OF.

Section 5 of the act of May 22, 1917, provides that additional temporary officers authorized by said act may be appointed from, among others, "commissioned and warrant officers of the United States Coast Guard."

Section 7 of the same act provides: "That the permanent and probationary commissions, appointments, and warrants of officers shall not be vacated by reason of their temporary advancement or appointment, nor shall said officers be prejudiced in their relative lineal rank in regard to promotion in accordance with the act of August twenty-ninth, nineteen hundred and sixteen: * * *."

The same section also provides: "That upon the termination of temporary appointments in a higher grade or rank as authorized by this act the officers so advanced, including * * * commissioned and warrant officers of the United States Coast Guard, shall revert to the grade, rank, or rating from which temporarily advanced, unless such officers * * * in the meantime, in accordance with law, become entitled to promotion to a higher grade or rank in the permanent Navy or Marine Corps, in which case they shall revert to said higher grade or rank and shall, after passing the prescribed examinations, be commissioned accordingly."

The provision of the foregoing section which reads, "nor shall said officers be prejudiced in their lineal rank in regard to promotion in accordance with the Act of August twenty-ninth, nineteen hundred and sixteen," obviously does not relate to Coast Guard officers, because they are not entitled to pro-

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motion under said act of August 29, 1916; but the provision that "the permanent and probationary commissions, appointments, and warrants of officers shall not be vacated by reason of their temporary advancement or appointment" is broad enough to apply to Coast Guard officers [P. 28] appointed temporary officers in the Navy as well as Navy and Marine Corps officers temporarily advanced to higher ranks and grades. It is my opinion, therefore, that the commissions and warrants of officers of the Coast Guard temporarily appointed commissioned officers in the Navy are not vacated, but are held in abeyance until the termination of their temporary appointments, at which time such officers are entitled to revert to the grade and rank from which they were appointed, unless in the meantime such officers have "become entitled to promotion to a higher grade or rank in the permanent Navy or Marine Corps, in which case they shall revert to said higher grade or rank and shall, after passing the prescribed examinations, be commissioned accordingly." The act, however, does not preserve their lineal rank, nor authorize them to revert to a higher rank or grade in the Coast Guard on the termination of their temporary appointments.

There is some indication from the language employed that the provisions of section 7 (quoted above) apply only to officers of the Navy and Marine Corps temporarily advanced to higher grades or ranks, but inasmuch as officers of the Coast Guard are expressly mentioned in section 5 among those from whom temporary appointments may be made, and again in section 7 among those who "shall revert to the grade, rank, or rating from which temporarily advanced." I think Congress clearly intended that officers of the Coast Guard should so revert, and that any other construction would be untenable (File 28762–341, J. A. G., Mar. 12, 1918).

COURTS MARTIAL: JURISDICTION OF.

It is held that under the Navy Regulations and the Articles for the Government of the Navy (sec. 1624, R. S.) all persons in the naval service are subject to discipline and trial by court martial for any offense committed by them which is a violation of any Federal or State law (File 3980–1429, J. A. G., Mar. 30, 1918).

FAMILY ALLOWANCE: CLASS A BENEFICIARIES NEED NOT BE FINANCIALLY DEPENDENT ON ENLISTED MAN TO SECURE.

Under the act of October 6, 1917, the financial dependence on the enlisted man of class A beneficiaries (wife, former wife divorced, and child or children) is in no wise a factor in or condition of the grant of a family allowance to them, and it would be improper and illegal for the Government to disallow a family allowance to such beneficiaries because they are not so dependent. Such action could not legally be justified under the portion of section 201 of the act which permits exemption "for good cause" from the allotment. Family allowances to class B beneficiaries, however, are paid under the terms of section 206 of the act, "only if and while the member is dependent in whole or in part on the enlisted man" (File 28909–85, J. A. G., Mar. 18, 1918).

[P. 29] FLEET NAVAL RESERVE: ELIGIBILITY FOR ENROLLMENT IN, OF DISMISSED MIDSHIPMEN SUBSEQUENTLY PARDONED.

In the Acting Attorney General's opinion of February 15, 1918, to the Secretary of the Navy (File 26282–326: 2) it was held that an officer of the Navy who has been dismissed by sentence of court martial and subsequently pardoned for the offense for which dismissed is not eligible for reappointment in the Navy or to membership in the Fleet Naval Reserve, in view of section 1441 of the Revised Statutes; section 21 of the act of February 16, 1914 (38 Stat. 283, 290); and the provisions of the act of August 29, 1916 (39 Stat. 589).

The act last cited provides that:

> "All former officers of the United States naval service, including midshipmen, who have left that service under honorable conditions, * * *

and who shall have enrolled in the Naval Reserve Force shall be eligible for membership in the Fleet Naval Reserve."

The Acting Attorney General's opinion, therefore, applies to the cases of former midshipmen as well as to other former officers of the United States naval service (File 26282–287:4, J. A. G., Mar. 16, 1918).

LOSS OF NUMBERS: COMPUTATION OF.

A lieutenant commander in the Navy was sentenced to lose 25 numbers in his grade. On the date of approval of said sentence the list of lieutenant commanders of the permanent Navy immediately below him, counting 25 numbers down the list from him, included 19 officers who had been selected and promoted to temporary commanders and 6 permanent officers in the grade of lieutenant commander who had not been selected or promoted. The question arose as to whether or not the 19 lieutenant commanders of the permanent Navy who had been selected and promoted to temporary commander should be counted in computing the said loss of numbers.

The act of May 22, 1917, provides that the commissions of officers "shall not be vacated by reason of their temporary advancement or appointment, nor shall said officers be prejudiced in their relative lineal rank in regards to promotion in accordance with the act of August twenty-ninth, nineteen hundred and sixteen.

Officers of the permanent Navy, therefore, temporarily advanced to higher grades and ranks have a dual status with regard to promotion and their positions on the permanent list and rights to promotion in accordance with the act of August 29, 1916, are not lost but are preserved to them by the express language of the act of May 22, 1917, above quoted.

The Judge Advocate General was therefore of the opinion that the 19 lieutenant commanders on the permanent list who are temporarily in the grade of commander are as much entitled to places in the permanent list as those who were not selected and promoted temporarily, and they should be counted as lieutenant commanders [P. 30] in computing the numbers lost by the lieutenant commander in question (File 11130–51, J. A. G., Mar. 13, 1918).

PAY OFFICERS: DISTRIBUTION OF, IN VARIOUS GRADES UNDER ACT OF AUGUST 29, 1916.

The act of August 29, 1916, provides that the total authorized number of commissioned officers of the active list of the Pay Corps, exclusive of commissioned warrant officers, shall be 12 percent of the total number of commissioned officers of the active list of the line of the Navy; and the distribution among the various grades of the Pay Corps shall be as follows:

> "One-half pay directors with the rank of rear admiral to four pay directors with the rank of captain, to eight pay inspectors with rank of commander, to eighty-seven and one-half in the grades below pay inspector."

It will be noted that no provision is made in the above for distribution below the grade of pay inspector (rank of commander).

It would appear that this provision of the act of August 29, 1916, should receive the same construction as similar provisions in previous acts (26 Op. Atty. Gen., 511), and that the distribution of the increase among the grades below pay inspector had been left to executive discretion.

The Judge Advocate General was, therefore, of the opinion that 87½ percent of the increase in the commissioned personnel of the Pay Corps may be distributed among the three lower grades in such proportions as may in the opinion of the Secretary of the Navy best serve the interests of the service, there being a minimum requirement of 40 pay officers of the grade of assistant paymaster when the three lower grades are full; this requirement being imposed by the act of March 3, 1899 (File 27223–37, J. A. G., Mar. 20, 1918).

[C. M. O. 30—1918]

PROCEEDINGS OF BOARDS: EFFECT OF CHANGE OF STATUS OF MEMBER UPON LEGALITY OF.

An assistant surgeon in the Medical Reserve Corps was appointed as a member of certain boards. He was then enrolled as a passed assistant surgeon in the U. S. Naval Reserve Force, no change being made in the precepts of the boards.

Upon request for advice as to his legal standing on said boards, he was informed that his standing was legal and his change of status did not invalidate any action of any boards on which he was serving, provided he had not been regularly detached from duty on said boards.

He was also informed that pending the receipt of new precepts setting forth his correct title and branch of the service, he should attach to each record of proceedings of the boards evidence of his change of status in form of certified copies of the letters from the Department notifying him of his changed status (File 28550–272, J. A. G., Mar. 9, 1918).

[P. 31] SUBSISTENCE ALLOWANCE FOR OFFICERS: AUTHORITY TO CHANGE WITHOUT ACT OF CONGRESS.

The act of April 6, 1914 (38 Stat. 312, 318), provides as follows:

> "On and after July first, nineteen hundred and fourteen, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of $5 per day; nor shall any allowance or reimbursement for subsistence be paid to any officer or employee in any branch of the public service of the United States in the District of Columbia unless absent from his designated post of duty outside of the District of Columbia, and then only for the period of time actually engaged in the discharge of official duties."

It was therefore held that an act of Congress would be necessary to change the limitation of $5 per day, for subsistence of officers of the Navy when traveling under orders, contained in R–4495 (15), (*a*) and (*b*), Navy Regulations, 1913. (File 3980–1426, J. A. G., Mar. 23, 1918).

TEMPORARY APPOINTEE ACCEPTING PERMANENT APPOINTMENT: (1) EFFECT OF, ON RANK AND PRECEDENCE; (2) STATUS OF, IN REGARD TO PERMANENT AND TEMPORARY PROMOTION.

(1) John Doe was appointed an assistant surgeon, temporary, in the Navy with the rank of lieutenant (junior grade) from November 17, 1917. His "running mate" in the line was Richard Roe, lieutenant (junior grade) in the permanent Navy, ranking from October 15, 1917. John Doe was appointed an assistant surgeon in the permanent Navy with rank of lieutenant (junior grade) from January 18, 1918. The regular lieutenant (junior grade) of the line next after whom he was appointed is the said Richard Roe, who ranks as such from October 15, 1917, and the temporary lieutenant (junior grade) of the line, next after whom he was appointed, is Thomas Jones, ranking as a lieutenant (junior grade) from January 1, 1918.

The appointment of John Doe as an assistant surgeon in the permanent Navy with date of rank from January 18, 1918, is an original appointment in the permanent Navy, and pursuant to law he takes rank from the date of his commission (act of Mar. 4, 1913, c. 148), and, therefore, he loses his original date of precedence in the rank of lieutenant (junior grade) by reason of such appointment in the permanent Navy.

(2) Assume the facts as above except that Richard Roe is a temporary lieutenant (junior grade) and Thomas Jones is a permanent lieutenant (junior grade). No other lieutenant (junior grade) of the line, either permanent or temporary, being appointed between January 1, 1918, and January 18, 1918. John Doe's "running mate" for either temporary or permanent promotion is Thomas Jones (File 11130–37:4, J. A. G., Mar. 12, 1918).

[C. M. O. 31—1918]

[P. 32] TEMPORARY OFFICERS: COMPUTATION OF LOSS OF NUMBERS BY.

A temporary captain in the Marine Corps was appointed a second lieutenant in said corps on October 6, 1916, for a probationary period of two years from September 29, 1916. He was promoted to temporary first lieutenant from May 22, 1917, and to temporary captain from May 23, 1917 He was tried by general court martial and was sentenced "to lose forty (40) numbers in his grade."

He is not now serving in the grade of second lieutenant (probationary), although such is his permanent status to which he is authorized to revert on the termination of his temporary commission in a higher grade. His grade is that of captain in the Marine Corps, which is the grade in which he was serving when sentenced and in which he should lose the specified numbers. In the opinion of the Judge Advocate General, no other construction would be justified in the absence of an express sentence of the court that he is to lose numbers or seniority in his permanent grade. Inasmuch as he was not sentenced to loss of numbers or seniority or to suspension from promotion in his permanent grade of second lieutenant (probationary), the loss of numbers adjudged should be computed in his temporary grade only, and he should be examined for permanent promotion at the same time as other probationary second lieutenants of the same date of appointment (File 26521–263, J. A. G., Mar. 28, 1918).

WIDOW'S PENSION: EFFECT OF, UPON ENROLLMENT IN U. S. NAVAL RESERVE FORCE.

The fact that one is drawing a widow's pension is no obstacle to the completion of her enrollment in the Naval Reserve Force. Whether, if so enrolled, she would be entitled to continue drawing her pension is a question for decision by the Pension Office, involving an interpretation of section 4724, Revised Statutes, as modified by the act of March 3, 1891 (26 Stat. 1082), concerning payment of pensions to persons in the Army, Navy, or Marine Corps (File 28550–280, J. A. G., Mar. 7, 1918).

C. M. O. 31—1918

[P. 1] Ensign Charles A. Nelson, U. S. Naval Reserve Force, was tried by general court martial on March 9, 1918, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

Charge III.—Breaking arrest (one specification).

Findings

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of that charge; the specification of the second charge "not proved," the accused "not guilty," of the second charge, and acquitted the accused of that charge; and the specification of the third charge "proved in part," and the accused of the third charge "guilty in a less degree than charged, guilty of absence from station and duty without leave."

Sentence

"The court therefore sentences him, Ensign Charles A. Nelson, United States Naval Reserve Force, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the fact that it appears from the evidence as set forth in the testimony that he has already been punished by his commanding officer for the offenses set forth in the charges and specifications, by withholding his pay for a period of two months, we recommend Ensign Charles A. Nelson, U. S. N. R. F., to the clemency of the reviewing authority."

[C. M. O. 33—1918]

[P. 2] RETURNED FOR REVISION

The Department on March 23, 1918, returned the record of the proceedings in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering its findings upon the third charge and the sentence. The Department stated:

> "It is noted that the court has found the accused on the third charge (breaking arrest) guilty in a less degree than charged, 'Guilty of absence from station and duty without leave.' The Department does not concur in the opinion of the court that 'Absence without leave' is a charge of lesser degree than 'Breaking arrest.'
>
> "If, in the opinion of the court, the evidence adduced conclusively shows that the accused was placed under arrest by the lawful order of his commanding officer duly delivered to the accused, and he then left the confines of his station and duty to which he was thereby restricted, the court would be justified in arriving at a finding of guilty. On the contrary, if the court concludes that the accused was not placed under arrest in accordance with the regulations governing such procedure, or, if the court is left in doubt as to the exact status of the accused as a consequence of the procedure followed in this case by his commanding officer, the lack of formal arrest or the benefit of the doubt should be given the accused and he would be entitled to an acquittal. The Department is inclined to the latter view as neither the action of the commanding officer nor the executive officer is conclusive as to the procedure followed by them although the commanding officer was thoroughly familiar with the procedure necessary as shown by his action subsequent to the time alleged in the specification. Furthermore, the Department believes that the evidence is conclusive that the accused stood his regular duty after the time alleged, and was not under arrest in the strict interpretation of the law, although his absence from the ship was established as irregular."

FINDINGS IN REVISION

The court revoked its former sentence and finding as to the third charge; substituted for the latter a finding of the specification of the third charge "not proved," and the accused "not guilty" of the third charge, and acquitted the accused of that charge.

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

The Judge Advocate General recommended the approval of the proceedings, findings, and acquittal of the general court martial in the foregoing case.

The foregoing recommendations of the Judge Advocate General are approved, and Ensign Charles A. Nelson, U. S. Naval Reserve Force, will be released from arrest and restored to duty.

C. M. O. 33—1918

[P. 1] Ensign Clarence F. Williams, U. S. Naval Reserve Force, was tried by general court martial on February 11, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, on the following charges:

Charge I.—Desertion (two specifications).

Charge II.—Conduct unbecoming an officer and a gentleman (one specification).

FINDINGS

The court found the first and second specifications of the first charge "proved in part," and the accused of the first charge "guilty in a less degree than charged, guilty of 'absence from station and duty after leave had expired,' and 'absence from station and duty without leave' "; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of that charge.

[C. M. O. 34—1918]

SENTENCE

"The court therefore sentences him, Clarence F. Williams, ensign, United States Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATIONS TO CLEMENCY

The following recommendation to clemency, signed by four of the eight members of the court, was spread upon the record:

"In consideration of the extenuating circumstances shown to exist in connection with the service of the accused on the U. S. S. *Lykens*, his inexperience in the customs and procedure of the service, his excellent record in both the mercantile and United States services, particularly in the war zone on a United States transport, and, finally, of the favorable impression produced before the court by the accused, we recommend Clarence F. Williams, ensign, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

[P. 2] The following additional recommendation to clemency, signed by three of the remaining four members of the court, was also spread upon the record:

"In consideration of the extenuating circumstances shown to exist in connection with the service of the accused on the U. S. S. *Lykens*, of the refusal and failure of his commanding officer to forward his application for transfer, of his inexperience in the customs and procedure of the service, his excellent record in both the mercantile and United States services, particularly in the war zone on a United States transport, and finally of the favorable impression produced before the court by the accused, we recommend Clarence F. Williams, ensign, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on March 26, 1918, recommended that, in view of all the circumstances in the case, the sentence be held in abeyance, and that Ensign Clarence F. Williams, U. S. Naval Reserve Force, be placed on probation.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendation of the Chief of the Bureau of Navigation was disapproved on April 2, 1918. The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Clarence F. Williams, U. S. Naval Reserve Force, were approved, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On April 15, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 34—1918

[P. 1] Machinist (T) William F. Osborn, U. S. Navy, was tried by general court martial on February 18, 1918, on board the U. S. S. *Dixie*, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charges:

Charge I.—Disobeying the lawful order of his superior officer (two specifications).

Charge II.—Drunkenness on duty (one specification).

Charge III.—Conduct to the prejudice of good order and discipline (one specification).

[C. M. O. 34—1918]

SENTENCE

"The court therefore sentences him, Machinist (T) William F. Osborn, United States Navy, to be reduced to the rating of fireman, first class, and to lose pay amounting to two hundred and thirty-one (231) dollars."

ACTION OF CONVENING AUTHORITY

The convening authority, on February 28, 1918, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Machinist (T) William F. Osborn, U. S. Navy, and directed that he be released from arrest and restored to duty.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General on April 6, 1918, placed an endorsement on the record in the foregoing case in part as follows:

"In my opinion, so much of the foregoing sentence as provides that Machinist (T) William F. Osborn, U. S. Navy, be reduced to the rating of fireman, first class, is illegal and should be set aside.

"Article 8 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) provides that:

"'Such punishment as a court martial may adjudge may be inflicted on any person in the Navy who * * * (19) * * * is absent from his station or duty without leave, or after his leave has expired';

[P. 2] "and article 9 of the Articles for the Government of the Navy, provides that:

"'Any officer who absents himself from his command without leave, may, by the sentence of a court martial, be reduced to the rating of an ordinary seaman.'

"The only provision of law authorizing the reduction of an officer to an enlisted rating is found in article 9, A. G. N., above quoted, and it authorizes such punishment only in the case of an officer 'who absents himself from his command without leave.' Article 9 was originally enacted by Congress as section 2 of an act approved May 16, 1864 (13 Stat. 75), which reads as follows:

"'SEC. 2 *And be it further enacted*, That naval courts martial shall have the power to sentence officers who shall absent themselves from their command without leave, to be reduced to the rating of ordinary seamen.'

"If courts had the power to inflict the punishment of reduction to the rating of ordinary seaman on officers for all offenses, Congress need not have expressly empowered courts to inflict it for a particular offense; and we should not impute to Congress the doing of a vain and useless thing, but should, if possible, give full effect to its enactments. Furthermore, it is to be presumed that Congress, having laid down the special rule that officers who absent themselves from their command without leave may, by sentence of a court martial, be reduced to the rating of an ordinary seaman, intended thereby to limit such punishment to that particular offense.

"A valuable rule frequently used by the courts in interpreting statutes is that where certain classes of things are specifically included or specifically excepted in a statute, this is to be understood as meaning that the legislature did not intend to include or except any class of persons or things not specifically mentioned. The rule is known in law as 'expressio unius est exclusio alterius,' which means that 'the expression of one thing is the exclusion of another.' Applying this rule to the instant case leads to the conclusion that Congress, having specified one offense for which a court martial is empowered to punish an officer by reduction to ordinary seaman, thereby excluded it from application to other cases.

"The Department has heretofore held that the sentence of reduction to an enlisted rating can lawfully be inflicted on an [P. 3] officer only for the offense of absence from his command or from his station or duty without leave, and the sentence has been set aside by the Department when it was imposed as a punishment for other offenses (G. O. No. 61, 1865; G. O. No. 37, 1864; C. M. O. No. 11, 1916; see also C. M. O. No. 18, 1918, and C. M. O. No. 34, 1889).

[C. M. O. 36—1918]

"Subject to the foregoing remarks, the proceedings, findings, and sentence are, in the opinion of this office, legal. It is therefore recommended that so much of the sentence as provides for loss of pay amounting to $231 be allowed to stand, and that so much of the sentence as provides that Machinist (T.) William F. Osborn, U. S. Navy, be reduced to the rating of fireman, first class, be set aside."

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who on April 8, 1918, concurred in the action taken by the Commander, U. S. Naval Forces Operating in European Waters as amended by the endorsement of the Judge Advocate General, and recommended that said endorsement be approved.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved.

C. M. O. 36—1918

[P. 1] Chief Boatswain Edward Cunningham, U. S. Naval Reserve Force, was tried by general court martial on March 28, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Knowingly and willfully appropriating and applying to his own use and benefit subsistence stores of the United States intended for the naval service thereof (three specifications).

SENTENCE

"The court therefore sentences him, Edward Cunningham, chief boatswain, United States Naval Reserve Force, to be dismissed from the United States Naval Reserve Force and from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of the good character of the accused, evidenced in a long sea-faring career; that his having been largely in merchant service, he was ignorant of naval customs and regulations and of the technical illegality of the acts charged; that they arose largely from a practical continuation of the system of supply necessarily inaugurated by him before the regular commissary system of supply was established and which as continued was a development of the system called 'saved rations,' whereby such exchanges have been made for the benefit of the messes, we recommend Edward Cunningham, chief boatswain, U. S. N. R. F., to the clemency of the reviewing authority."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on April 19, 1918, placed an endorsement thereon to the effect that, as the accused was only technically guilty, and in view of the circumstances of the case [P. 2] and the unanimous recommendation to clemency, it was recommended that the sentence be mitigated to loss of pay amounting to $25 per month for six months.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings and findings of the general court martial in the foregoing case of Chief Boatswain Edward Cunningham, U. S. Naval Reserve Force, are approved, but, in accordance with the recommendation of the Bureau of Navigation, the sentence is mitigated to the loss of $25 per month of his pay for a period of six months and, as thus mitigated, is approved.

[C. M. O. 37—1918]

REMARKS

It was noted in the foregoing case that the accused pleaded not guilty to the charge and specifications thereunder, and his counsel immediately thereafter by material admissions substituted therefor an admission for the accused amounting to a plea of guilty. Nothing appears on the record to indicate that the accused authorized the admissions made by his counsel, but in view of the facts as brought out by the evidence adduced, which clearly show that the accused did appropriate the sugar to his own use as alleged, it is assumed that such was made by his implied authority, in that he was present and made no objection to the action taken by his counsel. It is deemed proper, however, that an express authorization be shown rather than an implied one. It was clearly the duty of the court when these admissions were made in behalf of the accused to put to the latter such questions as would insure that his assent was given to the action taken by his counsel, and his concurrence therein should be affirmatively shown on the record.

C. M. O. 37—1918

[P. 15] ACCUSED AS WITNESS: RIGHT OF, TO REFUSE TO ANSWER INCRIMINATING QUESTIONS.

In volume 2, Bishop's New Criminal Procedure, section 1183, it is stated that "the tender of his (accused's) testimony is a waiver of every form of the exemption from criminating himself; so that, without the violation of any terms of the constitutional guaranty, he may be fully questioned concerning his alleged crime. But he can not be required to disclose other and independent offenses, though to avoid this on cross-examination he must claim his privilege like any other witness." (See also Naval Courts and Boards, 1917, section 161; File 26251–15777, G. C. M. Rec. No. 37122).

[P. 16] ACCUSED AS WITNESS: SCOPE OF CROSS-EXAMINATION OF.

In *Fitzpatrick* v. *United States* (178 U. S. 315) it is stated:

> "Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime." (See Naval Courts and Boards, 1917, sec 161.)
>
> "An accused person may, at his option, take the stand as a witness, but in so doing he occupies no exceptional status, and becomes subject to cross-examination like any other witness. As a witness he can not be permitted to state only circumstances favorable to himself and maintain silence as to the other facts in the case; nor, as it has been repeatedly held, can he read or put in an ex parte 'statement,' sworn to, as his testimony. The same rules as to the admissability of evidence, privilege of the witness, impeaching of his credit, etc., will apply to him as to any other witness, and the only noticeable difference between his attitude and that of other witnesses will be that he will in general naturally and properly enough be exposed to a more searching cross-examination, * * *. Such testimony will always be fair material for a rigid cross-examination, and, as it has been observed by the U. S. Supreme Court, 'a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses. Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion' " (*Rea* v. *Missouri*, 84 U. S. 542; Win. Mil. Law and Precedents, vol. 1, pp. 508 and 544–45).

But it has been held, and it is believed properly so, where the accused took the stand to testify, and did testify, only as to the date of his confinement in arrest, that it would be inquisitorial and illegitimate to cross-examine him as

to other facts of the merits of the case (Winthrop's Military Law and Precedents, vol. 1, p. 509, note).

Again, when an accused voluntarily takes the stand as a witness in his own behalf and denies the commission of a crime with which he is charged, a very wide latitude of cross-examination is allowed (*State* v. *Rogers*, 77 Pac. 293).

> "A defendant who voluntarily takes the stand and broadly denies the crime, thus waives his constitutional privilege, and may be cross-examined on all facts relevant and material to the issue" (*Thomas* v. *State*, 103 Ind. 419, 2 N. E. 808).
>
> "A defendant who goes upon the stand and denies his guilt may be cross-examined upon every fact and circumstance that led up to it, or rendered it more probable" (*Commonwealth* v. *Burke*, 3 Lanc. Law Rev. 138; File 26251–15777; G. C. M. Rec. No. 37122).

[P. 17] FRAUDULENT ENLISTMENT: EFFECT OF DEPARTMENT DIRECTING THAT NO DISCIPLINARY ACTION BE TAKEN FOR OFFENSE OF.

The accused in a recent general court-martial case had received a bad-conduct discharge from the Navy in 1909 and fraudulently enlisted under an assumed name on April 18, 1917.

A letter from the Department to his commanding officer of May 24, 1917, read, in part, as follows:

> "Inform this man that he will be retained under his fraudulent enlistment; that no disciplinary action will be taken in his case, but he will be placed on probation for a period of one year, and shall during said probation conduct himself in such manner as in the opinion of the commanding officer warrants his further retention in the service; otherwise, he is to be summarily discharged with an undesirable discharge, notation in accordance with the above to be prominently made on his service record."

Upon being brought to trial on several charges inter alia, that of fraudulent enlistment, the accused, by his counsel, based a plea in bar of trial upon the above-quoted extract, his contentions being that—

(*a*) There having been a final adjudication by the Department on the charge of "fraudulent enlistment," the court was without jurisdiction.

(*b*) That the Department had by its action constructively pardoned him and wiped out the offense and barred the court of jurisdiction as far as the offense of "fraudulent enlistment" was concerned.

Objection (*a*) raises the question of former jeopardy. Article V of the Amendments to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." But as there had been no trial whatsoever in this case there could be no former jeopardy.

As to the constructive pardon mentioned in objection (*b*), the President has the sole power of pardon in such a case; and not having exercised said power, the mere restoration to duty by the Department of a man who has committed an offense, and not been tried for same, in no wise operates as a constructive pardon (Naval Digest, p. 445, sec. 47).

Independently of the foregoing, the fact was recognized that as the offense of fraudulent enlistment was knowingly passed over by the Department it should not, under the circumstances, be brought into question.

The court having ruled the plea a valid one and halted proceedings, informing the Department thereof, it was advised that its ruling was erroneous for the reasons above set forth, and the Department directed that if the court, upon reconsideration of its action on the plea in bar, decided that said plea was invalid, the judge advocate should enter a nolle prosequi on the charge of fraudulent enlistment (File 26251–15021:5, Sec. Nav., Apr. 2, 1918; G. C. M. Rec. No. 37874).

[C. M. O. 37—1918]

[P. 18] WITNESSES: LATITUDE ALLOWED COURT IN EXAMINATION OF.

Court-Martial Order 19, 1915, pages 3–5, fully covers the subject set forth in the heading, and in the final paragraph thereof the following conclusion is reached:

> "Generally speaking, it may be said that members of courts martial may impartially examine witnesses for the prosecution or defense with a view to arriving at the truth, and are allowed greater latitude in this respect than the parties; but this power cannot be so exercised as to admit evidence which is clearly improper."

In this connection, however, it is not out of place to state that there may arise conditions under which an exception may be made to the general rule, to wit, where it is clearly evident that the judge advocate is inexperienced, the court may find it necessary to propound questions not strictly confined to the limits above outlined, and may go even further by suggesting questions to the judge advocate or accused where either has omitted to elicit some material particular. This extension of the scope of the usual limitation prescribed for a court's examination does not include, however, the admitting of improper evidence; such action is under no circumstances permissible (File 26251–15777; G. C. M. Rec. No. 37122).

ADMIRALS AND VICE ADMIRALS: PRECEDENCE OF.

Upon opinion requested as to the proper order of precedence of the admirals and vice admirals of the Navy:

Held: Admiral Benson is Chief of Naval Operations with the rank of admiral from August 29, 1916, under the provisions of the act of Congress of same date, which provides that the Chief of Naval Operations "shall have the rank and title of admiral to take rank next after The Admiral of the Navy," thereby clearly indicating that he is not to be outranked by any officer except The Admiral of the Navy.

Under the act of March 3, 1915, Admirals Mayo, Caperton, Knight, and Vice Admiral Coffman took rank as such from the "date of assuming command." Their precedence was fixed accordingly, and, although redesignated under the act of May 22, 1917, they were never relieved from command under their original designations. Inasmuch as the above-mentioned officers have never been detached from duty as commanders in chief and second in command, respectively, they had not lost the rank incident to such command previous to the act of May 22, 1917; and there is nothing in that act which could operate to disturb their rank and precedence. Accordingly they continue to take precedence from the dates on which they [P. 19] assumed command under their previous designations (Act of March 3, 1915; File 11130–47, J. A. G., Nov. 28, 1917).

The relative precedence of the above-mentioned admirals and vice admirals is not governed by their positions on the list of rear admirals, but they should take rank as follows:

Admirals	*Vice Admirals*
1. William S. Benson.	1. De Witt Coffman.
2. Henry T. Mayo.	2. William S. Sims.
3. William B. Caperton.	3. Albert W. Grant.
4. Austin M. Knight.	

(File 11130–53, J. A. G., Apr. 17, 1918.)

COAST GUARD: REGULATIONS GOVERNING, WHEN OPERATING AS PART OF NAVY.

It was recently recommended by an officer of the Coast Guard that the Coast Guard regulations be entirely suspended while that organization is operating as a part of the Navy in time of war, and that the Coast Guard be governed during such time only by the laws and regulations for the government of the Navy.

The act of January 28, 1915 (38 Stat. 800), creating the Coast Guard provides that it "shall constitute a part of the military forces of the United States and which shall operate under the Treasury Department in time of peace and operate

as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct." The Naval Appropriation Act approved August 29, 1916 (39 Stat. 556, 600), contains the following provision:

> "Whenever, in time of war, the Coast Guard operates as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy * * *."

It was the opinion of the Judge Advocate General that inasmuch as the Coast Guard is only temporarily serving with the Navy, it was not the intention of either of the above-mentioned acts of Congress to make the Navy laws and regulations applicable to the Coast Guard in all respects and to suspend from operation the laws and regulations under which the Coast Guard normally serves.

To examine the laws and regulations relating to the Navy and the Coast Guard and to determine in each instance which is applicable under present conditions would entail unnecessary labor and would consume a great deal of time. It seems that it would be far better to apply the general rules heretofore laid down and whenever a doubtful case arises to determine it upon its own merits. There may be [P. 20] many cases arise, such as the nature of entries to be made in ships' logs, which may be determined administratively by the Navy Department without unnecessary waste of time. Such matters do not necessarily involve questions of law but are matters of administration (File 28762–336, J. A. G., Apr. 11, 1918).

FILIPINOS: WHERE, MAY BE NATURALIZED.

Filipinos are eligible for citizenship under decisions rendered by the Supreme Court of the District of Columbia (in re Monico Lopez, Naturalization No. 1345) and by the United States District Court for the Northern District of California (in re Bautista, 245 Fed. 765). However, as was stated by Mr. Justice Gould in the decision first-above referred to "in other jurisdictions, an opposite conclusion has been reached" with reference to the naturalization of Filipinos.

The act of June 30, 1914 (38 Stat. 392, 395), provides that any alien with honorable discharge, or ordinary discharge with recommendation for reenlistment, from the U. S. Navy, Marine Corps, or Coast Guard, may under certain circumstances be "immediately" naturalized upon application made under conditions of said act.

A Filipino applicant being on the Atlantic coast of the United States, it was suggested as a matter of convenience that he apply to the Supreme Court of the District of Columbia for naturalization (File 26252–134, J. A. G., Apr. 23, 1918).

GIFT FROM CITIZENS OF FOREIGN CITY: ACCEPTANCE OF, BY OFFICER IN NAVY.

Upon inquiry made to ascertain whether or not the captain of the U. S. S. *Orion* could accept a loving cup from the citizens of Ponta Delgada, Azores, without the consent of Congress, in recognition of his action in attacking an enemy submarine which bombarded that city last summer, it was held that the acceptance of said gift would not be a violation of article I, section 9, clause 8, of the Constitution of the United States, or of any law of the United States (File 9644–43, J. A. G., Apr. 6, 1918).

JURISDICTION OF THE SECRETARY OF THE NAVY AND THE SECRETARY OF THE INTERIOR: IN CASES UNDER SECTIONS 4756 AND 4757, REVISED STATUTES, INVOLVING PENSIONS FOR INMATES OF NAVAL HOME.

In an opinion of the Acting Judge Advocate General, December 29, 1916 (File 26510–1022:4), it was advised that the allowances provided by section 4756, Revised Statutes, in the cases of men who have served 20 years in the Navy or Marine Corps, who have become disabled from sea service by reason of age or infirmity and who have [P. 21] not been discharged for misconduct, are "pensions" within the meaning of the act approved June 30, 1914 (38 Stat. 398), providing that "pensions of beneficiaries of the Naval Home shall be disposed of in the same manner as prescribed for inmates of the Soldiers' Home"; that such

allowances under section 4756, the same as other pensions, should be disposed of in accordance with the act of June 30, 1914, notwithstanding that section 4756 provided that allowances thereunder were authorized "in lieu of being provided with a home in the Naval Asylum"; and that the question presented in this case is one which it is the exclusive prerogative of the Secretary of the Navy to decide.

The opinion of the Acting Judge Advocate General, which was approved by the Secretary of the Navy, was not concurred in by the Secretary of the Interior, who sustained the refusal of the Commissioner of Pensions to make payments under section 4756, Revised Statutes, in accordance with the act of June 30, 1914, and later referred the question to the Attorney General for the latter's opinion. The reply of the Attorney General, dated June 12, 1917 (see C. M. O. No. 46, 1917, p. 23), held that the Secretary of the Navy and not the Secretary of the Interior has exclusive jurisdiction to determine whether applicants are entitled to the payments referred to in section 4756; that the Commissioner of Pensions, in making such payments acts only in a ministerial capacity; that it is immaterial whether the latter concurs or differs in such judgments as may be arrived at by the Secretary of the Navy; and that the act of June 30, 1914, has no bearing whatever on the question of jurisdiction (File 26510–1022: 7).

The Secretary of the Interior again submitted this matter to the Attorney General, with certain additional questions bearing upon the application of other statutes to the allowances provided for in section 4756, and also in section 4757, which latter section refers to persons who had served not less than ten years as enlisted men in the Navy or Marine Corps. In reply the Attorney General again advised, November 7, 1917 (File 26510–1022: 11), that the questions submitted pertained to the administration of the Navy Department rather than of the Department of the Interior, and that he felt precluded from expressing an opinion in view of the fact that such opinion was not requested by the Secretary of the Navy; and as to certain of the questions submitted, that they appeared to be hypothetical in form, and that "the pressure of official work, at this especial time, is such that it is impossible to give opinions on possible or hypothetical cases which have not yet arisen in other departments."

The Secretary of the Interior resubmitted to the Attorney General, with specific cases, the questions embodied in his former submissions upon which differences of opinion existed between the Navy and Interior Departments; and the Secretary of the Navy, being advised thereof, submitted to the Attorney General for consideration [P. 22] in connection therewith, the views of the Navy Department as embodied in a memorandum of the Judge Advocate General dated December 4, 1917 (File 26510–1022: 11).

In reply, the Attorney General, in an exhaustive opinion addressed jointly to the Secretary of the Navy and the Secretary of the Interior, April 11, 1918 (File 26510–1022: 11), advised that "in the light of the whole correspondence as now developed," the questions asked by the Secretary of the Interior "may be regarded as arising in his Department, since the Department of the Navy and the Interior Department are jointly concerned in the administration of the several statutes out of which the questions grew."

The "fundamental propositions of fact upon which the submission rests" were then stated by the Attorney General as follows:

> "(1) Among the inmates of the Naval Home, Philadelphia, are a number of persons who have been certified by the Secretary of the Navy as entitled to allowances under section 4756, Revised Statutes, or section 4757, Revised Statutes.
>
> "(2) The names of a number of persons certified as above are borne on the pension roll as also receiving a pension under general pension laws (e. g., act of May 11, 1912, 37 Stat. 112; Revised Statutes, sections 4692–4701, both inclusive).
>
> "(3) Payment of allowances under section 4756, Revised Statutes, is being withheld by the Commissioner of Pensions for periods during which the grantees are maintained at the Naval Home (or at the naval hospital on the Naval Home grounds), but is being made to the grantees of the allowances for periods when they are not so maintained, regardless of the fact that they may also be recipients of pensions under general pension laws.
>
> "(4) Allowances under section 4757, Revised Statutes, are being paid by the Commissioner of Pensions directly to the beneficiaries, whether or not

they are also maintained in the Naval Home and regardless of the fact that they may be receiving, in addition, a pension under general pension laws."

Upon the above facts the questions which had arisen and with respect to which the Interior Department desired his advice, were stated by the Attorney General as follows:

"(1) Are the money benefits provided for in section 4756, Revised Statutes, within the purview of the word 'pension' in section 4813, Revised Statutes?

"(2) Are the money benefits provided for in section 4756, Revised Statutes, within the purview of the term 'pensions' as used in the Naval Appropriation Act of June 30, 1914 (38 Stat. 392, 398), which provided '* * * That the pensions of beneficiaries of the Naval Home shall be disposed of in the same manner as prescribed for inmates of the Soldiers' Home, * * * under such regulations as the Secretary of the Navy may prescribe * * *'?

"(3) Do such money benefits inure to the grantees concurrently with maintenance in the Naval Home?

[P. 23] "(4) Can allowances under section 4756, Revised Statutes, or section 4757, Revised Statutes, and a pension under general pension laws both be paid in view of section 4715, Revised Statutes?

"(5) Should allowances granted by the Secretary of the Navy under section 4757, Revised Statutes, to persons who are inmates of the Naval Home be paid as at present directly to the beneficiaries (as not being within the purview of section 4813, Revised Statutes), or should they be paid, pursuant to section 4813 and the act of June 30, 1914, to the governor of the Naval Home for the use of the grantees?"

The conclusions of the Attorney General, sustaining the views of the Judge Advocate General upon the above questions, were recapitulated in his opinion as follows:

"1. That the money benefits provided for in section 4756 are within the purview of the word 'pension' in section 4813, that they are also within the purview of the word 'pensions' in the pertinent provision of the Naval Appropriation Act of June 30, 1914 (38 Stat. 392, 398), and in view of that act inure to the grantees concurrently with maintenance in the Naval Home:

"2. That allowances under sections 4756 and 4757 do not fall within the prohibition of section 4715 and may therefore be paid in addition to a pension under general pension laws.

"3. That allowances under section 4757 are 'pensions' within the meaning of section 4813, Revised Statutes, and the act of June 30, 1914, above referred to, and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that act."

LINE OF DUTY: DEATH IN.

A certain enlisted man contracted syphilis not in line of duty and as a result of his own misconduct.

Five doses of salvarsan were administered by proper medical authority, and the patient died from salvarsan poisoning. In the opinion of the medical officer in charge of the case, the disease (syphilis) would not have caused death at the time death did occur.

It was held that since the patient's death was the direct and immediate result of the treament administered to him by proper medical authority, that the death of the deceased occurred in line of duty. It is immaterial that the disease for which he was being treated was contracted not in line of duty and was acquired as a result of his own misconduct, the fact being established that death was not the result of the disease, but of the medical treatment for the disease (File 26543–213, J. A. G., Apr. 29, 1918).

[P. 24] MEDICAL CORPS PERSONNEL: DISTRIBUTION OF, IN LOWER GRADES.

The conclusions of the Judge Advocate General, in regard to distribution in the lower grades of the Pay Corps, reached in his opinion of March 20, 1918

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(File 27223-37, Bul. 30, 1918, p. 30), apply with equal force to the Medical Corps, in which the distribution of the commissioned personnel in the grades below medical inspector with the rank of commander is 87½ percent, under the act of August 29, 1916, which provides for no distribution between such grades except that "nothing contained herein shall be held to reduce below that heretofore authorized by law the number of officers in any grade or rank in the Staff Corps."

The act of March 3, 1903 (32 Stat. 1197), provided that "the grades of the active list of the Navy heretofore designated shall be so increased that there shall be * * * thirty additional surgeons with the rank of lieutenant commander, in all eighty-five; one hundred and twenty additional passed assistant and assistant surgeons, with the rank, respectively, of lieutenant, and lieutenant (junior grade), in all two hundred and thirty."

The act of June 12, 1916, section 4 (39 Stat. 224), authorized a further increase of one surgeon and two passed assistant surgeons; and the act of August 29, 1916, increased the number of surgeons by one. Accordingly in the distribution of medical officers between the grades below medical inspector under the act of August 29, 1916, the following numbers should be regarded as established by law and not to be reduced in consequence of anything contained in the act of August 29, 1916: 87 in the grade of surgeon, and 232 in the grades of passed assistant and assistant surgeon.

There is no fixed distribution between the grades of passed assistant and assistant surgeon except for the specific authorization of two passed assistant surgeons contained in the act of June 12, 1916, section 4 above cited (File 27233-37. J. A. G., Apr. 6, 1918).

NAME: RIGHTS OF PARTY CHANGING.

A man who had served an enlistment in the Navy under the name of W_____ G_____, submitted affidavits to show that his surname was W_____, which name he claimed he was entitled to bear by reason of it being his stepfather's name, and requested certain reenlistment pay and medals in the latter name.

Upon the question as to what effect the remarriage of the mother of said man, during his minority, had upon the name which he was legally entitled to bear, the Acting Judge Advocate General expressed the following views:

A stepson does not necessarily take his stepfather's name. In a previous case, where the mother of a former enlisted man remarried, and he had requested that the Department's records be changed so that he would be known under his stepfather's name, and that a new [P. 25] discharge be issued to him under such assumed name, the request was denied. (See File 24368-14, J. A. G., Apr. 24, 1915; C. M. O. 16, 1915, 6; Naval Dig., 1916, p. 395.)

A man has the right to change his name without legal proceedings, and the name thus assumed is as much his legal name, for all purposes, as though he had borne that name from birth (18 A. & E. Ann. Cas. 701, 703; Naval Dig., 1916, p. 394). Yet there is no duty on the Department to change his name on its records, and the Department has heretofore uniformly declined to make such changes except in cases where legal steps to effect the change of name have been taken by the interested party, or in pursuance of statutory authority (Naval Dig., 1916, pp. 395-396).

The question of whether or not the change should be made appears, then, to be one of administrative policy; it may be sufficient in this case to file the aforementioned affidavits with the record of said W_____ G_____ alias W_____ W_____; and he may be paid such bounties or rewards as he may be entitled to, under either name (File 24368-24, J. A. G., Apr. 29, 1918).

OATHS: NAVAL TRAINING CAMP IS NAVAL STATION FOR CERTAIN PURPOSES.

It is the opinion of the Judge Advocate General that an officer of the National Naval Volunteers is authorized to administer an oath of office to an officer in the Regular service when said officer of the National Naval Volunteers is serving in one of the capacities enumerated in the act of March 3, 1917, which provides:

> "That judges advocate of naval general courts-martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of

[C. M. O. 37—1918]

navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, and the adjutant and inspector, assistants adjutant and inspector, commanding officers, recruiting officers of the Marine Corps, and such other officers of the Regular Navy and Marine Corps, of the Naval Reserve Force, of the Marine Corps Reserve, and of the National Naval Volunteers as may be hereafter designated by the Secretary of the Navy, be, and they are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration."

And further, an officer of the National Naval Volunteers, serving as commanding officer of a United States naval training camp, is, under I–5354, Naval Instructions, 1913, defining a naval station to be " any establishment for * * * training under the control of the Navy," the commandant of a naval station, and as such may execute acceptances and oaths of office for men who are promoted to officer's rank in the regular branch of the service (File 19037–74, J. A. G., Apr. 8, 1918).

[P. 26] PROMOTION: EFFECT OF TEMPORARY APPOINTEE ACCEPTING COMMISSION IN LOWER GRADE.

A warrant officer, having been temporarily appointed a lieutenant (junior grade) under the provisions of the act of May 22, 1917, desired information as to whether he could accept an appointment as an ensign in the Navy without suffering a reduction from the rank of lieutenant (junior grade).

A consideration of the specific provisions of the act of May 22, 1917, and its general tenor, establish very clearly the intent of Congress that no officer of the naval service shall lose either rank, emoluments, or right to promotion by reason of anything contained in said act or by reason of the acceptance of temporary promotion in accordance with its provisions. The officers and enlisted men in the naval service who are advanced in accordance with the provisions of said act have a dual status in the Navy—their permanent enlistment, warrant, or commission, as the case may be, remaining dormant until the termination of their temporary commissions or warrants.

If the officer in question is actually commissioned an ensign in the permanent Navy prior to the termination of his temporary appointment, he will, of course, render no service as an ensign until the termination of his temporary appointment as lieutenant (junior grade), at which time he will revert to the grade of ensign or to any higher grade to which he may in the meantime have become entitled to promotion. The act of May 22, 1917, also provides "that no person who shall receive a temporary appointment shall be entitled to pay or allowances except under such temporary appointment." His pay, therefore, will be that of his temporary rank (File 26806–155, J. A. G., Apr. 24, 1918).

REIMBURSEMENT OF OFFICERS' MESSES: FOR LOSS, DESTRUCTION, OR DAMAGE TO MESS PROPERTY.

The act of October 6, 1917, authorizes the Paymaster General of the Navy to reimburse "such officers, enlisted men, and others in the naval service of the United States as may have suffered, or may hereafter suffer, loss or destruction of or damage to their personal property and effects in the naval service due to the operations of war or by shipwreck or other marine disaster when such loss, destruction, or damage was without fault or negligence on the part of the claimant * * *. And the liability of the Government under this act shall be limited to such articles of personal property as the Chief of the Bureau of Navigation of the Navy Department, with reference to the personnel of the Navy, or the major general commandant of the Marine Corps, with reference to the personnel of that corps, in his discretion, shall decide to be reasonable, useful, and proper for such officer, enlisted man, or other person while engaged in the public service in line of duty, and the certificate of said chief of bureau or major general commandant, as the case may be, shall be sufficient vouchers for and shall be final as to all matters [P. 27] necessary to the establishment and payment or settlement of any claim filed hereunder * * *: *Provided*,

[C. M. O. 37—1918]

That the liability of the Government under this act shall be limited to such articles of personal property as are required by the United States Naval Regulations and in force at the time of loss or destruction or such officers • • • *And provided further,* That reimbursement or loss, destruction or damage sustained and determined as herein provided shall be made in kind for such articles as are customarily issued to the service and shall be made in money for other articles at the valuation thereof at the time of their loss, destruction, or damage."

In the opinion of the Acting Judge Advocate General, the stores belonging to an officers' mess are the personal property of the officers composing the mess, and they are "such articles of personal property as are required by the United States Naval Regulations" (R–4517 and I–821–828, 4545, U. S. Navy Regs., 1913). And therefore reimbursement may be made to an officers' mess for the loss, destruction, or damage of such stores under the circumstances prescribed by the act of October 6, 1917, on the certificate of the Chief of the Bureau of Navigation that the stores for which reimbursement is claimed are "reasonable, useful, and proper" for such officers' mess (File 26283–1416:2, J. A. G., Apr. 25, 1918).

RETIRED ENLISTED MEN: PROMOTION AND PAY OF.

So far as this office is aware there is no statutory prohibition against the advancement of a retired enlisted man, employed in "active service" pursuant to authority contained in the act of August 29, 1916, to a higher rating, such higher rating to continue during the active-service status of the enlisted man. There is also no provision in the Navy Regulations which would preclude the advancement in question.

The act of August 29, 1916, provides:

> "The Secretary of the Navy is authorized in time of war or when a national emergency exists to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the same pay and allowances they were receiving when placed on the retired list."

It will be noted from the above that said retired enlisted men "shall receive the same pay and allowances they were receiving when placed on the retired list." This does not mean that they should receive the identical pay that they were receiving when placed on the retired list (Comp. Dec., 7/28/18; File 7657–450: 2), for to so construe the act of August 29, 1916, would be to hold that their pay was not subject to be increased by future legislation. In the Comptroller's decision cited it was held that "a chief petty officer on the retired list who has been recalled into the active service under the act of August 29, 1916, is entitled to the present pay of men on the active list in the same rating and of the same length of service."

[P. 28] In another decision of the Comptroller of June 26, 1917 (File 26254–2293:1), it was held that "retired enlisted men of the Marine Corps called into active service under authority of the act of August 29, 1916, are not entitled to pay of a higher rating or grade than that held by them at the time of their retirement."

In view of the above the Judge Advocate General was of the opinion that legislation would be necessary to enable retired enlisted men, who have been advanced in rating, to receive the pay of the rating to which advanced (File 7657–585, J. A. G., Apr. 2, 1918).

RETIRED OFFICERS: PROMOTION OF, UNDER SECTION 1481, REVISED STATUTES.

A staff officer, having been retired at the age of 62 years, after approximately 35 years of service, with the rank of captain, made a request that he be given the rank of commodore, under section 1481 of the Revised Statutes, which provides:

> "Officers of the Medical, Pay, and Engineer Corps, chaplains, professors of mathematics, and constructors, who shall have served faithfully for forty-five years, shall, when retired, have the relative rank of commodore; and officers of these several corps who have been or shall be retired

at the age of sixty-two years, before having served for forty-five years, but who shall have served faithfully until retired, shall, on the completion of forty years from their entry into service, have the relative rank of commodore."

(Forty years have elapsed since applicant's entry into the service.)

Held: The act of August 5, 1882, providing that "hereafter there shall be no promotion or increase of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officer shall be retired," clearly repeals so much of the provisions of section 1481 of the Revised Statutes as authorized the promotion of staff officers to the grade of commodore on the retired list after having completed 40 years from their entry into the service, where such officers have not actually served 40 years before retirement (File 27231–112, J. A. G., Apr. 1, 1918).

C. M. O. 38—1918

[P. 1] Lieutenant Commander Herbert B. Riebe, U. S. Navy, was tried by general court martial on April 8, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Drunkenness (one specification).

Sentence

"The court therefore sentences him, Lieutenant Commander Herbert B. Riebe, United States Navy, to lose fifteen (15) numbers in his grade."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his excellent record in the performance of invaluable services during a period of national emergency, we recommend Lieutenant Commander Herbert B. Riebe, U. S. Navy, to the clemency of the reviewing authority."

Action of the Convening Authority

The convening authority on April 16, 1918, placed the following endorsement on the record in the foregoing case:

"The accused in this case has been charged with a grave offense and has plead guilty. The sentence of the court, even under circumstances most favorable to the accused, had they existed, is a most lenient one, and the convening authority cannot but feel that, in arriving at its sentence, the court, misinterpreting its functions, took into consideration those very circumstances which formed the basis of the recommendation to clemency made unanimously by its members.

"While the country is in a state of war it is incumbent upon every officer to so conduct himself as to be at all times prepared to perform his duty to the utmost extent. By overindulgence he renders himself not alone unfit to perform his individual duty but so weakens and destroys his intellectual powers as to make it [P. 2] extremely inadvisable, if continued in, to entrust him with those duties involving the necessity for well-balanced judgment and instant decision as well as responsibility for the lives of others.

"The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Herbert B. Riebe, U. S. Navy, are approved, and he will accordingly be released from arrest and restored to duty."

[C. M. O. 40—1918]

C. M. O. 39—1918

[P. 1] Lieutenant (junior grade) (T) Donald McDonald (M) U. S. Navy, was tried by general court martial on April 5, 1918, on board the U. S. S. *New Jersey*, by order of the Commander, Battleship Force One, U. S. Atlantic Fleet, on the following charge:

Charge.—Drunkenness on duty (one specification).

Finding

The court acquitted the accused of the charge.

Action of the Convening Authority

The convening authority on April 26, 1918, approved the proceedings, finding, and acquittal of the general court martial in the foregoing case of Lieutenant (junior grade) (T) Donald McDonald (M), U. S. Navy, subject to certain remarks concerning irregularities in the record, and directed that he be released from arrest and restored to duty.

Remarks

The following among other irregularities which showed a lack of attention to details were noted by the convening authority:

The front cover sheet contained the notation "Copy furnished," but the receipt of the accused for said copy was not appended to the record, as required by Naval Courts and Boards, 1917, section 369.

The front cover sheet bore the date April 5–6, 1918. The date should have been the date when the court first convened for the case. See Naval Courts and Boards, 1917, section 85.

The record contained notations to the effect that two witnesses were cautioned by the president of the court as to the solemn nature of their oaths. In addition to said notations, the record should have shown the reasons and necessity for said cautions with sufficient detail to enable the reviewing authority to intelligently review those parts of the record.

C. M. O. 40—1918

[P. 1] Lieutenant Harry S. Lyons, U. S. Naval Reserve Force, was tried by general court martial on April 2, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Absence from station and duty without leave (one specification).

Sentence

"The court therefore sentences him, Harry S. Lyons, lieutenant, United States Naval Reserve Force, to be restricted to the limits of the post, station, or ship to which he may be attached for a period of thirty (30) days."

Recommendation to Clemency

The following recommendation to clemency signed by four of the five members of the court was spread upon the record:

> "In consideration of the fine character given Lieutenant Harry S. Lyons in the testimony and letters; his reputation and standing on the Great Lakes, as a commander and manager of merchant ships; his strenuous efforts as executive of the U. S. S. *Jupiter* during the excessively cold weather of the past winter, whereby several transports were coaled in time to sail, though stevedores refused to work, with resulting official commendation by the supply officer, we recommend Lieutenant Harry S. Lyons, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

[C. M. O. 42—1918]

RETURNED FOR REVISION

On April 18, 1918, the Department returned the record of the proceedings in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the Department, was inadequate to the offense found proved.

[P. 2] SENTENCE IN REVISION

The court reconvened in April 23, 1918, and decided to revoke its former sentence, and substituted therefor the following:

> "The court therefore sentences him, Harry S. Lyons, lieutenant, United States Naval Reserve Force, to be dismissed from the United States Naval service."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on May 2, 1918, recommended the approval of the proceedings, findings, and sentence, and further recommended that in view of the recommendation to clemency and of the other circumstances, that the sentence be mitigated to the loss of $50 a month for six months.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Harry S. Lyons, U. S. Naval Reserve Force, are approved, but in view of the recommendation of the Bureau of Navigation, the sentence is mitigated to the loss of $50 a month for six months. He will be released from arrest and restored to duty.

REMARKS

There was nothing in the record in the foregoing case to indicate that the accused authorized an admission made by his counsel, and it can only be assumed that such was made by his implied authority, in that he was present and made no objection. It was clearly the duty of the court when this admission was made to put to the accused such questions as would insure that he assented to the action of his counsel, and the record should show said assent.

The court also allowed the introduction in evidence of certain letters, testimonials as to previous good character of the accused. Such procedure was improper (even had these letters been properly identified), but in this case did not affect the interests of the accused adversely. The court should have excluded these letters and directed that such testimonials be forwarded [P. 3] by the judge advocate to the Department for the consideration of the reviewing authority. (See Naval Digest, 1916, p. 333, sec. 17.)

C. M. O. 42—1918

[P. 1] Ensign (T) Thomas F. Morris (M), U. S. Navy, was tried by general court martial on April 2, 1918, on board the U. S. S. *Alabama*, by order of the Commander, Battleship Force One, U. S. Atlantic Fleet, on the following charge:

Charge.—Neglect of duty (two specifications).

FINDINGS

The court found the first specification of the charge "proved," the second specification of the charge "proved in part," and the accused guilty of the charge.

SENTENCE

"The court therefore sentences him, Ensign (T) Thomas F. Morris (M), U. S. Navy, to lose twenty (20) numbers in his grade."

[C. M. O. 46—1918]

ACTION OF THE CONVENING AUTHORITY

The convening authority, on April 26, 1918, placed an endorsement on the record in the foregoing case in part as follows:

"Since the sentence in this case, consisting of loss of numbers, is practically without any effect, and is not a substantial punishment, the convening authority is of the opinion that a sentence of the nature outlined in Naval Courts and Boards, 1917, page 362, variation 4, would have been a better one for the court to have adjudged. The convening authority will not reconvene the court for a revision of the sentence, since to do so would take high ranking officers from their duties and cause considerable inconvenience and loss to the naval service.

"Subject to the above remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign (T) Thomas F. Morris (M), U. S. Navy, are approved. He will be released from arrest and restored to duty."

C. M. O. 46—1918

[P. 1] Assistant Surgeon William E. Beatty, U. S. Navy, was tried by general court martial on April 22, 1918, at Base Seven, by order of the Commander Patrol Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Violation of the 90th article of war (one specification).

Charge II.—Violation of the 96th article of war (one specification).

FINDINGS

The court acquitted the accused of the charges.

RETURNED FOR REVISION

The convening authority, on April 25, 1918, returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its findings on the first charge and the acqittal. In the opinion of the convening authority the finding on the first charge and the specification thereunder was not in accord with the evidence adduced.

ACTION IN REVISION

The court reconvened on April 26, 1918, and decided "respectfully to adhere to its former findings and acquittal."

ACTION OF THE CONVENING AUTHORITY

On April 29, 1918, the convening authority placed an endorsement on the record in the foregoing case in part as follows:

"Upon proceedings in revision the court has seen fit to adhere to its former finding and acquittal of the accused. The court has had the witnesses before it and has had an opportunity to observe their bearing and demeanor while testifying, and some of the witnesses, it appears, required the admonition of the court to bring out the facts of the case more explicitly. It may be that the unsatisfactory character of such evidence weighed materially in the deliberations of the court, and the convening [P. 2] authority will not do the members of the court the injustice of treating too lightly the result of such deliberations, particularly after their reconsideration of the case.

"However, the convening authority must base his action upon the evidence as it appears in the record, and is of the opinion that such evidence proves the material allegations of the specification of the first charge.

"The proceedings of the general court martial in the foregoing case of Assistant Surgeon William E. Beatty, U. S. Navy, are approved. The finding on the second charge and the specification thereunder are approved. The finding on the first charge and the specification thereunder and the

[C. M. O. 46—1918]

acquittal are disapproved. He will be released from arrest and restored to duty."

REMARKS

The accused was brought to trial before a naval general court martial on two charges, to wit: (1) Violation of the 90th Article of War, and (2) violation of the 96th Article of War, the specification of each setting forth a wrongful act committed when at the time "detached for service with the Army by order of the President." They fail, however, to indicate the station or service of the accused at the date of preferring the charges or when the trial was held, and further, the averment that the accused was, at the time he committed the offense alleged "serving with a body of marines" is omitted; all of which are most important and desirable in order that the jurisdiction of the naval court might be clearly established. The statement contained in the specification—to wit, "then detached for service with the Army by order of the President"—is not deemed complete, in that the law makes no direct provision for officers of the Medical Corps of the Navy being detached for service with the Army, but it does provide for occasions and conditions under which such officers become subject to the rules and Articles of War prescribed for the government of the Army, and that is, when "serving with a body of marines detached for service with the Army," and therefore in order to complete a showing of jurisdiction in such a case, it is preferable to aver that the accused was "at that time serving with a body of marines detached for service with the Army by order of the President."

[P. 3] By going outside the record it was found that the offenses with which the accused was charged were committed on March 28, 1918, when he was under the jurisdiction of the Army, and amenable to the Articles of War, while the charges were preferred against him and he was brought to trial after having been returned to the jurisdiction of the Navy, and the naval court therefore had cognizance of the offenses and jurisdiction of the person of the accused under the Articles of War, which mention among others subject to military law the following:

> "Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court martial after such detachment ceases" (art. 2 (c)).

And under the act of August 29, 1916, which provides that—

> "Officers and enlisted men of the Medical Department of the Navy, serving with a body of marines detached for service with the Army in accordance with the provisions of section sixteen hundred and twenty-one of the Revised Statutes, shall, while so serving, be subject to the rules and Articles of War prescribed for the government of the Army in the same manner as the officers and men of the Marine Corps while so serving" (39 Stat. 573).

It should not be necessary to go outside the record to discover such important features, but the record itself should be made to cover them.

These irregularities, however, are not deemed fatal, particularly as no objection was made by the accused.

From a careful review of this case and consideration thereof, it is not understood why the other party to the altercation engaged in by this accused was not called as a witness. He had previously been tried and pleaded guilty to his part of the same altercation in which the accused was involved, and all the evidence in this case goes to show the latter to have been the aggressor; and whereas the evidence adduced seems clearly sufficient to sustain a finding of guilty, it would appear that the most satisfactory evidence had not been produced. The decision reached by the convening authority in this case, that the finding of the court on the specification of the first charge and said charge is not in accord with the evidence, is concurred in. [P. 4] The failure of

[C. M. O. 49—1918]

the court to reach a proper finding in this case presents an instance of having an aggressor in an altercation preliminary to a possible personal encounter exempted from the consequences thereof and the passive party being punished.

C. M. O. 49—1918

[P. 1] Commander Frederic N. Freeman, U. S. Navy, was tried by general court martial on April 24, 1918, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy, on the following charges:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Drunkenness (four specifications).

Charge III.—Violation of a lawful general order issued by the Secretary of the Navy (three specifications).

Findings

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the first specification of the second charge "not proved," the second, third, and fourth specifications of the second charge "proved," and the accused "guilty" of the second charge; the specifications of the third charge "not proved," the accused "not guilty" of the third charge, and acquitted the accused of the third charge.

Sentence

"The court therefore sentences him, Commander Frederic N. Freeman, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his known professional ability and the circumstances under which his offenses were committed, we recommend Commander Frederic N. Freeman, U. S. Navy, to the clemency of the reviewing authority."

Action of the Judge Advocate General

On May 10, 1918, the Judge Advocate General recommended that the findings upon the third charge and specifications thereunder [P. 2] and acquittal of said charge be disapproved; that, subject to remarks thereon, the proceeding and findings upon the first and second charges and specifications thereunder and the sentence in the foregoing case be approved.

The Judge Advocate General was of the opinion that the findings of the court on the third charge and the specifications thereunder were not in accord with the evidence adduced, which appeared to establish the allegations beyond a reasonable doubt.

The order referred to in the third charge was General Order No. 306, of 1917, in regard to uniform. The accused based his defense on ignorance of said order. Each officer and enlisted man is presumed to have knowledge of the contents of Navy Regulations and General Orders, and, although ignorance of same may be considered as an extenuating circumstance, it does not excuse one guilty of infraction thereof nor relieve him from the consequences of his acts.

As to the first and second charges and the specifications thereunder, with the possible exception of the first specification of the second charge, the evidence clearly shows the commission of the offenses alleged.

The defense was based on irresponsibility of the accused due to his confused or exhausted mental condition. The evidence, however, shows no such mental condition as would warrant the excusing of the accused from the consequences of his acts. There was no evidence to show insanity; in fact, such appears to have been carefully avoided; but the trend of the testimony was to establish a mental irresponsibility which is not recognized as a legal defense. The evidence did not show that the accused was insane, but, on the contrary, that his condition was such as to enable him to determine right from wrong and thus to render him responsible for the probable consequences of his acts.

[C. M. O. 50—1918]

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on May 16, 1918, placed the following endorsement thereon:

> "The Bureau recommends approval of the findings upon the first and second charges and specifications, and does not recommend [P. 3] approval of the findings upon the third charge and specifications.
> "The action of the court in recommending clemency is not concurred in. The Bureau recommends that the sentence be approved."

The remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, were approved on May 21, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence of the general court martial in the foregoing case of Commander Frederic N. Freeman, U. S. Navy, be confirmed.

ACTION OF THE PRESIDENT

On May 25, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 50—1918

[P. 16] ADMISSIONS IN OPEN COURT: JUDGE ADVOCATE NOT AUTHORIZED TO MAKE, FOR ACCUSED WITHOUT COUNSEL.

The judge advocate in a recent case stated to the court that, as the accused did not have counsel, the judge advocate was authorized by Navy Regulations to direct him how to present to the court in the most efficient manner the facts upon which his defense was based, and that the accused would admit going to St. Marc, as set forth in the specification, etc.

> "Though the judge advocate may act in an advisory capacity as counsel to the accused, rendering him, both in and out of court such assistance as may be compatible with his primary duty of conducting the prosecution, he cannot act in a personal capacity of counsel * * *" (Naval Dig., 1916, p. 307, sec. 28).

[P. 17] There is no provision authorizing the judge advocate to assume the status of counsel; neither can he make admissions for the accused and to that extent usurp the prerogative of counsel.

The judge advocate in quoting Navy Regulations as his authority for his action apparently overlooked other just as important provisions relative to his duties connected with assistance to be rendered the accused when without counsel. The regulation referred to was R–753, Navy Regulations, 1913, which has been superseded by Naval Courts and Boards, 1917. (See G. O. 325 of Sept. 17, 1917.) The above-mentioned regulation, however, in addition to the part referred to by the judge advocate, contains the following:

> "The judge advocate * * * shall at all times prevent the accused, if he be not assisted by counsel, from advancing anything which may tend either to criminate him or prejudice his cause, * * *."

The substance of this provision is contained in Naval Courts and Boards, 1917, section 255.

It is clearly evident from the above that the judge advocate disregarded his duty, and especially is this more apparent when the explanation of his action as recorded was "to save the court any unnecessary delay or waste of time" (File 26262–4360, J. A. G., May 17, 1918; G. C. M. Rec. No. 38226).

As to the necessity of accused's assent to admissions made by counsel, see C. M. O. 30, 1918, 17.

CHARGES AND SPECIFICATIONS: "UNAUTHORIZED EXIT" AND "PROHIBITED EXIT" NOT EQUIVALENT TERMS.

Where a specification alleges that the accused did, on or about 9:30 p. m., April 1, 1918, leave the barracks at which he was serving through an unauthor-

[C. M. O. 50—1918]

ized exit—to wit, through a gap in the fence which inclosed said barracks—no offense is charged, as the use of an unauthorized exit is the use of one not affirmatively sanctioned but not necessarily a prohibited one. It was, therefore, held that the specification was fatally defective (File 26262–4360, J. A. G., May 17, 1918; G. C. M. Rec. No. 38226).

FORMER JEOPARDY: WHAT CONSTITUTES.

John T. Murphey was recently tried for desertion. He entered a plea of former jeopardy and based same on the fact that he had been previously tried for the offense of desertion and acquitted. It appeared that the accused had been formerly tried under the name of John T. Murphy, but that the accused was not the John T. Murphy who had committed said former offense, and that the desertion in the former case was from a different ship, at a different time and place from that for which he was now being tried. It was therefore held that the accused was not being tried for the same offense of desertion, and that there was no former jeopardy under the fifth amendment to the Constitution [P. 18] of the United States, which provides against any person being twice put in jeopardy of life or limb for the same offense (File 26251–16321, J. A. G., May 8, 1918; G. C. M. Rec. No. 38077).

PETTY OFFICERS SERVING PRISON SENTENCES: POLICY OF DEPARTMENT IN REGARD TO.

In a recent case the court in adjudging the sentence made the part relating to reduction in rating follow that relating to confinement. The sentence was thus rendered ambiguous, in that it might be held that the reduction in rating would not occur until after the term of confinement had been served. The policy of the Department in regard to petty officers serving prison sentences is set forth in Naval Digest, 1916, page 518, sections 36 and 37. In such cases the form of sentence set forth in Naval Court and Boards, 1917, section 348, should be followed in order to prevent uncertainty (File 26251–16248, Sec. Nav., May 1, 1918; G. C. M. Rec. No. 37994).

RECOMMENDATION TO CLEMENCY: JUDGE ADVOCATE SHOULD NOT JOIN IN.

It is improper for the judge advocate to join all or any of the members of the court in making a recommendation to clemency (File 26251–16075, J. A. G., Apr. 10, 1918; G. C. M. Rec. No. 37625).

STATEMENT OF ACCUSED AND ARGUMENT OF COUNSEL: SHOULD NOT BE CONFUSED.

The record in a recent general-court-martial case disclosed the following:

"The counsel for the accused made the following statement."

There then followed averments of material facts which had not been introduced in evidence.

It is not the province of counsel to make a statement. It is provided by Naval Courts and Boards, 1917, sections 313 and 314, that he (counsel) shall be afforded an opportunity to present an argument of the character specified, but a distinction is made between argument of counsel and statement of accused. The latter may be either written or oral. If written, the counsel for the accused may prepare and read it for him, but other than that he has no part connected therewith. And whatever be the method of introduction employed, the contents of said statement should be restricted to that authorized in Naval Courts and Boards, 1917, section 311 (File 26251–16487, Sec. Nav., May 24, 1918; G. C. M. Rec. No. 38242).

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WILLFULLY DISOBEYING LAWFUL ORDER: (A) DRUNKENNESS AS A DEFENSE TO; (B) INCOMPETENCY OR IMPOSSIBILITY OF EXECUTION AS A DEFENSE TO.

An accused in a recent case was charged with "Disobeying the lawful order of his superior officer," and the specification thereunder alleged that he "did willfully disobey the lawful order," etc.

[P. 19] The accused pleaded guilty to the charge and specification, and then submitted a statement to the effect that (*a*) he was under the influence of intoxicating liquor and unfit for duty, and (*b*) the order was a very severe one and one which he was incapable of carrying out.

Such a statement may well be held to be inconsistent with the plea of guilty because (*a*) above tended to show that the accused was incapable of harboring the intent necessary to constitute the offense of willful disobedience to orders (see Naval Dig., 1916, p. 196, sec. 51; see also file 26262–4234, G. C. M. Rec. No. 37786), and (*b*) tended to show that the accused was incompetent to carry out the orders, or that it was impossible for him to do so, either of which, if established by evidence, would have been a good defense to the charge.

It therefore became the duty of the court to instruct the accused as to the nature and effect of his statement in order that he might have withdrawn his plea of "guilty" and substituted the plea of "not guilty," or if he persisted in his plea, to direct that the plea of "not guilty" be entered and then to proceed with the trial as if the latter plea had been made (Naval Dig., 1916, p. 585, sec. 18).

As such a course was not pursued, the Department disapproved the findings on the charge (File 26262–4237, J. A. G.; G. C. M. Rec. No. 37789).

BOARD OF INVESTIGATION: RIGHT OF PARTY AFFECTED THEREBY TO BE FURNISHED WITH FINDINGS.

An officer of the Navy requested that he be furnished the result of a certain investigation ordered by the Secretary of the Navy to inquire into the condition of a ship's engineer department which had been under his charge, in order that he might "meet any reflection or insinuation that may have been directed toward the period during which the department was" under his charge.

He was informed of the time and place of the meeting of the board; that the record was voluminous; that, prior to the investigation, unfavorable entry had been made on his record, to which he had replied by letter; that one of the causes given by the board for the condition of the department in question was the inexperience of said officer; that, in view of the unfavorable [P. 20] entry referred to, the Secretary of the Navy, in his action on the record, directed that no further disciplinary action would be taken; and that, therefore, it was not considered necessary to furnish him with information further than that set forth above (File 26283–1480:3, Sec. Nav., May 25, 1918).

PAY OF PUBLIC OFFICERS.

(1) Pay of public officers cannot lawfully be withheld on account of an unadjudicated cross-claim against them by the United States; where this is done the civil courts may order payment of salary in mandamus proceedings, regardless of the alleged indebtedness, and the officers concerned are not required to bring suit in the Court of Claims.

(2) Neither the law nor propriety justifies an auditor or disbursing officer in attempting to exercise espionage or petty supervision over the time, services, and whereabouts of a public officer and to "dock" his pay for an alleged absence from duty in excess of the specified leave of absence authorized by law, particularly where the head of the Department has advised that the officer's explanation was entirely satisfactory.

(3) The Comptroller of the Treasury has no jurisdiction to render a decision concerning the authority of a disbursing officer to withhold any portion of a public officer's statutory salary on account of an unadjudicated cross-claim against him by the Government; and a decision of the Comptroller of the Treasury in such a case is extraofficial and not required by law.

(4) The opinion of the Attorney General that the pay of a public officer cannot be withheld on account of an unadjudicated cross-claim against him

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by the United States should be followed by the auditor and disbursing officer notwithstanding a contrary decision rendered by the Comptroller of the Treasury in the same case.

On April 15, 1918, a decision was rendered by the Supreme Court in the case of *Smith* v. *Jackson* which should prove of great interest to the Navy, concerning as it does the jurisdiction of the accounting officers and their right to set off against the statutory salary of a public officer alleged indebtedness by such officer to the United States, where the existence of such indebtedness as well as the amount thereof were denied by the officer and had not been adjudicated against him in any court.

Briefly stated, the facts in this case were that the auditor of the Panama Canal, who was also a disbursing officer, withheld the salary of Judge William H. Jackson, of the district court of the Canal Zone, alleging that the judge was indebted to the United States for house rent and electric light, and also on account of his alleged absence from duty five days in excess of [P. 21] the six weeks' leave of absence expressly provided for by law. Judge Jackson denied that he was indebted to the United States in any sum whatsoever, and also denied the right of the auditor to withhold his statutory salary on account of alleged indebtedness.

Upon reference by the Secretary of War, the Attorney General rendered an opinion July 8, 1915, holding that "without specific authority, no portion of the salary of an officer of the United States may be withheld"; that there was no statute authorizing the deduction in this case; that any claim which the Government might have against Judge Jackson "can only be enforced through proceedings in the courts," and, if this were proposed, that it would be the duty of the Department of Justice to reach a conclusion as to whether grounds for such a suit exist.

Thereafter, on March 25, 1916, the Comptroller of the Treasury, contrary to the opinion of the Attorney General, rendered a decision upon submission of the Governor of the Panama Canal holding that "Judge Jackson is both a debtor and creditor of the Government, and the right of the Government to set off one indebtedness against the other is recognized by numerous decisions of the accounting officers"; that "this practice is an old one, and is legal and proper without any express statute on the subject, and has been recognized by the courts"; that "there is no specific statutory authority for the Comptroller of the Treasury to decide whether or not a deduction shall be made," but that "he has specific authority and a duty in deciding the question whether the salary or any part thereof shall be paid"; that "when he decides that it cannot be paid by the disbursing officer because it involves controverted questions of law or fact, or for other reasons, it is the duty of the disbursing officer to refuse payment"; and that under the circumstances of the present case "the paymaster is not authorized to pay the salary except such amount thereof as may be in excess of the claimed indebtedness."

Thereupon Judge Jackson filed a petition in the district court of the Canal Zone for mandamus against the auditor to compel the latter to audit, approve, issue, and deliver to him warrants, vouchers, or pay checks for his salary as district judge of the Canal Zone, as required by law and practice, without regard to the said claim of indebtedness set up by the auditor. Hon. Henry D. Clayton, United States district judge for the middle and northern districts of Alabama, was designated by the President to perform the duties of the judge of the district court of the Canal Zone in the trial of this case, and rendered a lengthy opinion sustaining the contentions of Judge Jackson and ordering that the writ of mandamus be issued to compel the auditor to perform his duty as prayed in the petition.

In the opinion of Judge Clayton there were fully considered, among other things—first, the duty of the auditor; second, the [P. 22] jurisdiction of the Comptroller of the Treasury; and, third, the weight to be given the opinion of the Attorney General.

(1) As to the first point, the court said:

> "It is clear that Judge Jackson is entitled to his salary of $6,000 per annum in monthly payments of $500 just as in case he were a district judge of the United States. And it appears to be equally clear that the district court of the Canal Zone has authority to issue a peremptory mandamus if a proper case is presented * * *.

"Here the salary was ascertained or fixed by law and the money for its payment appropriated by Congress, as before stated. In legal effect it was on the Canal Zone, or in the hands or under the control of the disbursing officer, who is the respondent here. There was nothing left to the judgment or discretion of the respondent whose duty it was to disburse the money appropriated for the salary. Being satisfied of the identity of Judge Jackson, it was the plain duty of the respondent to issue his warrant for the salary * * *.

"The respondent further suggests that Judge Jackson can resort to the Court of Claims for the vindication of his rights. That court passes upon disputed claims, and whenever a judgment is rendered there, it is the duty of Congress to appropriate money for its payment. Probably that tribunal would hold that demand for the payment of Judge Jackson's salary could not be a claim triable there; that it is not a claim, but is compensation fixed by law, for which payment is provided for by an existing appropriation (*Benedict* v. *U. S.*, supra, 176 U. S. 357–360).

"The respondent insists that the relator is indebted to the United States or the Canal Zone, as hereinbefore stated. Is this true? Whether it is or not, the relator denies such indebtedness, and his case is justiciable and cannot be determined by a mere ministerial officer who has undertaken to decide without the intervention of a court or a judge and jury * * *.

"Judge Jackson has never had his day in court. He has been deprived of his salary, or the sum of $1,131.76, without due process of law. It has been withheld from him by the refusal of the auditor in this case to issue his voucher upon which the salary is paid. The indebtedness is denied by Judge Jackson. He denies it upon the grounds that there was no law or regulation under which the indebtedness was or could have been created. He denies that the respondent has authority to withhold any part of his pay in the collection of an alleged but disputed indebtedness. And yet the executive officer has sat as a court, and, without evidence or hearing, except what he considered evidence, and except what he considered a hearing, decided a controversy that he created by his own action. He has passed upon a disputed claim which is a disputed claim merely because he has created the dispute in refusing to make payment where it was his plain duty to make such payment. [P. 23] His conduct, however good his intention may have been, hardly falls short of being shocking to the judicial sense of justice, proper, and orderly procedure in a matter that is clearly justiciable * * *. In any event Judge Jackson was entitled to his day in court. But the auditor here held that having the money for Judge Jackson under his control and subject to his disbursement, he had the right to determine the claim against Judge Jackson, one disputed in law and in fact, and now insists that his summary way of determining an issue of law and an issue of fact, and the collection by deduction from the judge's salary of a disputed indebtedness, cannot be reviewed or questioned by the court. Notwithstanding that view, I think the Attorney General was right in saying that the matter 'was one for judicial rather than administrative determination,' and that whatever demand or offset that the Government may have 'could only be enforced through proceedings in the courts' * * *.

"As has been shown, the amount of the relator's salary had been fixed by law and the money for its payment appropriated and was by the terms of the law in the possession or under the control of this respondent as disbursing officer, and he, as such, was under the legal obligation to pay, or under the regulations and practice to do his part in the payment of, such salary. There was nothing left to be determined by his judgment or according to his discretion. The judge having served as judge, the law itself automatically audited and determined the amount to be paid to him. The case of *McCoy* v. *Handlin*, supra (35 S. D. 487; 153 N. W. 361; L. R. A., 1915 E., 858), is, I think, in point, as I have endeavored to show, for there it was said: 'On the other hand, where the amount claimed is fixed by law, as, for instance, an officer's salary, the auditor is vested with no discretion whatever. If he is satisfied as to the identity of the officer claiming a salary, it is his duty to issue his warrant for the amount so fixed. In that case, there is nothing to be determined by an action at law, and, if the auditor refused to issue the

warrant, mandamus is a proper remedy to compel him to issue the same' * * *.

"It seems to me that upon reason and authority, when the salary has been fixed by law and the money appropriated for its payment, that the officer who controls the funds refused to pay the salary to the one entitled thereto, mandamus is the proper remedy, and the only remedy, which the aggrieved party can invoke for the protection and enforcement of his rights * * *.

"(2) It will be noted that the respondent has withheld $83.33 of Judge Jackson's salary for five days' absence from the Canal Zone in excess, as it is alleged, of the six weeks' annual vacation allowed under the Adamson Act. It is thus seen the respondent was under the misapprehension that Judge Jackson was to be classed as a day laborer, and that it was his duty [P. 24] as auditor, so he contends, to 'dock,' to use the respondent's language as a witness on this trial, Judge Jackson's salary on account of alleged absence. Of course, any laborer is respected, for labor is honorable, but the judge was not engaged to work by the hour or day. It is sufficient to say that the act of Congress provided that Judge Jackson should be paid an annual salary of $6,000 just as United States district judges are paid, and he was given by statute an annual leave of six weeks; and that this does not preclude the idea that he could lawfully have a longer leave of absence. Undoubtedly he could have been granted a longer leave, and undoubtedly the judge could not be deprived of the six weeks allowed by the statute. If without authority Judge Jackson absented himself from the Canal Zone for a period of time not permitted, the remedy for such dereliction was not committed to the judgment or authority of the respondent. For such an excess the judge was amenable to the President, with his power of removal, or to Congress, with its power of impeachment.

"* * * It is rather strange, to say the least of it, that this respondent should now insist he has the right to withhold a part of Judge Jackson's salary for five days' absence in view of the fact he was informed that the Attorney General, the head of the Department of Justice, advised that the judge's explanation as to why he had been absent for the brief time mentioned was entirely satisfactory * * *.

"I do not believe that law or propriety justified the respondent in this case to exercise the espionage or petty supervision over the time, services, and whereabouts of the judge as was shown by the testimony on the trial. The testimony in the case warrants the statement that the judge was faithful, efficient and independent in the discharge of the duties of his office. And testimony introduced at the trial without objection showed that Judge Jackson had so properly and fearlessly adjudged in a case before him as to bring forth from the respondent a published criticism upon the decision by the judge in that given case. But the judge was independent of him, and if he is to continue to be independent of the respondent, as a judge ought to be, he should not be subservient to the respondent for his salary or compensation."

(3) As to the second point, the jurisdiction of the Comptroller of the Treasury in this case, the court's opinion contained the following:

"In his answer the respondent says that he has sought the advice of the Comptroller of the Treasury under the following provision of the Dockery Act (R. S. Supp., vol. 2, 1892–1901, p. 216, act July 31, 1894, ch. 174, sec. 8, 28 Stat. 207): 'Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them' * * *

[P. 25] "It was asserted by counsel for respondent that the salary of the judge was a claim or demand against the United States, and that the amount alleged to be due by relator to the Panama Canal by way of house rent was a claim or demand against the relator, and that therefore the auditor acted within the provisions of that section of the Dockery Act above quoted, in submitting this matter to the Comptroller. But as I have said, it was a disputed claim merely because of the fact that the auditor, the respondent in this case, had made it so. It cannot be said that the salary of the judge

constituted a claim disputed or otherwise prior to the time that the respondent in this case saw fit to so assume. Furthermore, the Dockery Act provides that the auditor may submit to the Comptroller of the Treasury a question involving a payment to be made by the auditor. This was no question of a payment to be made from Government funds by the auditor to a party asserting a right to such funds. It is a question of the auditor retaining from a Federal judge, whose salary had been provided for and appropriated by Congress, such amounts as he saw fit to withhold. The claim in dispute was not against the Government; it was against the relator. The act does not provide, and clearly never contemplated, that the auditor should arrogate to himself the right to even consider that any amount by way of claim or otherwise could be deducted from the salary of a Federal judge based upon an alleged claim asserted by officials of the Government.

"Under this Dockery Act, therefore, this alleged claim was improperly submitted to the Comptroller of the Treasury by the respondent. It seems to me that the Comptroller of the Treasury should have advised the auditor when he submitted the alleged claim that he, the Comptroller, had no authority to pass upon it. The law confers no such function upon the Comptroller nor upon the auditor. Consequently, the opinion of the Comptroller of the Treasury was extra-official, was not required by law, and constituted purely a gratuitous act of the respondent in this case in furtherance of his endeavor to unlawfully withhold relator's salary from him. The contention of the counsel for respondent that this court is without jurisdiction to issue the writ of mandamus because the Comptroller of the Treasury had 'judicially decided the question' is, I think, untenable."

(4) As to the third point—namely, the weight to be given the opinions of the Attorney General—it will be noted from the statement of facts hereinbefore set forth that subsequent to the opinion rendered by the Attorney General in this case a contrary decision was rendered by the Comptroller of the Treasury, and that the auditor followed and applied the decision of the Comptroller of the Treasury instead of the opinion of the Attorney General. Under these circumstances the court held that "Mr. Attorney General Gregory was correct in saying that if the authorities in the Canal Zone believe that the relator in [P. 26] the present case owed any amounts of money whatsoever to the Panama Canal it was 'a question for judicial rather than administrative determination,' and that the claim now urged by the respondent in this case 'could only be enforced through proceedings in the courts.' That is a sententious and felicitous statement of this case." Furthermore, with specific reference to the effect of the Attorney General's opinion, the court quoted with approval the following extract from an opinion of the Attorney General to the Secretary of the Treasury dated February 12, 1894 (20 Op. Atty. Gen. 722), which was a repetition of what had been stated in a prior opinion of the Attorney General to the Secretary of the Treasury dated September 8, 1893 (20 Op. Atty. Gen. 659):

"The act of 1870, section 4 establishing the Department of Justice, provided that written opinions prepared by a subordinate in the Department may be approved by the Attorney General, and that 'such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney General.' This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the Attorney General shall have some actual and practical force. Congress's intention cannot be doubted that administrative officers should regard them as law until withdrawn by the Attorney General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice."

The auditor prosecuted error to the United States circuit court of appeals, fifth circuit, from the adverse decision of the district court, and the court of appeals affirmed the decision of the lower court, stating that:

"The elaborate opinion of Judge Clayton covers the entire case, and fully justifies the judgment rendered."

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Thereupon the auditor carried the case to the Supreme Court of the United States, which affirmed the judgment in an opinion rendered by the Chief Justice, which is quoted in full as follows:

"Congress provided for a district court of the Canal Zone, the appointment of a judge, and the salary attached to the office (act of Aug. 24, 1912, ch 390, 37 Stat. 565, sec. 8). In due course the salary fixed was definitely appropriated for. It is apparent that some controversy arose as to whether the auditor of the Canal Zone had the power to refuse to give effect to the act of Congress fixing and appropriating the salary by withholding such sum as he might think was due from the judge as rent for quarters in property belonging to the United States in the Canal Zone. We say this is to be inferred, because in 1915 the Secretary of War submitted to the Attorney General two questions; First, whether the district judge was entitled to the [P. 27] same privilege as to quarters in the Canal Zone there enjoyed by other employees of the Government; and second, if not, whether the auditor had authority to deduct from the salary of the judge before paying it the sum which he considered due for rent of such quarters. Reversing the order in which the questions were asked, the Attorney General came first to reply to the second question, and said: '* * * without specific authority no portion of the salary of an officer of the United States may be withheld. See 20 Opinions, 626 (1893); *Benedict* v. *United States*, 176 U. S. 357 (1900),' * * *.

"While it is apparent that this ruling should have put the subject at rest, obviously the misconception of the auditor as to the nature of his powers prevented that result from being accomplished, and the auditor refused to carry out the act of Congress and deducted from the salary of the judge, fixed by Congress, not only a charge for rent of quarters but a sum which he considered due because of the absence of the judge from the Canal Zone during a certain period. The judge thereupon commenced the proceeding, which is before us, to compel the auditor to perform his plain duty under the law and pay the salary without the deductions. As a result of the action of the auditor and the necessity of bringing the suit, the expense was occasioned the United States of calling a judge from the United States to hear the cause, and Judge Clayton, of the middle and northern districts of Alabama, proceeded to the Canal Zone to discharge that duty. He did so, stating the reasons which controlled him in an elaborate and careful opinion making perfectly manifest the error of the action of the auditor and his wrong in refusing to observe the ruling of the Attorney General in the premises (241 Fed. Rep. 747). From the consequent judgment directing the payment of salary to be made without the deductions the auditor prosecuted error to the circuit court of appeals for the fifth circuit, in which court the judgment below was affirmed, and it is a further writ of error prosecuted by the auditor from this court to that ruling which brings the subject matter before us now.

"The expense of printing a voluminous record has been occasioned and the views of the auditor have been pressed before us in a printed argument of more than 100 pages. We think, however, that we need not follow or discuss that argument, as we are of opinion that it is obvious on the face of the statement of the case that the auditor had no power to refuse to carry out the law, and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney General, and second, beyond all possible question, to the judgments of the courts below. It follows, therefore, that the prosecution of the writ of error from this court constituted a plain abuse by the auditor of his administrative discretion. In an ordinary case the situation would be one not only justifying but making it our duty to direct the enforcement of rule 23 as [P. 28] to damages. As, however, the judgment is not one for money, but relates solely to the obligation to perform a manifest public duty, and plain as may have been the abuse of discretion committed we are fain to believe it involved no intentional disregard of official duty, we pass that subject by and our order will be—Judgment affirmed" (File 22465–11).

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PENSIONS: EFFECT OF SECTION 312, WAR-RISK INSURANCE ACT, UPON SECTION 4756, REVISED STATUTES.

Section 4756, Revised Statutes, as amended, provides that—

> "There shall be paid out of the naval pension fund to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted person or as an appointed petty officer, or both, in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly, under the direction of the Commissioner of Pensions; and applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized."

Section 312 of the act of October 6, 1917 (War-Risk Insurance Act), provides that—

> "The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment to persons now in or hereafter entering the military or naval service, or to their widows, children, or their dependents, except in to far as rights under any such law shall have heretofore accrued."

The Acting Attorney General, in an opinion rendered to the Secretary of the Navy on May 28, 1918, stated that payments under section 4756, Revised Statutes, were no longer applicable except insofar as rights under the law had accrued on October 6, 1917; and that one who had become entitled to allowances under section 4756, Revised Statutes, in all respects except that he had not actually received his discharge from the service prior to October 6, 1917, was entitled to the benefits of said section 4756 as having "accrued" rights thereto.

So that a first sergeant in the Marine Corps who had served in said corps for more than 21 years prior to October 6, 1917, and had "become disabled from sea service" by a wound received in action in June 1916, but who was not discharged until November 5, 1917, when he was discharged by medical survey, his character being excellent, was held to be entitled to benefits provided by section 4756, Revised Statutes. And, further, the said first sergeant was entitled both to the benefits of section 4756, Revised Statutes, and to whatever allowances he may be [P. 29] otherwise entitled under the provisions of the War-Risk Insurance Act (act of Oct. 6, 1917). Payments under section 4756, Revised Statutes, would not commence to run until actual discharge (act of Mar. 3, 1891, 26 Stat. 1082.) (File 26510–1366: 2 and 3.)

PUBLIC PROPERTY: CHECKAGE OF PAY FOR LOSS OF, OR DAMAGE TO.

It was recently suggested by a certain commanding officer that "a limited number of hammocks, bags, mattresses, and ditty boxes be carried either on the clothing and small-stores account or as authorized items in the ship's store, in order that men who, through no fault of their own, lose similar articles issued them, can be required to make replacement."

In an indorsement on the letter of suggestion it was stated:

> "Referring to the question of hammocks, bags, ditty boxes, and mattresses and their loss through carelessness on the part of the men, it might be possible to transfer monthly the required number from the naval supply account (credit) to the clothing and small-stores account (debit) in order to provide a ready means whereby a commanding officer might require a man to pay for a lost or damaged article in cases where the man is obviously at fault."

It was further stated in the paper that the method suggested seemed to be "a reasonable method of requiring men who are obviously at fault to pay for lost or damaged articles."

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In the Judge Advocate General's opinion, containing citations of numerous precedents on the subject (5012–57 : 3) it was held that the pay of persons in the naval cannot, in the absence of legislation like that existing for the Army or for the Naval Militia in the act of August 29, 1916, legally be checked or withheld, directly or indirectly, to prevent financial loss to the Government for loss or destruction of its property through the fault of such persons.

It was held that the scheme proposed would not be objectionable provided that the man who was required "to pay for lost or damaged articles" in the manner proposed, retained title to said articles, and provided that he was required by regulation to have such articles in his outfit. But if the man is required to pay for a damaged article, the title to such article to remain in the United States, the proposed scheme would be contrary to law. (*Smith, Auditor of the Panama Canal* v. *Jackson*, U. S. C. No. 457 of April 15, 1918.) (File 5012–57 : 3, J. A. G., May 3, 1918.)

NOTE.—Under date of June 4, 1918, the Secretary of the Navy directed that, in view of the opinion of the Judge Advocate General and a memorandum from the Bureau of Navigation dated May 24, 1918 (N6HEL), "no change will be made at this time in the manner of issuing hammocks, bags, ditty boxes, etc., and in the method of replacements when damaged, lost, or destroyed," (File 5012–57 : 3).

[P. 30] RETIREMENT FOR PHYSICAL DISABILITY INCURRED IN LINE OF DUTY: OFFICERS OF THE NAVAL RESERVE FORCE NOT ELIGIBLE FOR.

The laws relating to retirement in the Regular Navy are not applicable to officers of the Naval Reserve Force, especially in view of the provisions of the act of August 29, 1916, to the effect that "when not actively employed in the Navy, members of the Naval Reserve Force shall not be entitled to any pay, bounty, gratuity, or pension except by the provisions of this act." Retirement with pay for physical disability is not expressly provided by the act; no retired list is authorized for officers of the Reserve Force, and there is no law authorizing the President to place them on the retired list of the Navy. Officers of the Reserve Force are, however, entitled to compensation for disability resulting from injuries suffered or disease contracted in line of duty under the War-Risk Insurance Act (File 27231–115, J. A. G., May 20, 1918).

STATE INCOME TAX: LIABILITY OF NAVAL OFFICER TO PAY.

An officer of the Navy made inquiry as to whether or not he was liable for the payment of an income tax levied by the State of Massachusetts under the Massachusetts income-tax law of May 26, 1916 (ch. 269, General Acts, Mass., 1916).

The Judge Advocate General's reply to the officer in question was as follows:

> "As was stated by the assistant to the income-tax deputy, department of tax commissioners, in his communication to you of March 11, 1918, 'the question of your liability under the Massachusetts income-tax law would depend upon your legal residence' (37 Cyc. 810, 947).
>
> "Your salary as an officer of the United States Navy is of course exempt from taxation by the State (Willoughby on the Constitution, citing decision of the U. S. Supreme Court in the case of *Dobbins* v. *Commissioners*, 16 Pet. 435). In addition, section 5 of the Massachusetts income-tax law of May 26, 1916 (ch. 269, General Acts, Mass., 1916, p. 253), provides that 'the wages and salaries of employees and officers of the United States Government shall not be taxed; but if such employees and officers receive other income taxable under this section, that part of such other income shall be taxed which, when such other income is added to the amount of the wages or salaries received as an employee or officer of the United States Government, shall be in excess of two thousand dollars.'
>
> "It will be seen from the above that if you are a legal resident of the State of Massachusetts you are liable to pay a tax on your income; your salary as an officer of the United States, however, not being taxable.
>
> "The first paragraph of reference (a) appears to present the question whether your income is taxable under the laws of Massachusetts on account

of your being on inspection duty in that State during 1916 and 1917. If you are not a legal [P. 31] resident of that State it is the opinion of this office that no part of your income is taxable by reason of your having been within the territorial limits of that State under proper orders of the Navy Department, and as its representative 'at the Fore River Shipyards, Quincy, Mass.' (See in this connection *Ex parte White*, 288 Fed., 88.)" (File 23472-47, J. A. G., May 15, 1918.)

UNNATURALIZED NATIONAL ENLISTED IN NAVY: NOT ENTITLED TO INCREASED PAY FOR CITIZENS.

A person who was born in Guam prior to the acquisition of that island by the United States, and who has since lived in Guam, the Philippines, and the United States, and who has been enlisted in the U. S. Navy as a mess attendant since October 24, 1917, does not thereby, and without naturalization, become a citizen of the United States, and is not entitled to the increased pay prescribed by the regulations for mess attendants who are citizens of the United States (File 26252-135, J. A. G., May 21, 1918).

C. M. O. 51—1918

[P. 1] Captain Nimmo Old, Jr., U. S. Marine Corps, was tried by general court martial on January 22, 1918, at the Marine Barracks, Santo Domingo City, Dominican Republic, by order of the commanding officer, Second Brigade, U. S. Marine Corps, and found guilty of the following charge:

Charge.—Absence from station and duty after leave had expired (one specification).

Sentence

"The court therefore sentences him, Captain Nimmo Old, Jr., U. S. Marine Corps, to lose ten (10) numbers in his grade."

Returned for Revision

The convening authority, on February 7, 1918, returned the record of the proceedings in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was not adequate to the offense found proved.

Sentence in Revision

The court decided to revoke its former sentence and to substitute therefor the following:

"The court therefore sentences him, Captain Nimmo Old, Jr., U. S. Marine Corps, to lose forty (40) numbers in his grade."

Action of the Convening Authority

The convening authority, on February 20, 1918, placed an endorsement on the record in the foregoing case, in part, as follows:

"In spite of the large number of errors committed, no error militated against the rights of the accused, but, to the contrary, afforded him unwarranted latitude.

"In view of previous sentences imposed by courts martial upon officers convicted under the same charge, and approved by [P. 2] the President, the court erred seriously in regarding the case so leniently as to award so mild a sentence in the first instance; and, in proceedings in revision, after the court's attention had been called to such error and to the seriousness of the offense, the court again erred in awarding the accused a sentence of the loss of only forty numbers in his grade.

"Subject to the foregoing remarks, the proceedings of the general court martial in the foregoing case of Captain Nimmo Old, Jr., U. S. Marine

[C. M. O. 54—1918]

Corps, are approved; the finding is approved; and, that the accused may not wholly escape justice, the sentence is approved. He will be released from arrest and restored to duty."

C. M. O. 54—1918

[P. 1] Lieutenant Hervey A. Ward, U. S. Navy, was tried by general court martial on April 5, 1918, on board the U. S. S. *Connecticut*, by order of the commander, Battleship Force Two, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Neglect of duty (eleven specifications).

Charge II.—Conduct unbecoming an officer and a gentleman (six specifications).

Sentence

"The court therefore sentences him, Lieutenant Hervey A. Ward, U. S. Navy, to be dismissed from the United States naval service."

Recommendation for Consideration

The following recommendation, signed by four of the seven members of the court, was spread upon the record:

"In view of the urgent need for experienced officers and of the testimony showing him to be reasonably well qualified in military matters, it is considered that the Navy Department might have further use for his services in this war, and for the above reasons alone the accused is recommended for consideration as to the advisability of further using him."

Recommendation of the Judge Advocate General

The Judge Advocate General, on May 27, 1918, placed an endorsement on the record in the foregoing case, which, after commenting on the first charge to the effect, inter alia, that the first four specifications thereof indicated the commission of a graver offence than "neglect of duty" would have warranted the charging of "embezzlement" or at least "scandalous conduct tending to the destruction of good morals," and that, although all specifications of said charge were defective and showed lack of care and attention to detail, they were nevertheless legally sufficient to support the charge, continued as follows:

"Referring to charge II, 'Conduct unbecoming an officer and a gentleman,' the first specification alleges in effect that the [P. 2] accused on turning over his accounts to his relief certified that there were no liabilities outstanding against the mess and failed to inform said relief of certain obligations to various persons and corporations. There is no allegation, however, indicating his certification was knowingly false or that he did this intentionally, or that his failure to inform his relief of these outstanding liabilities was an intentional one, or that there was any intent to deceive or commit a fraud involved. Unless such certification or failure was intentional or done with the purpose of defrauding or deceiving the mess or the officer relieving him as treasurer thereof there would appear to be no such offense as charged included in the specific acts set forth. The acts or omissions of the accused as herein alleged might have been entirely the result of error and could readily have happened through mistake or oversight. This could not excuse him, however, from the consequences thereof; but if unintentional, his conduct would not appear under such circumstances to be that as should be included within the scope of acts depriving one of his claim to association with officers and gentlemen, though it might, and doubtless would, go to sustain a charge of a minor nature, such as culpable inefficiency in the performance of duty, the degree of which would depend upon the facts brought in issue. Consequently in alleging such acts as an offense under the charge laid it is essential that the intent which would make the same an offense be averred.

"Specifications 2 to 6, inclusive, under this same charge allege that it being the duty of the accused at the close of each month to render to the officers'

[C. M. O. 59—1918]

mess a detailed statement showing the sums owed and persons owing during the months of May to September 1917, inclusive, did sign and submit a statement for the various months named showing there were no outstanding liabilities, which statement was misleading and incorrect in that he failed to report certain specified indebtednesses, and that he did therein and thereby exhibit a disregard of his obligations as an officer and a gentleman.

"Whereas the failure to render to the officers' mess a proper report of its outstanding liabilities and the making of a misleading and incorrect one might, if intentionally and willfully done, constitute conduct unbecoming an officer and a gentleman, it would, in my opinion and under these conditions, have been more appropriate to have alleged same under scandalous conduct tending to the destruction of good morals. On the other [P. 3] hand, it must be recognized that an unintentional error in preparing or submitting a statement such as called for, and which this might readily have been according to the wording of the specifications, does not necessarily constitute an offense unless it might be that as above stated, viz, culpable inefficiency in the performance of duty.

"In view of the foregoing it is my opinion that none of these specifications under charge II as alleged are sufficient to support the charge under which they are laid, and are therefore fatally defective.

"Based on what has been said, I have to recommend that, subject to the above remarks, the proceedings and findings upon the specifications of the first charge and said charge be approved, that the findings upon the specifications of the second charge and said charge be disapproved, and that the sentence be approved."

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on June 5, 1918, recommended that the findings upon the first charge and specifications thereunder be approved, that the findings upon the second charge and specifications thereunder be disapproved, and that the sentence be approved.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, were approved on June 6, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) the record was submitted to the President of the United States, with the recommendation that the sentence of the general court martial in the foregoing case of Lieutenant Hervey A. Ward, U. S. Navy, be confirmed.

ACTION OF THE PRESIDENT

On June 7, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 59—1918

[P. 1] Lieutenant (junior grade) (T) Birney O. Halliwill (B), U. S. Navy, was tried by general court martial, on April 29, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Disobeying the lawful order of his superior officer (two specifications).

SENTENCE

"The court therefore sentences him, Birney O. Halliwill, lieutenant (junior grade) (T) (B), United States Navy, to be restricted to his ship or station for a period of two (2) months and to lose fifty (50) dollars per month of his pay for a period of six (6) months."

[C. M. O. 60—1918]

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by four of the five members of the court, was spread upon the record:

"In consideration of the following extenuating circumstances in this case, we recommend the accused, Birney O. Halliwill, lieutenant (j. g.), U. S. Navy, to the clemency of the reviewing authority:

"Great stress of mind seemed to have been produced in the accused by his belief that Lieutenant Beardsley's authority over the submarine chasers was actually related only to the outfitting of such vessels and did not extend as far as covering the case in point, or matters of import concerning their personnel and ship discipline. It appears, both from the evidence of Lieutenant Beardsley and the accused, that Lieutenant Beardsley's full, or exact, status as regards his authority in connection with the submarine chasers was in the premises never conveyed either in writing or verbally to the accused. In fact, in the former trial of Lieutenant Halliwill, on August 16, 1917, referred to in this case, the opinion of the Department clearly indicated the necessity of such character of information being definitely conveyed by the superior officer to his inferior. This opinion must have had a compelling influence upon the accused in the present case [P. 2] and made him feel that his prerogatives as commander of a squadron and his own vessel were improperly invaded by Lieutenant Beardsley, particularly in the matter of passes issued or refused by Lieutenant Beardsley, or his authority.

"Further, the long service of the accused in the naval service of some 24 years and his service on the U. S. S. *Brooklyn* in the naval battle off Santiago de Cuba in 1898 are respectfully offered for consideration in this case."

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on May 29, 1918, recommended that the proceedings, findings, and sentence be approved.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) (T) Birney O. Halliwill (B), U. S. Navy, are approved. He will be released from arrest and restored to duty.

C. M. O. 60—1918

[P. 1] Lieutenant Hubert V. La Bombard, U. S. Navy, was tried by general court martial, on April 12, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Drunkenness (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Hubert V. La Bombard, United States Navy, to lose five (5) numbers in his grade."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on April 22, 1918, placed the following endorsement on the record in the foregoing case:

"The sentence in this case appears to be a lenient one and were it not for other considerations the convening authority would be disinclined to approve it. However, while the loss of five (5) numbers in itself is not an appropriate punishment for the offense of 'Drunkenness'—even though it may not have been aggravated—the convening authority is of the opinion that the burden of the punishment lies in the fact that the official record of the accused will permanently bear evidence of his misconduct. This fact, considering the method of promotion now prevailing in the service, makes the punishment more severe than at first appears.

[C. M. O. 61—1918]

"Therefore, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Hubert V. La Bombard, U. S. Navy are approved. He will be released from arrest and restored to duty."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on May 16, 1918, recommended that, in view of all the circumstances of the case, and the conflicting [P. 2] testimony, the loss of numbers be remitted and that Lieutenant La Bombard be given a letter of reprimand.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Hubert V. La Bombard, U. S. Navy, and the action of the convening authority are approved. The recommendation of the Bureau of Navigation is disapproved.

C. M. O. 61—1918

[P. 1] Ensign (T) H. W. D. Rudd, U. S. Navy (R. F.), was tried by general court martial on April 16, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Drunkenness (one specification).

SENTENCE

"The court therefore sentences him, Ensign (T) H. W. D. Rudd, United States Navy (R. F.), to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

The convening authority on April 24, 1918, placed an indorsement on the record in the foregoing case as follows:

"The accused, who bears a good reputation, both in the service and without, has been tried and found guilty of 'Drunkenness' and has been sentenced to dismissal from the service. It appears from the evidence, however, that his offense was not of an aggravated nature, and the complaint against him was probably induced by other occurrences at the same time and place, but with which the accused was not concerned.

"If the convening authority knew in what manner he could reduce the sentence of dismissal and still appropriately punish an officer of his grade—Ensign (T) U. S. N. (R. F.)—for the offense found proved, he would be inclined to so do.

"The proceedings, findings and, in view of the foregoing, the sentence of the general court martial in the foregoing case of Ensign (T) H. W. D. Rudd, U. S. Navy (R. F.), are approved, and in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on May 25, 1918, placed an indorsement thereon as follows:

"Due to the very conflicting testimony in this case, the fact that two officers of the Navy testified that Ensign Rudd was not [P. 2] intoxicated, the Bureau is of the opinion that the evidence in this case does not warrant the findings and sentence, and therefore recommends that the findings and sentence be disapproved."

The proceedings and findings in the foregoing case of Ensign (T) H. W. D. Rudd, U. S. Navy (R. F.), were approved on June 18, 1918, but, in view of all the circumstances of the case, the sentence was remitted; and by direction of the President, as an entirely separate and independent proceeding, his temporary appointment as an Ensign in the United States Navy was revoked.

C. M. O. 62—1918

[P. 1] Lieutenant Charles S. Yost, U. S. Naval Reserve Force, was tried by general court martial, on April 8, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (one specification).

Charge II.—Using provoking words toward another person in the Navy (one specification).

Sentence

"The court therefore sentences him, Lieutenant Charles S. Yost, United States Naval Reserve Force, to lose fifty (50) numbers in his grade."

Returned for Revision

The convening authority, on April 13, 1918, returned the record of proceedings in the foregoing case to the court with an endorsement thereon in part as follows:

> "The convening authority, after careful consideration, is of the opinion that the court did not fully appreciate the status of the accused as a member of the Fleet Naval Reserve, U. S. Naval Reserve Force, the sentence being entirely inadequate for the offenses to which the accused plead guilty. Members of the Fleet Naval Reserve * * * in lieu of having a number for the purpose of determining seniority and promotion, are assigned a running mate in the regular line. In view of this, the sentence of the court appears to be indefinite as to the application intended, and there is considerable doubt whether it could be so interpreted as to be susceptible of execution.
>
> "The conduct of the accused deserved the most severe condemnation and stringent disciplinary action, especially when it is considered that the offenses were committed in a foreign country during a national emergency, a time when the naval service demands of its personnel the utmost in deportment and cooperation of effort. It can readily be appreciated that the court, by the exercise of leniency, would measurably encourage [P. 2] conditions which are vicious in their nature and bound, if continued in, to diminish the efficiency of the service.
>
> "The court will reconvene for the purpose of reconsidering the sentence."

Sentence in Revision

The court reconvened on April 16, 1918, decided to revoke its former sentence, and substituted therefor, the following:

> "The court therefore sentences him, Lieutenant Charles S. Yost, United States Naval Reserve Force, to be dismissed from the United States naval service."

Action of the Convening Authority

The convening authority, on April 23, 1918, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Charles S. Yost, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Action of the Secretary of the Navy

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on June 6, 1918, concurred in the action of the convening authority.

On June 8, 1918, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) the record of proceedings of the general court martial in the foregoing case of Lieutenant Charles S. Yost, U. S. Naval Reserve Force, was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

[C. M. O. 64—1918]

ACTION OF THE PRESIDENT

On June 19, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 63—1918

[P. 1] Ensign John J. Fingleton, U. S. Navy Reserve Force, was tried by general court martial on June 4, 1918, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, on the following charges:

Charge I.—Using threatening language toward his superior officer (one specification).

Charge II.—Assaulting and striking his superior officer (one specification).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, John J. Fingleton, ensign, United States Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency signed by five of the seven members of the court was spread upon the record:

> "In consideration of the gross and repeated provocation offered to the accused by Lieutenant Danielson, the very short time the accused had been in the service, and his candid admission of his responsibility for the assault on Lieutenant Danielson, and with the belief that the accused acted in accordance with the custom prevailing in the merchant service in which he had spent a large portion of his life, and also that he is considered by his superior officers on board the *Lake Huron* as a competent engineer, we recommend Ensign John J. Fingleton, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

[P. 2] RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on June 18, 1918, recommended that, in view of all the circumstances in the case, and the recommendation to clemency, the sentence be mitigated to a loss of pay of twenty-five (25) dollars per month for six (6) months.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings and findings of the general court martial in the foregoing case of Ensign John J. Fingleton, U. S. Naval Reserve Force, are approved, but in view of the recommendation of the Bureau of Navigation the sentence is mitigated to a loss of pay of twenty-five (25) dollars per month for six (6) months. He will be released from arrest and restored to duty.

C. M. O. 64—1918

[P. 1] Lieutenant Julius W. Simms, U. S. Navy, was tried by general court martial on April 27, 1918, on board the U. S. S. *Dixie*, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charges, proved by plea:

Charge I.—Gambling (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

[C. M. O. 65—1918]

SENTENCE

"The court therefore sentences him, Lieutenant Julius W. Simms, U. S. Navy, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on May 14, 1918, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Julius W. Simms, U. S. Navy, but remitted that portion of the sentence involving confinement, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President of the United States.

RECOMMENDATION OF THE CONVENING AUTHORITY

In a letter from the convening authority to the Department, of May 20, 1918, it was stated:

> "The substance of the second charge is to the effect that the accused gambled for money with enlisted men, members of the crew of the ship on which the accused was serving, in the petty officers' compartment of the ship.
>
> [P. 2] "I have approved the sentence of the general court martial in this case remitting that part of the sentence involving imprisonment. I still consider that the sentence involving dismissal from the Navy is a drastic one, unless this officer's record shows other breaches of discipline prejudicial to the good order of the service; otherwise this single slip may be the cause of separating an officer from the service who may have done, and might do in the future, good work for the Navy. The record of this officer is not before me; but I urgently recommend that the Department give this officer's record very careful consideration, and if it is apparent from his record that this is a single slip, and his record is otherwise good, the sentence be further mitigated by the Department to loss of numbers or suspension from duty or in such other manner as may seem best. If, however, the Department considers that this officer should leave the service, it is suggested that he be permitted to tender his resignation, and that this be accepted 'for the good of the service.'"

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on June 8, 1918, concurred in the action taken by the convening authority.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Lieutenant Julius W. Simms, U. S. Navy, was, on June 13, 1918, submitted to the President of the United States, with the recommendation that the sentence, as reduced by the convening authority, be confirmed.

ACTION OF THE PRESIDENT

On June 24, 1918, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

C. M. O. 65—1918

[P. 1] First Lieutenant Edgar Hayes, U. S. Marine Corps, retired, was tried by general court martial on May 22, 1918, at the U. S. Marine Barracks, Parris Island, S. C., by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness (one specification).

[C. M. O. 65—1918]

Charge II.—When on shore maltreating an inhabitant (two specifications).
Charge III.—Conduct unbecoming an officer and a gentleman (one specification).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the specifications of the second charge "proved," and the accused "guilty" of the second charge; the specification of the third charge, "proved," and the accused "guilty" of the third charge.

SENTENCE

"The court therefore sentences him, First Lieutenant Edgar Hayes, United States Marine Corps, retired, to be dismissed from the United States Marine Corps and from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In view of the accused's excellent report on fitness, his ability and worth as an officer, as testified to and reported by his immediate superiors, including his post commander, and, though the evidence is sufficient to convict, the impression gained by the court from the witnesses leads the undersigned members to consider the offenses not as serious as would appear to one who relies upon the reading of the testimony, and, further, in [P. 2] view of the need of experienced officers in the present emergency, the previous military record and unquestioned intense feeling of loyalty of the accused, we recommend First Lieutenant Edgar Hayes, U. S. Marine Corps, retired, to the clemency of the reviewing authority."

RECOMMENDATION OF THE MAJOR GENERAL COMMANDANT, U. S. MARINE CORPS

The record in the foregoing case was referred to the Major General Commandant, U. S. Marine Corps, who, on June 11, 1918, placed an indorsement thereon, in part, as follows:

> "The court sentenced Lieutenant Hayes to dismissal, and ordinarily I would recommend that the sentence of an officer convicted of these charges of which Lieutenant Hayes was found guilty be confirmed.
>
> "In view, however, of the fact that the court which tried Lieutenant Hayes unanimously recommended him to the clemency of the reviewing authority, I feel that the court itself was in a better position than I to judge whether or not there were extenuating circumstances in this case, and I therefore recommend that the Department give earnest consideration to the court's recommendation that clemency be extended to Lieutenant Hayes."

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of First Lieutenant Edgar Hayes, U. S. Marine Corps, retired, were approved on June 19, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On June 24, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 67—1918

[P. 1] Ensign (T) William M. Price, U. S. Navy (NL), was tried by general court martial on May 9, 1918, on board the U. S. S. *New York*, by order of the Commander, Battleship Division Nine, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (two specifications).

Sentence

"The court therefore sentences him, Ensign (T) William M. Price, United States Navy (NL), to the revocation of his appointment as a temporary ensign in the United States Navy; to be restricted to his ship or station for a period of one year; and to lose fifty (50) dollars per month of his pay for a period of six (6) months."

Recommendation to Clemency

The following recommendation to clemency, signed by five of the six members of the court, was spread upon the record:

> "In consideration of the previous excellent record of the accused, both as regards character and efficiency, as testified to by officers with whom he has served, we recommend Ensign (T) William M. Price, U. S. Navy (NL), to the clemency of the reviewing authority."

Returned for Revision

The convening authority, on May 12, 1918, placed an indorsement on the record in the foregoing case, in part, as follows:

> "The convening authority, after careful consideration, does not consider that the sentence is adequate to the offense found proved, and has further grave doubt as to the legality of that part of the sentence involving 'revocation of appointment.'
>
> "The court will reconvene for the purpose of reconsidering the sentence."

[P. 2] Sentence in Revision

The court reconvened on May 13, 1918, and decided to revoke its former sentence, and substituted therefor the following:

> "The court therefore sentences him, Ensign (T) William M. Price, United States Navy (NL), to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the previous excellent record of the accused, both as regards character and efficiency, as testified to by officers with whom he has served, we recommend Ensign (T) William M. Price, U. S. Navy (NL), to the clemency of the reviewing authority."

Action of the Convening Authority

The convening authority, on May 15, 1918, placed an endorsement on the record in the foregoing case, in part, as follows:

> "The proceedings, findings, and sentence in revision of the general court martial in the foregoing case * * * are approved, and, in conformity with article 53 of the Articles of the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President.
>
> "This case is a particularly aggravated one, as the accused brought disgrace upon the uniform by appearing in an intoxicated condition before

officers and enlisted men not only of our service but of the British also, and especially as it was well known by all persons in this division that we were to do our utmost to create a good impression at this time.

"In view, however, of the recommendation to clemency, and as the record shows that this man was previously a chief petty officer in excellent standing, it is recommended that he be allowed to reenlist as a chief turret captain, the rate from which he was commissioned."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on June 8, 1918, recommended [P. 3] that upon execution of the sentence, the accused be enlisted as a chief turret captain.

ACTION OF THE SECRETARY OF THE NAVY

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Ensign (T) William M. Price, U. S. Navy (NL), was, on June 13, 1918, submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On June 24, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 69—1918

[P. 1] Boatswain Austin P. Graham, U. S. Naval Reserve Force, was tried by general court martial on April 9, 1918, on board the U. S. S. *Dixie*, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (one specification).

Charge II.—Violation of a lawful general order issued by the Secretary of the Navy (one specification).

SENTENCE

"The court therefore sentences him, Boatswain Austin P. Graham, U. S. Naval Reserve Force, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of six (6) months."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on April 20, 1918, approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President of the United States.

OPINION OF THE JUDGE ADVOCATE GENERAL

On May 28, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case in part as follows:

"In the opinion of this office the finding on charge II should be disapproved on the grounds that the statement of the accused was inconsistent with his plea of 'guilty.' Upon the submission of this statement it became the duty of the court to instruct the accused in the premises that he might withdraw his plea of 'guilty' and substitute therefor the plea of 'not guilty'

Or, in the event of the accused adhering to his plea, the court [P. 2] should have directed the judge advocate to proceed as though the accused had pleaded not guilty, and to introduce such evidence as may have been obtainable, in order that the court might judge of the degree of his culpability."

[C. M. O. 71—1918]

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

On June 4, 1918, the Chief of the Bureau of Navigation concurred in the action of the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended that the endorsement of the Judge Advocate General be approved, and that the confinement be remitted.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence, and remarks of the Chief of the Bureau of Navigation, and the Judge Advocate General, were approved on June 27, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States with the recommendation that the sentence of the general court martial in the foregoing case of Boatswain Austin P. Graham, U. S. Naval Reserve Force, be confirmed. The naval prison, Navy Yard, Portsmouth, N. H., was designated as the place of confinement.

ACTION OF THE PRESIDENT

On June 28, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 71—1918

[P. 15] BURGLARY: NOT A CRIME OF LESS DEGREE THAN ROBBERY.

The accused in a recent case was charged with "Robbery." The court found the accused guilty in a less degree than charged—guilty of burglary.

Burglary is not a crime of less degree than robbery; it is not included in the crime of robbery, but is an altogether separate and distinct crime. Burglary at common law is the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony therein (Clarke's Crim. Law, p. 261).

The parts of the specification found proved by the court read as follows:

> "In that C_____ D. M_____, private, U. S. Marine Corps, attached to and serving with the Sixty-fourth Company, Second Regiment, First Provisional Brigade, U. S. Marine Corps, at the Marine Barracks, Cape Haitien, Republic of Haiti, did, on or about February 13, 1918, in the city of Cape Haitien, Republic of Haiti, near the aforesaid Marine Barracks, force the door and enter the house of A_____ I_____, residing in the aforesaid city of Cape Haitien, Republic of Haiti, the United States then being in a state of war."

As there was no allegation in the specification as found proved which charged either that the accused broke and entered in the nighttime or that the breaking and entering was with intent to commit a felony therein, the specification as found proved was held to be fatally defective (File 26262–4430, G. C. M. Rec. No. 38393).

CHARGES AND SPECIFICATIONS: INCONSISTENT PLEAS TO, ON ARRAIGNMENT.

The accused in a recent case was charged with "Disobeying the lawful order of his superior officer." The specification under the charge alleged that he "did willfully disobey," etc.

Upon arraignment the accused pleaded "guilty" to all of the specification except the word "willfully," and "guilty" to the charge.

[P. 16] Although the word "willfully" might have been omitted from the specification without necessarily constituting a fatal irregularity, in that the question of intent could have properly been held a matter of defense upon evidence being introduced to show that the disobedience was wilful, yet, having been alleged, it was apparently recognized as the gravamen of the offense, and the accused, in pleading, clearly indicated that it was his contention that the disobedience was unintentional.

[C. M. O. 71—1918]

The pleas were inconsistent in that the accused in effect said that he was not guilty of the only specification under the charge but was guilty of the charge. It thereupon became the duty of the court to instruct the accused in the premises and to have him rearraigned. If the original plea was persisted in, the court should have instructed that the plea of "not guilty" be entered and proceeded with the trial. Failure to have the accused rearraigned constituted fatal error. (See Naval Digest, 1916, p. 35, sec. 30; File 26262–4362, G. C. M. Rec. No. 38228).

DRINKING INTOXICANTS IN PUBLIC PLACES: CHARGES UPON WHICH MEN GUILTY OF, SHOULD BE TRIED.

An enlisted man of the Marine Corps was arrested by the military police of a certain city, and charged with "drinking; and liquor in possession, in violation of city ordinance." The commanding officer of the offender requested information as to what law or regulation had been violated, so that he might prefer proper charges.

He was informed that there is no law or regulation which specifically makes it an offense for a person in the naval service to drink or to have in his possession in the city in question, or in any other place outside prescribed places and zones, intoxicating liquors.

Upon examination of its ordinances it was discovered that the city in question had not covered the alleged offense therein.

It was held, however, that in absence of any law or regulation on the subject, there could be no doubt of the propriety and legality of bringing to trial on a charge of "conduct to the prejudice of good order and discipline" or "scandalous conduct tending to the destruction of good morals" a member of the naval service who disgraces himself and the service by openly and brazenly partaking of intoxicating liquor on the streets of a city or in any other public place (File 26509–201: 90, J. A. G., June 27, 1918).

FINDING OF GUILTY IN LESS DEGREE THAN CHARGED: SPECIFIC OFFENSE FOUND PROVED SHOULD BE STATED IN.

It is fatally irregular for the court to find the accused guilty of a charge in a less degree than charged without stating specifically the offense of which he was found guilty (File 26262–4311, G. C. M. Rec. No. 38021).

[P. 17] PERJURY: FALSE TESTIMONY MUST BE MATERIAL TO ISSUE.

An accused in a recent case was charged with perjury. The alleged false testimony was given at a former trial of the accused for drunkenness and "disorderly conduct," when the accused was a voluntary witness in his own behalf.

The alleged false testimony was as follows:

1. Q. How did this officer come to arrest you and send you back to the ship?
A. He mistook us for the men who were disorderly.
2. Q. Had you been acting in a disorderly manner that afternoon?
A. No, sir.
3. Q. Had anyone with you been carrying a bottle in his hands?
A. No, sir.

The accused pleaded guilty to the perjury charge and specifications and offered no evidence whatever. It was held, however, that the question of whether or not the findings and sentence were supported by the charges and specifications was one of law for determination by the Judge Advocate General.

In the opinion of the Judge Advocate General, the matter on which perjury was assigned was not material to the issue involved, and the accused could not, therefore, have been guilty of perjury, as alleged.

[C. M. O. 71—1918]

The first question called for the opinion of the accused as to the state of mind of the officer who arrested him, and as to the thoughts or conclusions which prompted his action in making the arrest. These were matters on which the accused was obviously not qualified to give an opinion and on which his opinion, when given, would be entitled to no weight, and could have no bearing on the issue.

The second question called upon the accused to inform the court whether or not he was disorderly as charged, thereby attempting to substitute the opinion of the accused for legal testimony from which the court could draw its own conclusions. Whether the accused's conduct was disorderly was a conclusion to be drawn by the court from the evidence adduced at the trial. What the accused thought about his conduct was beside the question and immaterial to the issue involved, especially is this so when the accused, as in this case, was alleged to have been drunk when the disorderly conduct occurred.

The issue involved in the case was whether or not the accused was drunk and disorderly. The third question was whether some unnamed person had, at some unspecified time and place, been carrying a bottle of unspecified character. It is quite impossible to determine the materiality of the matter of some stranger to the proceedings having in his hands, at some indefinite and unspecified time and place, a bottle of unspecified appearance and contents (File 26262–4434, J. A. G., June 29, 1918, G. C. M. Rec. No. 38412).

[P. 18] WITNESS: JUDGE ADVOCATE AS, MUST BE SWORN.

The record in a recent case recited that "the judge advocate took the stand as a witness for the prosecution * * *," but there was nothing to show that he was sworn. The swearing of a witness is mandatory, and the judge advocate occupies no peculiar status in this respect, but before testifying must be sworn as any other witness, and failure to do so constitutes a fatal irregularity, so far as his testimony is concerned; and such unsworn testimony as is given should be expunged from the record and the consideration of the court (File 26262–4311, G. C. M. Rec. No. 38021).

WORDS SUBSTITUTED IN COURT'S FINDINGS ON SPECIFICATIONS: SHOULD NOT CHANGE THE NATURE OF THE OFFENSE CHARGED.

The accused in a recent case was charged with leaving post before being regularly relieved. The evidence adduced indicated that the accused, as member of a patrol, had been relieved in the customary manner for supper, but that he did not thereafter return to his post of duty. The court originally found the offense charged not proved, but the convening authority not concurring, returned the case to the court, which, upon reconsideration, by exception and substitution of words, formulated a specification, which would not sustain the charge laid, but found the accused guilty of a wholly different one—to wit, that of failing to return to his post as ordered. No such charge as this is recognized, and its substitution was irregular for two reasons—(1) The offense not having been one specifically provided for should have been alleged as either "scandalous conduct tending to the destruction of good morals" or "conduct to the prejudice of good order and discipline," which latter would have been preferable (Naval Courts and Board, 1917, sec. 67); and (2) the court, though empowered in its findings on a specifications to except certain words as not proved, and to substitute other words which are proved, and to find the accused guilty of a lesser offense which is embraced in that charged and established by the evidence (Naval Dig., 1916, p. 240, sec. 28), is not authorized to substitute for the charge one of an entirely different nature not included within that upon which the accused was arraigned and tried. "Failing to return to his post and duty as ordered" is not included in, nor is it a charge of less degree than "leaving post before being regularly relieved" (File 26262–4343, G. C. M. Rec. No. 38130).

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[P. 19] LINE OF DUTY AND MISCONDUCT CONSTRUED: (1) CHIEF GUNNER'S MATE KILLED WHILE WORKING ON FUSE OF SHELL GIVEN TO SHIPMATE ON SHORE; (2) GUNNER'S MATE INJURED BY FUSE GIVEN HIM WHILE ON SHORE; (3) MAN INJURED WHILE ON LIBERTY GRANTED TO TRY OUT MOTORCYCLE; (4) MAN ON LIBERTY DROWNED WHILE RESCUING BATHERS; (5) PRISONERS INJURED WHILE SERVING SENTENCE.

(1) A seaman from the armed guard of a vessel, while on shore at an Army camp, was given a loaded shell and was asked if he could take it apart. He replied that he could not, but that he knew some one who could, and he took the shell aboard ship and gave it to the chief gunner's mate, who was in command of the guard. The latter removed the fuse from the shell, and while he was working on the fuse it exploded and killed him. There was nothing to show what motive actuated the deceased in examining the shell, and his death was held to be in line of duty and not the result of his own misconduct (File 26250–1326, Sec. Nav., June 12, 1918).

(2) A gunner's mate took aboard ship to show his shipmates a fuse which had been given him by a soldier on shore. He dropped the fuse and, at the same time, his ditty box, the latter striking the cap on the fuse. He picked up the fuse and attempted to throw it overboard, but it exploded before he could do so and badly injured his hand. Held that, inasmuch as there was no misconduct involved in his having taken the fuse aboard, the injury was incurred in the line of duty and was not the result of his own misconduct (File 26283–1649, Sec. Nav., June 12, 1918).

(3) An enlisted man who had been granted liberty for the express purpose of taking exercise and trying out his motorcycle which he had recently overhauled, was struck by an automobile, due to the criminal negligence of the driver thereof, and seriously injured.

His commanding officer encouraged the men under his command to take up motorcycle riding as a proper sport and for emergency uses.

His injury was held to be in the line of duty and not the result of his own misconduct (File 7657–390:17).

(4) Henry Peter Hanson, machinist's mate second class, N. N. V., while on liberty at Ocean Beach, Calif., rescued from drowning, five bathers, who, with many others, had been caught in a tide rip. He was nearly exhausted when he brought in the fifth person, but nevertheless returned to the water to rescue a sixth and was drowned in the attempt. Department held his death to be in line of duty and not the result of his own misconduct (File 26250–1352, Sec. Nav., June 18, 1918).

(5) In an opinion of the Judge Advocate General rendered June 8, 1918, it was held that the decision of the Secretary of the [P. 20] Navy, dated April 7, 1909 (File 26285–30), quoted in article 2831, Manual for the Medical Department of the United States Navy, is no longer in force. In this matter the medical officers may safely follow Naval Courts and Boards, 1917, page 290. (See also Naval Digest, 1916, p. 342, subhead "Prisoners.")

As examples of exceptional cases where a prisoner may be killed in line of duty, the following is quoted from an opinion of the Attorney General (7 Op. 149) which was cited in the Judge Advocate General's opinion referred to:

> "A soldier or sailor, while 'under arrest,' or 'in confinement,' is not discharged from the obligation of duty, and is occasionally called upon to perform duty in which he may distinguish himself and die honorably, and leave, it seems to me, a right of pension to his widow or children; as for example, in the contingency of a post or a camp attacked by the enemy, or a ship in peril at sea" (File 26267–223, J. A. G., June 8, 1918).

MEDICAL TREATMENT: PERSON IN NAVAL SERVICE MAY BE COURT MARTIALED FOR REFUSAL TO TAKE.

A person in the naval service can be punished by general court martial for refusing to submit to treatment for syphilis, provided such treatment is not, in the opinion of the medical officers, dangerous to the life of the patient. (See C. M. O. No. 72, 1917, 18 (Bul.).) (File 7036–382:4, J. A. G., June 21, 1918.)

[C. M. O. 71—1918]

MIDSHIPMEN WHO FAIL TO GRADUATE: MAY BE APPOINTED TEMPORARILY IN MARINE CORPS.

The act of August 29, 1916, provides:

> "That no midshipman at the United States Naval Academy * * * who fails to graduate therefrom shall be eligible for appointment as a commissioned officer in the Marine Corps until after the graduation of the class of which he was a member."

It was held that the foregoing provisions did not apply to officers appointed temporarily in the Marine Corps under the act of May 22, 1917 (File 5252–107, J. A. G., June 12, 1918).

NAVAL ACADEMY: AGE OF CANDIDATES FOR ADMISSION TO.

The act of May 14, 1918 (Public, No. 148), provides:

> "That hereafter all candidates for admission to the Naval Academy must be not less than sixteen years of age nor more than twenty years of age on April first of the calendar year in which they enter the academy: *Provided*, That the foregoing shall not apply to candidates for midshipmen designated for entrance to the academy in nineteen hundred and eighteen."

The Judge Advocate General was of the opinion that the above-quoted proviso was not intended to except from the general provisions those persons nominated in 1918 for entrance in 1919, but those to be entered in 1918, and that, therefore, a candidate who will be more than 20 years of age on April 1 of the calendar year 1919, will be ineligible for admission to the Naval Academy in that year (File 26509–229:3, J. A. G., June 3, 1918).

[P. 21] NATURALIZATION OF ALIENS: SERVING IN MILITARY FORCES OF THE UNITED STATES DURING PRESENT WAR.

The act of May 9, 1918, provides, in part, as follows:

> "Seventh. * * * any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; * * * and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; * * *."

The foregoing act contemplates that such alien who desires to become naturalized will appear with his two witnesses before the appropriate representative of the Bureau of Naturalization and take the required preliminary examination before filing his petition in the office of the clerk of the court.

The Major General Commandant of the Marine Corps, who had raised the question in this case, was requested to designate a responsible official to take up, with the officials of the Bureau of Naturalization, the question of naturalization of members of the Marine Corps (File 26252–137, Sec. Nav., June 27, 1918).

[C. M. O. 71—1918]

OFFICER UNDER CHARGES: LEGAL EFFECT OF PROMOTION UPON SUBSEQUENT TRIAL OF.

In a letter of June 26, 1918, the Secretary of the Navy instructed an examining board to proceed with the examination of a certain candidate for lieutenant commander, and to submit its report to him upon all the evidence legally before it, without regard to the effect which such action might have upon the candidate's future trial by court-martial upon charges based upon a court of inquiry in re the grounding of a vessel of the Navy. In this case the officer's trial had been decided upon, to take place at such future time as the exigencies of the service will permit; and it was suggested that if he should be promoted in the meantime, this might possibly operate as a constructive pardon which would bar his trial for the alleged offense now undisposed of. However, the letter of the Secretary of the Navy stated:

"It is desirable that this officer be tried, notwithstanding such change in his status as may be involved by his promotion in the meantime * * * leaving the question of the legal effect of [P. 22] his promotion while under charges to be determined in the future, should it be raised" (File 26521-279:1, Sec. Nav., June 26, 1918).

OFFICERS OTHER THAN NAVAL AVIATORS OR STUDENTS: MAKING FLIGHTS IN AIRCRAFT.

Upon the following questions being propounded in regard to medical officers being directed to make flights as passengers in aircraft, although not entitled to the increased pay of naval aviators or students:

"(*a*) If an officer is making a flight under proper authority or permission from proper authority and is injured while making such flight, would this injury be in the line of duty or not?

"(*b*) Can any officer be ordered by his superior officer to make a flight when such superior considers it necessary or advisable for the good of the service to obtain specific information or to do a specific duty which this officer can do; and if so, can the officer so ordered refuse to do such duty?

"(*c*) Is there any reason why an officer should not be authorized to make a flight or directed to take passage in aircraft without designating him as a student aviator?"

The following answers were given:

"(*a*) If a person in the naval service is ordered or permitted by proper authority to take passage in aircraft in connection with the performance of his naval duties and is injured thereby, his injury would be in line of duty.

"(*b*) Any person in the naval service refusing to take passage in aircraft when ordered by his commanding officer to do so would be guilty of violating the lawful order of his superior officer and could be punished accordingly.

"(*c*) There is no legal objection to authorizing or permitting a person in the naval service to take passage in aircraft without designating him as a student aviator or detailing him to aviation duty" (File 26983-822, J. A. G., June 28, 1918).

OPERATORS OF VEHICLES IN THE MILITARY OR NAVAL SERVICE: AMENABILITY OF, TO CITY ORDINANCES.

Where an opinion was requested as to the propriety of issuing the following instructions:

"In the military service of the United States operators of motor vehicles on military business shall, as far as practicable, comply with all State laws or local ordinances as to the operation of such vehicles and traffic

[C. M. O. 71—1918]

regulations, but shall not receive nor permit to be served on them warrants or permit forcible interference with the operation of such vehicles."

It was advised that such instructions be not issued unless a situation should arise from which it would appear that the city authorities in the enactment and enforcement of city ordinances were deliberately interfering with Federal vehicles with intent to obstruct the operations of the Federal Government. In case of arrests made by the civil authorities of any person in the naval service of the United States, on either civil or criminal process, or of any civilian employee of the Navy Department [P. 23] of the United States while engaged in the discharge of his duties as such, on any process, civil or criminal, not extending to a felony, the Department will, if the facts warrant, recommend to the Department of Justice immediate action by writ of habeas corpus to secure his release from custody (File 28864–86:1, J. A. G., June 4, 1918).

PARDON IN CASE OF DESERTION PRIOR TO AUGUST 22, 1912: HOW OBTAINED AND EFFECT THEREOF.

Where a man has been discharged from the Navy by sentence of court martial for desertion prior to August 22, 1912, his forfeited rights of citizenship may be restored by Executive pardon.

The proper procedure to follow in such cases, under the established practice of the Department, is to address a letter to the Secretary of the Navy requesting a pardon to restore rights of citizenship, setting forth the facts in the case, and accompanying said letter with at least four affidavits of employers and reputable citizens in the community in which the applicant has resided since his discharge from prison, the affiants testifying to his industrious and upright life since that time. The affiants should also state that they are aware of the use that is being made of their affidavits. Upon receipt of such application, should the facts in the case warrant, the Department will recommend to the President that a pardon be granted. If pardoned, the man so pardoned is eligible to reenter the naval service either by reenlistment or by appointment to an office of trust or profit therein (File 26282–345, J. A. G., June 24, 1918).

PENSIONS: EFFECT OF THE WAR-RISK INSURANCE ACT UPON SECTION 4757, R. S.

An applicant for service pension under section 4757, Revised Statutes, was honorably discharged from the service on November 12, 1917, by reason of disability. He had completed 10 years' service "as an enlisted person or as an appointed petty officer, or both," prior to October 6, 1917, and was on that date "disabled." The Secretary of the Navy approved the application and same was forwarded to the Commissioner of Pensions, who withheld payment.

The Judge Advocate General was of the opinion that, in consonance with the opinion of the Acting Attorney General of May 28, 1918 (see C. M. O. 50, 1918, 27, Bul.), concerning rights under section 4756, Revised Statutes, the applicant was entitled to benefits of section 4757, Revised Statutes, regardless of any benefits that he might be entitled to under the War-Risk Insurance Act of October 6, 1917 (File 26510–1366, J. A. G., June 6, 1918).

RECORDS OF OFFICERS: WHAT PARTS OF, SHOULD BE SUBMITTED TO SELECTION BOARD.

The act of August 29, 1916, provides:

"The board (on selection) shall be furnished by the Secretary of the Navy * * * with the names of all officers who are eligible for consideration for selection * * * together with the record of each officer."

[P. 24] In an opinion of the Judge Advocate General of June 21, 1918, it was held that it would not be legal for the Secretary of the Navy to withhold from the board portions of an officer's record, such as the following:

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(1) The record of proceedings of general courts martial although resulting in acquittal.

(2) The record of proceedings of courts of inquiry and boards of investigation although not resulting in disciplinary action.

(3) Unofficial letters or other unofficial evidence relative to supposed debts or any other subject derogatory to the officer concerned (File 26521–261 : 3, J. A. G., June 21, 1918).

REGISTRANT, MEMBER OF CREW OF LIGHTHOUSE VESSEL: ENTITLED TO DEFERRED CLASSIFICATION.

Section 79 of the Selective-Service Regulations provides:

> "In class V shall be placed any registrant found to be—
> "(*d*) A person in the military or naval service of the United States.
> "NOTE 3.—The words 'persons in the military and naval service of the United States,' as employed in said act of Congress and in these regulations, shall be construed as including * * * any of the personnel of the Lighthouse Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or the Navy Department."

The Department is of the opinion that a member of the crew of a lighthouse vessel doing duty for the Navy Department under order of the President is "a person in the naval service of the United States," for the time being, for the purpose of deferred classification in class V, Division D (File 28798–454, Sec. Nav., June 3, 1918).

SUMMARY COURT MARTIAL: TRANSFER OF MEN UNDER SENTENCE OF.

A yeoman in the Naval Reserve Force while under sentence of summary court martial to solitary confinement for 30 days was transferred from a submarine base to a receiving ship.

On request of the commander of the receiving ship for information "as to the authority for transferring a man in this status" and whether such transfer is a "proper procedure"—

Held: "No objection appears to exist, legal or otherwise, to the transfer of a man under the circumstances stated, from one station to another. On the other hand, it may be highly desirable under certain circumstances to transfer such men—for example, when a ship is about to sail and does not desire to carry such a person, or where it has no facilities for properly executing such a sentence," etc. (File 26287–4677, J. A. G., June 20, 1918).

C. M. O. 72—1918

[P. 1] Ensign Clayton P. Berlin, U. S. Naval Reserve Force, was tried by general court martial on May 13, 1918, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy on the following charges:

Charge I.—Through negligence suffering a vessel of the Navy to be stranded (three specifications).

Charge II.—Neglect of duty (three specifications).

FINDINGS

The court found the specifications of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the first specification of the second charge "not proved," the second and third specifications of the second charge "proved," and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Clayton P. Berlin, ensign, U. S. Naval Reserve Force, to be publicly reprimanded by the Secretary of the Navy."

[C. M. O. 73—1918]

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on June 5, 1918, recommended the approval of the proceedings, findings, and sentence; and further recommended that the sentence be mitigated to private reprimand.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Clayton P. Berlin, U. S. Naval Reserve Force, were approved on June 7, 1918. The recommendation of the Chief of the Bureau of Navigation relative to mitigating the sentence to private reprimand was disapproved. Ensign Berlin was released from arrest and restored to duty.

[P. 2] In compliance with the sentence of the court the following extract from a letter of reprimand addressed to the above-named officer on July 2, 1918, is published to the service:

> "It is noted from a reading of the record of proceedings that you neglected your duty as commanding officer of the U. S. S. *Gallup*, inasmuch as you failed to enter the position of your vessel in the log on coming to anchor in the Delaware Breakwater, and also keep a night order book. This was a disregard of the proper execution of the functions and responsibilities of a commanding officer of a naval vessel.
>
> "The Department accordingly hereby severely reprimands you in the premises, and cautions you to avoid the repetition of similar occurrences in the future."

C. M. O. 73—1918

[P. 1] Ensign (T) James W. Lennon, U. S. Navy, was tried by general court martial on May 30, 1918, on board the U. S. S. *Tonopah*, by order of the Commander, Azores Detachment, U. S. Atlantic Fleet, on the following charges:

Charge I.—Culpable negligence in the performance of duty (one specification).

Charge II.—Drunkenness on duty (one specification).

FINDINGS

The court found the specification of the first charge "proved by plea," and the accused "guilty" of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Ensign (Temporary) James W. Lennon, United States Navy, to be reduced to the rating of quartermaster third class, to be restricted to his ship or station, for a period of three (3) months, and to lose pay amounting to two hundred dollars ($200).

ACTION OF THE CONVENING AUTHORITY

On June 4, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign (T) James W. Lennon, U. S. Navy, and directed that he be released from arrest and restored to duty.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On June 21, 1918, the Judge Advocate General, in an endorsement to the record in the foregoing case, after setting forth the holding of the Department that the sentence of reduction to an enlisted rating could be lawfully inflicted on an [P. 2] officer only for the offense of absence from his command without leave (see C. M. O. 34, 1918), recommended that so much of the sentence as provided that Ensign (T) James W. Lennon, U. S. Navy, be reduced to the rating of quartermaster third class, be set aside.

[C. M. O. 75—1918]

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

On July 1, 1918, the Chief of the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

The remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved.

C. M. O. 75—1918

[P. 1] Commander Robert L. Berry, U. S. Navy, was tried by general court martial on April 15, 1918, on board the U. S. S. *Melville*, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charge:

Charge.—Culpable inefficiency in the performance of duty (one specification).

SENTENCE

"The court therefore sentences him, Commander Robert L. Berry, United States Navy, to lose fifteen (15) numbers in his grade."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by five of the six members of the court, was spread upon the record:

> "In view of his reputation for efficiency and of the urgency of the situation that confronted him as escort commander in a dangerous submarine area, involving safety measures for the protection of the convoy, we recommend Commander Robert L. Berry, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On April 22, 1918, the convening authority placed the following endorsement on the record in the foregoing case:

> "The proceedings, findings, and sentence of the general court martial in the foregoing case of Commander Robert L. Berry, U. S. Navy, are approved.
>
> "In view, however, of the recommendation to clemency, signed by five members of the court, and in view of the fact that but for the explosion of the depth charges on board the U. S. S. *Manley* the collision between that vessel and H. M. S. *Montagua* would undoubtedly have been regarded as of so small consequence as not to call even for a board of investigation, the loss of numbers is reduced to ten.
>
> "Commander Robert L. Berry, U. S. Navy, will be released from arrest and restored to duty."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

On June 13, 1918, the Chief of the Bureau of Navigation, in an endorsement placed on the record in the foregoing case, recommended approval of the proceedings, findings, and sentence as mitigated by the convening authority, and continued, as follows:

> [P. 2] "The Bureau does not concur in that part of the remarks of the convening authority hereon in which it is stated the loss of numbers is reduced because of the fact that but for the explosion of the depth charges the collision would undoubtedly have been regarded as of so small consequence as not to call for even a board of investigation, but the Bureau is of the opinion that mitigation of the sentence to the loss of ten numbers was justified because of the previous excellent record of Commander Berry."

[C. M. O. 79—1918]

ACTION OF THE SECRETARY OF THE NAVY

As the Department does not desire that too severe punishment be inflicted upon officers for errors committed by them in the war zone, when acting under great responsibility and tension, and where decisions must be quickly made and acted upon to prevent loss of life and property from enemy submarines, the loss of numbers in the foregoing case of Commander Robert L. Berry, U. S. Navy, is, in view of the above and all the circumstances in the case, reduced to seven.

C. M. O. 79—1918

[P. 1] Ensign James Phelan, U. S. Naval Reserve Force, was tried by general court martial on May 31, 1918, at the U. S. Naval Headquarters, London, England, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

SENTENCE

"The court therefore sentences him, Ensign James Phelan, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his short time in the service, his lack of experience in the Navy, and the fact that he had undergone a severe physical strain in operating against the enemy just prior to his misconduct, we recommend Ensign James Phelan, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On June 10, 1918, the convening authority placed the following endorsement on the record in the foregoing case:

> "The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign James Phelan, U. S. Naval Reserve Force, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President.
>
> [P. 2] "It appears that Ensign James Phelan, U. S. Naval Reserve Force, on May 14, 1918, while on a war flight, made a forced landing at sea, and was not picked up for five days, during which time he suffered from extreme exposure. On his return to his station he was granted two weeks leave of absence, and it was during this leave, and while still in an enfeebled condition, that the offense occurred for which he was brought to trial.
>
> "The Force Commander has received a letter from his present commanding officer, in which it is stated 'Since he has been under my command on this station his conduct has been very exemplary and he has conducted himself in a manner becoming an officer and a gentleman.' A letter has also been received from the British Commanding Officer of the Royal Air Force at Killingholme, who states, in part, as follows: 'May I be allowed to bring to your notice the excellent way in which this officer has behaved since he has been at this station. He is a most excellent and daring pilot and has done some splendid flights while he has been here. I think consideration should be given to the fact that this officer was adrift for five days in a Short Seaplane, and most likely the after effects are just beginning to tell. During this very trying period he upheld all the traditions of an officer and a gentleman.'

[C. M. O. 83—1918]

"In view of the above, and in view of the recommendation to clemency signed by all the members of the court, the Force Commander recommends that Ensign James Phelan, U. S. Naval Reserve Force, be placed on probation for such a period as the Department may direct, the sentence of the court to be carried into effect at any time, should this officer again commit himself in a similar manner, during such probationary period."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On June 29, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, in part, as follows:

"The accused pleaded 'guilty' to the charge of 'Drunkenness' and 'Scandalous conduct tending to the destruction of good morals.' He made a statement to the effect that he became [P. 3] unconscious after having taken four or five drinks and has no recollection of what happened after that.

"I am of the opinion that this statement is inconsistent with the accused's plea of 'guilty' to the charge of 'scandalous conduct tending to the destruction of good morals.' It then became the duty of the court to proceed in accordance with sections 310 and 312, Naval Courts and Boards, 1917. As the court failed to follow such procedure, and in view of the fact that no evidence was introduced relative to this charge, it is recommended that the findings on charge II be disapproved."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on July 11, 1918, recommended that, in view of the strong recommendation for clemency from the commander, U. S. Naval Forces Operating in European Waters, and the excellent performance of duty of this officer while attached to a British flying base, the sentence be mitigated to the loss of 100 numbers in his grade, and the loss of $50 per month for twelve months.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General and the recommendations of the the Bureau of Navigation are approved.

C. M. O. 83—1918

[P. 1] Second Lieutenant James L. Culleton, U. S. Marine Corps Reserve, was tried by general court martial on May 31, 1918, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy, and acquitted of the following charges:

Charge I.—Drunkenness on duty (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and acquittal of the general court martial in the foregoing case of Second Lieutenant James L. Culleton, U. S. Marine Corps Reserve, are approved. He will be released from arrest and restored to duty.

REMARKS

It was noted in the foregoing case that the court erred in its rulings as to admissibility of evidence in many instances. The rulings of the court uniformly sustained the contentions of the accused, and were in many cases so contrary to the well-established rules of evidence as to lay the court open to the suggestion of having unduly leaned, in its decision, in favor of the accused.

C. M. O. 85—1918

[P. 1] Ensign John C. Bixler, U. S. Naval Reserve Force, was tried by general court martial on June 21, 1918, at the Navy Yard, Philadelphia, Pa., by order of the Commander, Battleship Force One, U. S. Atlantic Fleet, on the following charges:

Charge I.—Violation of a lawful general order issued by the Secretary of the Navy (one specification).

Charge II.—Falsehood (four specifications).

Findings

The court found the specification of the first charge "proved by plea," and the accused "guilty of the first charge; the first specification of the second charge "proved in part," the second, third, and fourth specifications of the second charge "proved by plea," and the accused "guilty" of the second charge.

Sentence

"The court therefore sentences him, Ensign John C. Bixler, United States Naval Reserve Force, to be dismissed from the United States naval service."

Action of the Convening Authority

On June 29, 1918, the convening authority placed an endorsement on the record in the foregoing case, in part, as follows:

> "After a most careful review the convening authority is of the opinion that the pleas of the accused to the second charge and specifications thereunder are inconsistent with the testimony, the accused's statement, and counsel's argument to such a degree that the procedure followed by the court did not afford substantial justice to the accused. It would appear that the court should have followed the provisions of Naval Courts and Boards 1917, sections 310, 312.
>
> [P. 2] "Subject to the above remarks, the proceedings of the general court martial in the foregoing case of Ensign John C. Bixler, U. S. Naval Reserve Force, * * * are approved. The findings on the second charge and the specifications thereunder are disapproved; and the findings on the first charge and the specification thereunder are approved; in view of the sentences set forth in Court-Martial Orders, No. 3, 1918, and No. 29, 1918, finally approved in cases where the offenses were identical with that committed by this accused, the sentence is mitigated to the loss of $50 per month of his pay for a period of six months, and, as thus mitigated, is approved; he will be released from arrest and restored to duty."

Opinion of the Judge Advocate General

On July 16, 1918, the Judge Advocate General placed an endorsement on the record, in part, as follows:

> "The first charge against the accused herein is 'Violation of a lawful general order issued by the Secretary of the Navy.' The specification under this charge states (so far as necessary for this comment) that the accused wrote 'a letter in which he knowingly, without competent authority and not officially, made statements relating to the disposition, movements, and proposed movements of naval and military forces (including personnel), of a nature prohibited by a lawful general order issued by the Secretary of the Navy.'
>
> "This specification does not contain any allegation that the letter in question, its contents, or any portion thereof, was mailed, published, communicated, discussed, or came into the possession or to the knowledge of any person or persons not entitled thereto. The question thus appears to be whether or not the mere writing of a letter containing objectionable or prohibited information, without any publication whatever, constitutes a violation

of general orders issued upon the subject. Unless the information contained in a letter or writing is published or communicated in some manner it is not believed that the mere act of reducing the matter to writing alone would constitute such violation. Accordingly it must be held that said specification does not state an offense, and I therefore have to recommend that the proceedings, findings, and sentence of the court in this case be disapproved."

ACTION OF THE SECRETARY OF THE NAVY

[P. 3] The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on July 19, 1918, concurred in the endorsement of the Judge Advocate General.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved.

C. M. O. 88—1918

[P. 1] Lieutenant (junior grade) Enoch M. Gracie, U. S. Naval Reserve Force, was tried by general court martial on May 8, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Culpable negligence and inefficiency in the performance of duty (two specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant (j. g.) E. M. Gracie, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned at hard labor in such prison or penitentiary as the convening authority may designate for a period of two (2) years."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by two of the seven members of the court, was spread upon the record:

"In consideration of certain circumstances shown by the testimony we believe that the dereliction of the accused in the premises was largely due to his inexperience and lack of judgment. We therefore recommend Lieutenant (junior grade) Enoch M. Gracie, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On May 18, 1918, the convening authority placed an endorsement on the record in the foregoing case as follows:

"When it is considered that the accused in this case has, in addition to another offense, been found guilty of gross negligence and inefficiency as a result of which a French submarine chaser was practically abandoned at sea and lost with more than a score of lives, the action of the two members in requesting [P. 2] clemency for the accused is surprising, especially in view of the fact that the sentence is most lenient—so much so, in fact, that the convening authority hesitates to approve it.

"Subject to the foregoing remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Enoch M. Gracie, U. S. Naval Reserve Force, are approved, and the naval prison, at the Navy Yard, Portsmouth, N. H., is designated as the place for the execution of so much of the sentence as relates to confinement, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

[C. M. O. 89—1918]

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On June 24, 1918, the Judge Advocate General, in an endorsement to the record in the foregoing case, expressed the opinion that the prosecution had failed to prove beyond a reasonable doubt that the accused was guilty of the second charge and specification thereunder. By said charge and specification the accused was alleged to have caused a page to be removed from his ship's rough log and burned and inserting another in its place which did not contain true entries, which action, it was alleged, was intended to deceive a board of investigation subsequently convened. There was no evidence to establish that the log as rewritten was untrue or that the inserted page differed from the original page or that a difference between the two was made with intent to deceive. One witness testified that an entry on the inserted page was not a true statement, but he did not testify what the truth in regard to the matter was nor that a material difference existed between the original entry and that on the inserted page.

It was therefore recommended that the findings on the second charge and specification thereunder be disapproved; that the findings on the first charge, the specifications thereunder, and the sentence be approved; and that the confinement be remitted.

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

On July 22, 1918, the Chief of the Bureau of Navigation concurred in the action taken by the convening authority, as [P. 3] amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement; and further recommended, in view of all the circumstances of the case, the nonavailability of important witnesses for the defense, and the fact that the accused was not present at the court of inquiry held in this case wherein he was an interested party, that the sentence be mitigated to a loss of fifty (50) dollars a month for six (6) months.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, the findings on the first charge, and the specifications thereunder, of the general court martial in the foregoing case of Lieutenant (junior grade) Enoch M. Gracie, U. S. Naval Reserve Force, are approved. The findings on the second charge and the specifications thereunder are disapproved. In view of the recommendation of the Chief of the Bureau of Navigation, the sentence is mitigated to the loss of fifty (50) dollars per month of his pay for a period of six (6) months, and, as thus mitigated, is approved. He will be released from arrest and restored to duty.

C. M. O. 89—1918

[P. 1] Ensign Godwin Frederick Werliin, U. S. Naval Reserve Force, was tried by general court martial on April 23, 1918, on board the U. S. S. *McNeal*, by order of the Commander, Squadron Four, Patrol Force, U. S. Atlantic Fleet, on the following charge:

Charge.—Neglect of duty (two specifications).

FINDINGS

The court found the specifications of the charge "proved in part," and the accused "guilty" of the charge.

SENTENCE

"The court therefore sentences him, Ensign Godwin Frederick Werliin, United States Naval Reserve Force, to be publicly reprimanded by the United States Naval District Commander, Lorient, and to lose twenty-five (25) dollars per month of his pay for a period of twelve (12) months."

[C. M. O. 91—1918]

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by four of the five members of the court was spread upon the record:

"In consideration of his previous good record and in view of extenuating circumstances as shown in the evidence, we recommend Ensign Godwin Frederick Werliin, United States Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on May 15, 1918, placed an endorsement on the record in the foregoing case, in part as follows:

"The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Godwin Frederick Werliin, U. S. Naval Reserve Force, are approved.

"In view, however, of the previous good service of the accused in command of a mine sweeper, the recommendation to clemency by four out of five members of the general court martial, and [P. 2] further, in view of the limited experience of the accused as commanding officer of a vessel of the United States Navy, the loss of pay is remitted.

"The neglect of Ensign Werliin properly to safeguard the Government property under his charge, to which in part is due the loss to the Government, is entirely reprehensible.

"The publication of the general court martial order in this case will be considered as fulfilling so much of the sentence as relates to reprimand. (*The convening authority being also the District Commander, Lorient, mentioned in the sentence of the court.*)

"Ensign Werliin will be released from arrest and restored to duty."

REMARKS

The accused was charged with neglecting his duty in that he, the commanding officer of a naval vessel, received stores on board for transportation which he neglected to take precautions specified to safeguard; and also that after delivering same and after he had been notified that articles were missing, he took no steps to ascertain the whereabouts of the missing articles. Two matters which seem to require comment were raised by the defense: First, that the superior officer who turned the stores over to the accused told him that he (the accused) would not be required to give a receipt nor be responsible for the condition of said stores; and, second, that there was little time and few men available to take precautions for safeguarding the stores. While the bringing out of these matters tends to show that the accused was not devoid of a sense of responsibility in the premises, and that he might have thought that in view of what had been told him he was acting properly, still he failed to exercise the care that is required of commanding officers of naval vessels under like circumstances. The matters brought out by the defense as enumerated above, together with those indicating inexperience on the part of the accused, were matters of extenuation and did not constitute a defense to the charge and specifications as laid.

C. M. O. 91—1918

[P. 1] Lieutenant (junior grade) Charles T. Perry, U. S. Naval Reserve Force, was tried by general court martial on May 29, 1918, at the Navy Yard, Norfolk, Va., by order of the Commandant, Fifth Naval District, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (two specifications).

Charge II.—Disobeying the lawful order of his superior officer (one specification).

SENTENCE

"The court therefore sentences him, Charles T. Perry, lieutenant (junior grade), United States Naval Reserve Force, to lose twenty-five dollars ($25) per month of his pay for a period of six (6) months."

[C. M. O. 92—1918]

RETURNED FOR REVISION

On June 19, 1918, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was totally inadequate for the offenses found proved when committed in time of war.

ACTION IN REVISION

"The court decided respectfully to adhere to its former sentence in view of the physical condition of the accused, due to the long-continued and unusually strenuous performance of duty, which was the primary cause of the acts to which the accused pleaded guilty and which is the only evidence before the court."

ACTION OF THE CONVENING AUTHORITY

On July 13, 1918, the convening authority placed an endorsement on the record in the foregoing case as follows:

> "The court has found the accused guilty of the serious offenses of 'drunkenness' and 'disobeying the lawful order of his superior [P. 2] officer,' and gives as a reason for adjudging a light sentence and adhering to same that the physical condition of the accused was such as to cause him to commit the above offenses.
>
> "From a careful review of this case no evidence was brought before the court to show that the mental condition of the accused was such as to make him irresponsible for his acts, but, on the contrary, he testified that the alleged drunkenness was due to drinks taken by him; that he voluntarily took such drinks and was fully cognizant of his acts while so doing. Furthermore, there is nothing to show that the accused could not have obtained medical aid for his poor physical condition. The convening authority does not accept the reasoning of the court in its proceedings in revision in adjudging a sentence so manifestly inadequate to the serious nature of the offenses found proved.
>
> "Subject to the above, the proceedings, proceedings in revision, and findings of the general court martial in the foregoing case of Lieutenant (junior grade) Charles T. Perry, U. S. Naval Reserve Force, are approved, and, in order that the accused may not wholly escape punishment, the sentence is approved. He will be released from arrest and restored to duty."

C. M. O. 92—1918

[P. 14] AFTER PLEA OF GUILTY: PROSECUTION SHOULD NOT INTRODUCE EVIDENCE UNLESS AGGRAVATING CIRCUMSTANCES ARE TO BE SHOWN.

The record in a recent case disclosed that after the accused had pleaded "guilty" to the charges and specifications, witnesses for the prosecution were called and examined. Nothing which showed the offenses committed by the accused to have been aggravated by special circumstances was brought out by the prosecution. By his plea of guilty everything alleged was admitted by the accused, and there was no necessity for the introduction of the aforementioned evidence. (See Naval Courts and Boards, 1917, section 308: File 26262–4654, J. A. G., July 5, 1918; G. C. M. Rec. No. 38942.)

CHANGE OF PLEA OF ACCUSED BY COURT: IMPROPER PROCEDURE UPON.

The accused (without counsel) in a recent case was tried under two charges. He pleaded "guilty" to one and "not guilty" to the other. He took the stand at his own request to testify concerning the charge to which he had pleaded "not guilty," and in the course of the cross-examination certain testimony was

elicited which a member of the court thought inconsistent with the plea of guilty to the other charge, and he thereupon made the following objection:

> "I object on the ground that the accused has given testimony which is inconsistent with his plea of guilty to the second charge and specification thereunder."

(The judge advocate replied.)
The record then discloses the following:

> "The court was cleared. The court was opened. All parties to the trial entered and the president announced that the court had decided to direct the judge advocate to proceed with the trial of the case as though the accused had plead 'not guilty' to the second charge and specification thereunder.
>
> "The court was cleared to discuss a point of procedure. The court was opened. All parties to the trial entered, and the president announced that the court directs the judge advocate to proceed with the cross-examination."

[P. 15] The above course of procedure on the part of the court was unwarranted, in that prior to a direction being given to the judge advocate to so proceed, opportunity should have been afforded the accused to withdraw his plea, and upon his declining to do so it would have devolved upon the court to direct the trial to proceed as though a plea of "not guilty" had been entered. The prosecution would then have been put to proof of every allegation contained in the specifications (Naval Courts and Boards, 1917, sec. 310).

The court apparently overlooked the fact that this change of plea placed an entirely different aspect on the case; it being in effect a recommencement of the trial, as a new plea had been put in issue. The first stage of the new proceeding was for the prosecution to introduce evidence to prove its case, and not for the court to direct the cross-examination of the accused, who happened to be a witness in his own behalf at this stage of the trial. The accused took the stand as a witness under a plea of "not guilty" to the first charge, and could not legally, except at his own request, be continued as a witness under the new plea entered for him; and, further, the record should show that such request was made.

The above-mentioned illegal procedure was, in the opinion of the Judge Advocate General, sufficient to invalidate the proceedings on the charge and specifications under which it occurred (File 26251–16707; G. C. M. Rec. No. 38716).

DESERTION: ONE INVOLUNTARILY DRIVEN BY FEAR TO LEAVE STATION NOT GUILTY OF.

The accused in a recent case was charged with desertion. He plead guilty to the charge, and submitted and read a written statement. The court ruled that the part of said statement which read, "I never intended or had even thought of deserting the service, and I would have returned at once but I was so scared from what I had done that I couldn't get up nerve enough to come back," was inconsistent with his plea. The accused thereupon withdrew that part of his statement and adhered to his former plea.

An examination of the statement disclosed that the entire statement and not any particular portion thereof was inconsistent with his plea, in that it indicated that the whole idea of the accused in leaving his station was to escape legal prosecution with which he had been unlawfully threatened by the attorney of a certain bank. The accused's departure from the service was caused by fear and was not voluntary.

The statement of the accused rather than his plea must be regarded as his more intelligent act. The statement in this case clearly indicated that he had no intention of permenently abandoning the service, but that he left his station in a moment of terror; that he hid; that he was afraid; and that he dreaded more than anything in life to be tried as a criminal (as had been threatened). In short his actions were governed by fear of arrest and confinement in the penitentiary which had been threatened.

The statement being obviously inconsistent with the plea, the proceedings, findings, and sentence of the court in his case were disapproved (File 26251–16894, G. C. Rec. No. 38939).

[C. M. O. 92—1918]

[P. 16] MEDICAL OFFICERS: COMPOSITION OF COURT FOR TRIAL OF.

It was noted from the record of the trial of a medical officer that all the members of the court were junior to the accused and less than one-third were medical officers.

Article 39 of the Articles for the Government of the Navy provides that more than half of the members of the court, exclusive of the president, shall not be junior to the officer to be tried, "where it can be avoided without injury to the service." And section 221 of Naval Courts and Boards, 1917, provides that "in detailing officers for the trial of a medical * * * officer, it is proper if the exigencies of the service permit, that at least one-third of the court be composed of officers of the same corps as the person to be tried."

While the convening authority is the judge of what officers the "exigencies of the service" will "permit" to be ordered as members of the court "without injury to the service," still, in the opinion of the Department, the convening authority is justified in departing from the rules as set forth above only under the most unusual circumstances (File 26262–4590, G. C. M. Rec. No. 38822).

NEW TRIALS: IN CONNECTION WITH COURT-MARTIAL PROCEEDINGS.

New or second trials have been of rare occurrence in connection with court-martial proceedings. They have only been had and are only authorized where the sentence adjudged on the first trial has been disapproved by the reviewing authority and the accused has asked for a second trial. The reason why the privilege of applying for and being allowed a retrial has been but seldom exercised, is that parties convicted and sentenced are generally satisfied to have the proceedings in their cases terminated by disapproval. After a sentence has been duly approved and has taken effect, the granting of a new trial is beyond the power of the reviewing authority or President.

It is well established that where the sentence of a legally constituted court martial in a case within its jurisdiction has been approved by the reviewing authority and carried into execution, it cannot afterwards, under the present laws, be revised and set aside. The proceedings are then at an end and the action thus had upon the sentence is, in contemplation of law, final. (*Dynes* v. *Hoover*, 20 How. 65; *Ex part Reed*, 100 U. S. 13; 17 Op. Ttty. Gen. 297.)

After such approval and execution the only relief which may be granted must result from the exercise of the pardoning power or from clemency in mitigating the sentence imposed (File 26262–4529:1, Sec. Nav., July 5, 1918).

SENIOR OFFICER PRESENT: JURISDICTION OF, TO ORDER SUMMARY COURT.

"Summary courts martial may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy yard, naval station, or marine barracks *to which they belong* * * *." Art. 26, A. G. N.

"Summary courts martial may be ordered upon enlisted men in the naval service *under his command* by the commanding officer [P. 17] of any brigade, regiment," etc. Act of August 29, 1916 (39 Stat. 556).

In accordance with the above, the Judge Advocate General was of the opinion that the senior officer present could not legally order summary courts martial upon members of the Armed Guard Detail in foreign waters, the members of said detail not being *under the command* of said senior officer present (File 26504–335, J. A. G., July 19, 1918).

THREAT TO ASSAULT: NOT CONSTITUTED BY OVERT ACTS WHICH, IF PROPERLY CHARGED, WOULD CONSTITUTE ASSAULT.

The accused in a recent case was charged with threatening to assault his superior officer while in the execution of the duties of his office—the specification alleging that the accused had, on or about 11 a. m. on a certain date, been ordered by a certain chief petty officer "to go into the kitchen and do his

[C. M. O. 92—1918]

work," and the accused "did draw from his trousers' pocket a pocketknife, about four inches long, and did attempt to open said knife with intent to assault his superior officer," etc.

The allegation that the accused drew a knife and attempted to open it with intent to assault sets forth an overt act, which, if properly alleged (a question not passed upon), would constitute an assault.

An assault is in itself an attempt or offer—i. e., a threat—to do bodily harm to another; the cases under which one may "threaten to assault" are so rare as not to have been previously made the subject of comment by this office.

In accordance with the above, the Judge Advocate General was of the opinion that the specification did not support the charge (File 26232–4396, G. C. M. Rec. No. 38319).

CITIZENSHIP: RIGHTS OF, NOT FORFEITED BY DESERTION IN TIME OF PEACE SUBSEQUENT TO AUGUST 22, 1912.

The fact that a certain enlisted man was convicted of desertion, and that a mark of desertion now stands against him on his record, raises no legal objection to his receiving the benefits of General Order No. 34, as embodied in R–4427, paragraph 25, U. S. Navy Regulations, 1913. The man in question was convicted of desertion in time of peace and such desertion occurred subsequently to the passing of the act of August 22, 1912 (37 Stat. 356), which act provides against loss of rights of citizenship in such cases. (See Naval Digest, 1916, page 170, sections 28 and 29; File 26539–786, J. A. G., July 30, 1918.)

[P. 18] DESERTERS IN TIME OF PEACE WHO HAVE NEVER BEEN BROUGHT TO TRIAL: MAY BE LEGALLY ENROLLED, APPOINTED, OR REENLISTED.

P. J. C. _____ applied for enrollment in the Naval Reserve Force. He had deserted from the Navy and had been pardoned; he then deserted again, and had not since been apprehended nor surrendered himself. A "deserter's release," dated April 18, 1912, had been issued to him by the Bureau of Navigation for said second offense of desertion.

The second desertion occurred in time of peace, and there had never been a trial of the applicant for said desertion (the "deserter's release" apparently amounting to an assurance that he never would be tried). It having been held by the courts that statutory penalties for desertion take effect only upon conviction, it was held that, aside from the question of policy involved, there was no provision of law which prohibited the applicant's reentry into the naval service by enrollment, reenlistment, or appointment (File 26539–784, J. A. G., July 11, 1918).

FLEET MAIL CLERK: MAY BE DESIGNATED BY THE SECRETARY OF THE NAVY, AND PAID AS SUCH, WITHOUT CHANGING EXISTING REGULATIONS.

The following is quoted from the opinion of the Acting Attorney General of July 19, 1918, re the subject set forth in the heading:

> "The act of May 27, 1908, 35 Stat. 417, provided, in part, as follows:
> " 'That enlisted men of the United States Navy may, upon selection by the Secretary of the Navy, be designated by the Post Office Department as "Navy mail clerks" and "assistant Navy mail clerks" * * * They shall receive as compensation for such services from the Navy Department in addition to that paid them of the grade to which they are assigned, such sum in the case of mail clerks not to exceed five hundred dollars per annum, and in that of assistant mail clerks not to exceed three hundred dollars per annum, as may be determined and allowed by the Navy Department.'
> "After the passage of this act the Secretary of the Navy issued certain regulations fixing the conditions under which Navy mail clerks and assistant Navy mail clerks would be designated for vessels, and the rate of their

compensation. On May 4, 1917, the commanding officer of the Atlantic Fleet called the Secretary of the Navy's attention to the desirability of appointing a 'fleet mail clerk' to be allowed the extra compensation given to mail clerks on capital ships, and accordingly, on July 26, 1917, the Secretary of the Navy recommended to the Postmaster General that Yeoman A. J. Cassidy be designated 'Navy mail clerk for the Atlantic Fleet'; and on July 30, 1917, Cassidy was designated accordingly by the Postmaster General. The rate of his extra compensation, however, was not fixed by the Secretary of the Navy, probably through inadvertence. On December 27, 1917, the Secretary of the Navy, assumedly pursuant to the provisions of section 8 of the act of July 31, 1894, submitted to the Comptroller of the Treasury the question as to what rate of extra compensation Cassidy was entitled to while serving as fleet mail clerk. On February 26, 1918, the Comptroller rendered his opinion that Cassidy was not entitled to any extra compensation, because he had never been validly designated to the [P. 19] position of 'fleet mail clerk.' The reason for this conclusion was that the Secretary of the Navy having adopted and promulgated regulations covering the designation of Navy mail clerks and assistant Navy mail clerks, and having neglected in his regulations to provide for 'fleet mail clerks,' was now without power to designate an enlisted man for such position except by using the form of new general regulations or a general amendment of the old.

"You now request my opinion as to whether this ruling of the Comptroller was correct, and specifically whether the designation of Cassidy, made in the manner stated above and not pursuant to any general regulation, was valid.

"1. It is clear that the act of May 27, 1908, supra, confers absolute power upon the Postmaster General and the Secretary of the Navy to designate in their uncontrolled discretion Navy mail clerks, and power upon the Secretary of the Navy, with like uncontrolled discretion, to fix their compensation within the prescribed maximum. That being so, there was no question for submission to the Comptroller under the act of July 31, 1894, and his opinion therefore was extraofficial, and has only the weight which the experience and ability of that officer justly give it. This is expressly determined by the decisions of the Court of Claims in *Billings* v. *United States*, 23 Ct. Cls. 167; *Dyer* v. *United States*, 37 Ct. Cls. 337; *Hayden* v. *United States*, 38 Ct. Cls. 39; and by *United States* v. *Jones*, 18 How. 92, and *Jackson* v. *Smith*, Auditor, 241 Fed. 747, 757. The proper effect of such opinions of the Comptroller was satisfactorily stated by Mr. Olney in 20 Ops. A. G. 654.

"2. Coming then to the question as to whether the designation of Cassidy as a 'fleet mail clerk' was valid without the promulgation by the Secretary of the Navy of a general regulation, the decisive principles are stated by Comptroller Downey in his opinion to the Auditor for the State Department of January 25, 1915, 21 Comp. Dec. 482, in which he says:

"Regulations, however, may be distinguished as of two kinds:

"(1) Those that are made pursuant to, or in execution of, a statute.

"(2) Those that are made by virtue of general or special authority vested in the heads of departments to effect the purposes required by law.

"Regulations of class 2 must not be inconsistent with law and relate principally to the government of the Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property, etc. Such a regulation may be termed an administrative regulation and regarded as mainly directory. It has been held that such regulations may be waived or exceptions made thereto by the authority making said regulations. (See decision of this office Dec. 8, 1896, 3 Comp. Dec. 218, 220; Jan. 23, 1897, 3 Comp. Dec. 304, 305; Aug. 6, 1897, 4 Comp. Dec. 40, 42; Jan. 28, 1898, 4 Comp. Dec. 378, 387.)

"Regulations of the first class, namely, those made pursuant to or in execution of a statute, are quasi-legislative, and may be held to become a part of the law and to be of the same force as the statute [P. 20] itself; and though they may be changed by the authority making them they are binding on such authority as well as others as long as they are not changed and exceptions cannot be granted to them. The

power to make regulations involves the power to alter, amend, modify, or revoke the same, but said action must be general and not by specific exception or waiver, and can only be prospective, not retrospective.

"The present Comptroller in his opinion in this case cites this opinion of his predecessor, but evidently thinks that the regulations issued by the Secretary of the Navy in regard to Navy mail clerks and assistant Navy mail clerks fell within the first class stated by Comptroller Downey as being regulations made pursuant to, or in execution of, a statute, so that no special designation could be made outside of the regulations, or, in short, that the regulations could not be waived in special cases. In this view I think it is clear the Comptroller erred. The act of May 27, 1908, supra, contains no provision for regulations by the Secretary of the Navy. It apparently contemplates, or at any rate would be satisfied, by a special designation of a Navy mail clerk in each particular case. If the Secretary of the Navy chose, with a view to the better business administration of the Department, to lay down certain general rules which, until he was further advised, should guide his discretion in the performance of the duties cast on him by the act, that was a proper administrative action and directly authorized by section 161, R. S. Such regulations, however, have not the force of law. Speaking of a precisely similar regulation Mr. Moody said in 25 Ops. A. G. 183:

"'The provision in question, therefore, seems to be one which can be made or annulled at will and enforced or waived as seems expedient. Not being demanded by law, it is not law in the sense in which that term is used in the statutory provision (R. S. 356) that the opinion of the Attorney General may be required on "any questions of law" arising in the administration of the Executive Departments. It may more properly be left for interpretation by the Department or Bureau to which it pertains and which is responsible for its existence and execution' (18 Ops. 521; 20 Ops. 649; 21 Ops. 255).

"I think it is clear that the regulations issued by the Secretary of the Navy relative to Navy mail clerks fall within the second class, as lucidly stated by Comptroller Downey, and that there was therefore no legal obstacle in the way of a special designation by the Secretary of the Navy of Cassidy as a fleet mail clerk; that this designation was entirely valid; and that Cassidy has lawfully held this position from the time fixed in his designation."

In accordance with the above it was directed by the Secretary of the Navy that Cassidy's accounts be credited with additional pay at the rate of $30 per month from the date of his designation as Navy mail clerk by the Postmaster General (File 26254–2476:5, Sec. Nav., July 26, 1918).

[P. 21] FRAUDULENT ENLISTMENT: NOT CONSUMMATED BY CHANGING NAME AND ENLISTING.

A young man changed the spelling of his family name and enlisted in the Navy. He made voluntary allotments and applied for family allowances for his parents. The pay officer, noting the discrepancy between the names of the man and that of his parents, was of the impression that the man had enlisted fraudulently and suggested to this office that proper authority be obtained for changing his name, and further stated that no allotment would be registered and pay of the man would be withheld until the receipt of said authority.

The Judge Advocate General was of the opinion that under the circumstances the man's enlistment was not fraudulent. The mere fact that in signing his enlistment papers he spelled his name differently from the way in which it had theretofore been spelled by his parents or in other words, spelled it according to the English pronunciation, did not make his enlistment fraudulent. The gist of the offense of fraudulent enlistment is the concealment of a fact knowingly and willfully, which, if known to the recruiting officer, would cause the rejection of the applicant.

The pay officer was informed that there appeared to be no necessity for changing the man's name in the record, and further that there was no legal objection to the payment of the allotments and family allowance applied for, and that there was no legal reason why the man's pay should be withheld (File 28909–118, J. A. G., July 5, 1918).

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MARINE CORPS: DISTRIBUTION OF OFFICERS OF, IN GRADES ABOVE MAJOR.

The act of July 1, 1918, provides that "* * * the President is authorized to nominate, and, by and with the advice and consent of the Senate, to appoint one major general * * * and also one temporary major general in the Marine Corps * * *."

It is further provided by the same act:

> "That, based on the temporary increase of enlisted men of the Marine Corps herein authorized, the President, by and with the advice and consent of the Senate, is authorized, in his discretion, temporarily to appoint not exceeding six brigadier generals, twenty-two colonels, and twenty-two lieutenant colonels in the Marine Corps in addition to the number permanently allowed by law in these grades * * *."

The Judge Advocate General was of the opinion that the additional officers authorized in the grades of major general, brigadier general, colonel, and lieutenant colonel, above mentioned, are to be included in the total authorized commissioned strength of the Marine Corps, based on four per centum of the total authorized enlisted strength, exclusive of the Marine Band and men under sentence of discharge by courts martial (File 11112–1076, J. A. G., July 20, 1918).

MARINE CORPS: EFFECT OF PROMOTION OF OFFICERS WHO ARE ADDITIONAL NUMBERS.

Except in the case of promotions of officers in the grade and with the rank of colonel to the grade of brigadier general, the temporary promotion of an officer who is an additional number does not fill a vacancy in the higher grade (File 11112–1076, J. A. G., July 20, 1918).

[P. 22] MARK OF DESERTION: REMOVAL OF, NOT AUTHORIZED DURING PROBATIONARY PERIOD.

An enlisted man was tried by general court martial and found guilty of desertion. The Department directed that action on the case be withheld for a period of one year with a view to withholding action indefinitely should the conduct of the accused so warrant during the probationary period of one year.

Upon question raised as to whether or not the mark of desertion should be removed from the accused's record, *Held:* That at this time the removal of said mark is not authorized. The effect of the action taken is to suspend further action in the case and to restore the accused to duty, subject to the probationary requirements. It does not authorize a change in his record, which should be true as to existent facts. Accordingly his record should show the following notations: Charge of desertion, trial by general court martial, withholding of action, and restoration to duty on probation (File 26251–16739: 1, J. A. G., July 27, 1918).

MEDALS AND DECORATIONS CONFERRED BY ALLIES: MAY BE WORN BY PERSONS IN THE NAVAL SERVICE.

In an opinion of the Judge Advocate General of July 25, 1918, it was held that the following provisions of the Army appropriation act of July 9, 1918, apply to persons in the naval service:

> "That American citizens who have received, since August first, nineteen hundred and fourteen, decorations or medals for distinguished service in the armies or in connection with the field service of those nations engaged in war against the Imperial German Government, shall, on entering the military service of the United States, be permitted to wear such medals or decorations.
>
> "That any and all members of the military forces of the United States serving in the present war be, and they are hereby, permitted and authorized to accept during the present war or within one year thereafter, from the government of any of the countries engaged in war with any country

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with which the United States is or shall be concurrently likewise engaged in war, such decorations, when tendered, as are conferred by such government upon the members of its own military forces; and the consent of Congress required therefor by clause eight of section nine of article I of the Constitution is hereby expressly granted: *Provided*, That any officer or enlisted man of the military forces of the United States is hereby authorized to accept and wear any medal or decoration heretofore bestowed by the government of any of the nations concurrently engaged with the United States in the present war.

"That the President is authorized, under regulations to be prescribed by him, to confer such medals and decorations as may be authorized in the military service of the United States upon officers and enlisted men of the military forces of the countries concurrently engaged with the United States in the present war" (File 9644–44, J. A. G., July 25, 1918).

[P. 23] MEDICAL OFFICERS: SHOULD NOT BE ASSIGNED TO COMBATANT DUTIES.

Upon decision requested as to whether or not medical officers can be legally assigned to duty as coding officers, *Held:* That neither chaplains, doctors, nor members of the Hospital Corps should be assigned to duties of a combatant character. Such members of the staff personnel of a naval vessel are neutralized by the terms of the Geneva Convention, the principles of which the United States accepts for general guidance. (See paragraph 1, Instructions concerning the Disposition of Prisoners of War, etc., approved by the State Department, May 7, 1918, and by the Secretary of the Navy, May 9, 1918.)

Duty as a coding officer is, in the opinion of the Department, duty of a strictly military and combatant character, and no medical officer should be required to perform such duty, especially in time of war.

It was also pointed out that such duties as are required of members of naval courts and boards, while essentially military, are not of a combatant nature, and medical officers may be legally assigned to such duties (File 28578–356, Sec. Nav., July 27, 1918).

NATIONAL NAVAL VOLUNTEERS TRANSFERRED TO NAVAL RESERVE FORCE: MAY NOT BE CHECKED FOR CLOTHING FURNISHED THEM BEFORE TRANSFER.

There is no authority of law authorizing the checkage of the accounts of former members of the National Naval Volunteers, transferred pursuant to the act of July 1, 1918, to the Naval Reserve Force, for the clothing furnished them as members of the National Naval Volunteers (File 28550–28: 8, J. A. G., July 24, 1918).

NATIONAL NAVAL VOLUNTEERS TRANSFERRED TO NAVAL RESERVE FORCE: PERIOD REQUIRED TO SERVE.

The members of the National Naval Volunteers transferred to the Naval Reserve Force pursuant to the act of July 1, 1918, should, in the opinion of the Judge Advocate General, be required to serve only during the unexpired periods of their enrollments (3 years) as National Naval Volunteers, and not the four-year periods required of those enrolling directly in the Naval Reserve Force (File 28550–380, J. A. G., July 22, 1918).

OFFICERS: AUTHORITY OF, TO ADMINISTER OATHS FOR CIVIL PURPOSES.

In settling the estate of the mother of a certain enlisted man, it became necessary to have a certain paper acknowledged by said enlisted man before a person properly authorized to take such acknowledgment.

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It was held that an ensign in the Navy, before whom the acknowledgment was actually made, had no authority to take such acknowledgment under the act of March 4, 1917, which authorized certain officers to "administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration," the case in hand not being one of "naval justice" or "naval administration," as set forth in the said act, but a matter wholly civil in its nature (File 26802–38, Sec. Nav., July 15, 1918).

[P. 24] OFFICERS OF NAVAL RESERVE FORCE: PAYMENT OF SALARY TO, BY FIRMS FURNISHING WAR MATERIAL TO GOVERNMENT.

An officer of the Naval Reserve Force was granted leave of absence by the company employing him, said company being engaged in furnishing war material to the Government, with the agreement that his salary was to be continued during the time that he served with the Navy during the present war.

The provisions of the act of June 10, 1896, in regard to the above matter are set forth in C. M. O. No. 88, 1917, 16 (Bul.).

The Judge Advocate General was of the opinion that, since the officer in question was rendering services only to the United States Government and was not actually employed by said company, he could continue to receive both his pay as an officer of the United States and the salary being paid him by the aforesaid company without contravening the above-mentioned act of Congress (File 28550–178: 7, J. A. G., July 13, 1918.

PAY: OF MEN AWAITING TRIAL BY CIVIL AUTHORITIES.

The status as to pay of men turned over to the civil authorities for trial is governed by the ruling of the Comptroller of the Treasury in 9 Comp. Dec. 249, to the effect that persons in the naval service who are under arrest by civil authorities awaiting trial are not entitled to receive pay and allowances pending the outcome of the trial. If they are convicted on such trial, no pay or allowances are due them from the date of their arrest. On the other hand if they are acquitted at such trial, they are entitled to pay and allowances from the date of arrest (File 26524–609, Sec. Nav. July 8, 1918).

PROMOTION BY SELECTION OF STAFF OFFICERS: COMPOSITION OF BOARDS FOR.

The act of August 29, 1916 (39 Stat. 578), provides that boards of selection for line officers shall be composed of nine rear admirals "on the active list" of the line; and the act of July 1, 1918 (Public No. 182), provides that existing laws with reference to promotion by selection in the line shall apply to the staff corps "under the same conditions in all respects except as may be necessary to adapt the said provisions to such staff corps," with the proviso that said boards for staff officers shall be composed, when practicable, of not less than five "members" of the corps concerned.

In accordance with the above it was held, first, that retired officers may not be detailed as members of boards for selection of staff officers, and, second, that active staff officers of the rank of captain may be ordered to serve on boards for the selection of staff officers to the rank of commander and captain. But such selection board in any event should be composed of members of the corps concerned, and, when practicable, of not less than five members of such corps (File 7657–390: 22, J. A. G., July 13, 1918).

RETIRED CHIEF WARRANT OFFICER: MAY BE PROMOTED TO HIGHER PAY GRADE.

A chief warrant officer on the retired list who is performing active duty may, if he has had sufficient total length of service, be advanced [P. 25] permanently to a higher pay grade, under the provision of the act of July 1, 1918, first quoted under heading "Retired officers" below (File 26509–225: 13, J. A. G., July 25, 1918).

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RETIRED OFFICERS: PERMANENT AND TEMPORARY PROMOTION, AND PAY AND ALLOWANCES OF, UNDER THE ACT OF JULY 1, 1918.

The act of July 1, 1918, provides:

"That hereafter, during the existence of war or of a national emergency declared by the President to exist, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list may, in the discretion of the Secretary of the Navy, be ordered to active duty at sea or on shore; and any retired officer performing such active duty in time of war or national emergency, declared as aforesaid, shall be entitled to promotion on the retired list to the grade or rank, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, and shall thereafter receive the pay and allowances thereof, which his total active service as an officer both prior and subsequent to retirement, in the manner rendered by him, would have enabled him to attain in due course of promotion had such service been rendered continuously on the active list during the period of time last past.

"That during the existence of war or of a national emergency, declared as aforesaid, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list, while on active duty, may be temporarily advanced to and commissioned in such higher grade or rank on the retired list, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, as the President may determine, and any officer so advanced shall, while on active duty, be entitled to the same pay and allowances as officers of like grade or rank on the active list: *Provided*, That any such commissioned or warrant officer who has been so temporarily advanced in grade or rank shall upon his release from active duty, or in any case not later than six months after the termination of the war or of the national emergency, declared as aforesaid, revert to the grade or rank on the retired list and to the pay and allowance status which he would have held had he not been so temporarily advanced: *Provided further*, That nothing in this act shall operate to reduce the pay and allowances now allowed by law to retired officers."

The Judge Advocate General was of the opinion that—

(*a*) In interpreting the words "total active service as an officer," only service as a commissioned, chief warrant, and warrant officer "of the Navy, Marine Corps, or Coast Guard of the United States," should be counted in computing the total active service of one who is now a commissioned officer; and only service as a chief warrant officer and warrant officer "of the Navy, Marine Corps, or Coast Guard of the United States" should be counted in computing the total active service of one who is now a chief warrant or warrant officer. Service in the Coast Guard and Marine Corps should not be counted in computing the service for promotion of retired officers of the Navy. [P. 26] And conversely, the same rule applies to officers of the Coast Guard and Marine Corps.

(*b*) In interpreting the words, "in the manner rendered by him," the President may withhold promotions of retired officers on active duty whose services have not been satisfactory. Prior to promotion the record of the officer concerned should be examined, and if it should be found that he had been suspended from promotion for failure to qualify professionally, or had gained or lost numbers for any reason, the time or numbers gained or lost should be counted, and he should gain or lose date of precedence accordingly.

(*c*) The following scheme of computation for giving effect to the clause, "which his total active service as an officer both prior and subsequent to retirement, in the manner rendered by him, would have enabled him to attain in due course of promotion had such service been rendered continuously on the active list during the period of time last past," was suggested: Take the officer's total active service as an officer, subtract this from the date of computation, and give him a constructive reappointment from the date so determined. His record should then be examined to determine the rank or grade to which he is entitled under the above-mentioned act based upon such service "in the manner rendered by him."

(*d*) The President is authorized to promote retired commissioned and warrant officers on active duty on July 1, 1918, who were on that date qualified

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for promotion under the terms of the act, with rank from the date of approval of the act—i. e., July 1, 1918—they being entitled to rank from that date after confirmation by the Senate. Those assigned to active duty after July 1, 1918, who are eligible for advancement on the date of such assignment to active duty can be given rank from the date of assignment; and those assigned to active duty after July 1, 1918, who are ineligible for advancement on that date, but who subsequently become eligible for advancement, may be given rank from the date they become eligible.

(*e*) The appointments to higher offices must, under each of the foregoing provisions, be by the President, with the consent of the Senate. Confirmation is required, however, only when the appointment is to a different office. When promotion is in rank only, and not in grade, confirmation by the Senate is not required to vest the office, its pay and allowances, in the appointee.

(*f*) It is unnecessary to make a note upon the officer's commission to the effect that he was appointed under the provisions of the act of July 1, 1918, unless the act is mentioned in the nomination and confirmation. The confirmation should be in the terms of the nomination, and the commission in the terms of the confirmation.

(*g*) A formal commission is unnecessary for officers temporarily promoted (File 26509-227:11, J. A. G., July 12, 1918).

STAMPED FACSIMILE, INITIALED BY AUTHORIZED SUBORDINATES: CARRIES FULL AUTHORITY OF SIGNATURE OF SENIOR.

A stamped facsimile signature of a Chief of Bureau, when used and initialed by certain officers designated and authorized by said Chief of Bureau to affix such signature, carriers with it the full authority of the Bureau in all matters, including orders and disbursements of money (File 22724-39, J. A. G., July 19, 1918).

[P. 27] TITLE OF TECHNICIST IN NAVAL RESERVE FORCE: MAY BE LEGALLY EMPLOYED FOR CERTAIN PURPOSES.

In an opinion of the Judge Advocate General of July 9, 1918, after quoting from the act of August 29, 1916 (39 Stat. 587, 588), and from R-1001 (2) and (3) and R-1008, Navy Regulations, 1913, the following appears:

> "There is nothing in the statutes or in the foregoing regulations which prohibits the Secretary of the Navy from directing that certain members of the Naval Coast Defense Reserve shall be officially designated and known as 'technicists.' There is no such grade as 'technicist' in the Regular Navy, and consequently no such grade is authorized in the Naval Reserve Force; in either case authority of Congress would be necessary to establish a new grade. But persons in the public service may be officially designated by titles other than those used in the law to identify their offices or positions under the Government, it being necessary to adhere to the statutory designation only in making their appointments to office, or in the case of the Naval Reserve Force, their enrollments in commissioned grades and ranks. The mere assignment of a different title for official purposes to one occupying an authorized position under the Government does not by any means constitute an attempt by the executive to create a new grade or to change the office or position held by one whose designation has thus been changed for administrative reasons."

In consonance with the above it was advised that in making enrollments in the Naval Reserve Force, the statutory designations should be invariably used to identify the rank, grade, or rating assigned the enrolled members; but that in official communications and for all other official purposes such enrolled members of the Naval Reserve Force might, if it were so directed by the Secretary of the Navy, be addressed by such title as may be found administratively desirable (File 18141-24, J. A. G., July 9, 1918).

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[P. 1] Lieutenant (junior grade) (T) Emory F. Hosmer (B), U. S. Navy, was tried by general court martial on April 24, 1918, at the U. S. Naval Station, Cavite, P. I., by order of the Commandant, U. S. Naval Station, Cavite and Olongapo, P. I., and found guilty of the following charge:

Charge: Improperly hazarding the vessel under his command, in consequence of which she was run upon a rock and seriously injured (one specification).

Sentence

"The court therefore sentences him, Lieutenant (junior grade) (temporary) Emory F. Hosmer (B), U. S. Navy, to be placed at the foot of the permanent list of chief boatswains of the Regular Navy as existing on February sixth, nineteen hundred and eighteen."

Returned for Revision

On April 30, 1918, the convening authority returned the record in the foregoing case to the court, with the direction that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was practically without effect.

Action in Revision

The court decided to revoke its former sentence and substituted therefor the following:

> "The court therefore sentences him, Lieutenant (junior grade) (temporary) Emory F. Hosmer (B), U. S. Navy, to lose fifty (50) dollars per month of his pay for a period of six (6) months; to be reduced to the rank of boatswain, U. S. Navy; and to be placed at the top of the permanent list of boatswains, U. S. Navy, as existing on February sixth (6) nineteen hundred and eighteen (1918)."

Action of the Convening Authority

On May 4, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) (T) Emory F. [P. 2] Hosmer (B), U. S. Navy, and directed that he be released from arrest and restored to duty.

Opinion of the Judge Advocate General

On July 26, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, in part, as follows:

> "In my opinion so much of the foregoing sentence as provides that Lieutenant Hosmer is 'to be reduced to the rank of boatswain, U. S. Navy, and to be placed at the top of the permanent list of boatswains, U. S. Navy, as existing on February sixth (6), nineteen hundred and eighteen (1918),' is illegal and should be set aside.
>
> "The sentence involves the reduction of a commissioned officer to the grade of warrant officer, and specifies the rank and precedence he shall take on the list of permanent boatswains in the Navy. This sentence is not only unauthorized by law, but is impossible of execution, at least without the consent and assistance of the accused. Such a sentence is improper, and is unknown to naval law.
>
> " 'Reduction of officers in grade—as from captain to lieutenant—is * * * unknown to our law' (1 Winthrop's Military Law and Precedents, p. 660).
>
> "The only way in which Lieutenant Hosmer could be made a boatswain in the U. S. Navy would be by appointment to such office by the Secretary of the Navy, and acceptance and execution of oath of office by the appointee; and then he could take rank only from the date of his war-

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rant. The sentence might, therefore, be impossible of execution, even though it were approved by the Secretary of the Navy, as the appointee might refuse to accept the new office tendered him. Furthermore, if the Secretary of the Navy should appoint him a boatswain, he could not give him rank 'at the top of the list,' but only from the date of his appointment.

"Except as hereinbefore stated, the proceedings, finding, and sentence are legal. It is recommended, however, that so much of the sentence as provides that Lieutenant Hosmer is 'to be reduced to the rank of boatswain, U. S. Navy, and to be placed at the top of the permanent list of boatswains, U. S. Navy, as existing on February sixth (6), nineteen hundred and eighteen (1918),' be set aside."

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

In accordance with the recommendation of the Judge Advocate General, so much of the sentence of the general court martial in the foregoing case of Lieutenant (junior grade) (T) Emory F. Hosmer (B), U. S. Navy, as provides that Lieutenant (junior grade) Hosmer is "to be reduced to the rank of boatswain, U. S. Navy, and to be placed at the top of the permanent list of boatswains, U. S. Navy, as existing on February sixth (6), nineteen hundred and eighteen (1918)," is set aside as illegal.

C. M. O. 94—1918

[P. 1] Pharmacist (T) Henry Top, U. S. Navy, was tried by general court martial on July 8, 1918, on board the U. S. S. *Antigone*, by order of the Commander, Cruiser Force, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Stealing property of the United States intended for the naval service thereof (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

Charge III.—Conduct to the prejudice of good order and discipline (one specification).

SENTENCE

"The court therefore sentences him, Pharmacist (T) Henry Top, U. S. Navy, to be dismissed from the United States naval service."

RETURNED FOR REVISION

The convening authority, on July 9, 1918, returned the record in the foregoing case to the court, with the direction that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was not adequate for the offenses to which the accused plead guilty.

ACTION IN REVISION

The court decided to revoke its former sentence, and substituted therefor the following:

"The court therefore sentences him, Pharmacist (T) Henry Top, U. S. Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of one (1) year, and to perform hard labor during said imprisonment."

ACTION OF THE CONVENING AUTHORITY

On July 12, 1918, the convening authority approved the proceedings, findings, and sentence in revision, of the general court martial in the foregoing case of Pharmacist (T) Henry Top, U. S. Navy, and referred the record to the Secretary of the Navy for transmission to the President of the United States.

[C. M. O. 102—1918]

[P. 2] Recommendation of the Judge Advocate General

On July 17, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case in part as follows:

"From a review of the record in the foregoing general court-martial case of Pharmacist (T) Henry Top, U. S. Navy, it is noted that although the accused, being without counsel, made a statement to the court not under oath, no entry appears in the record showing compliance with section 253 (a), Naval Courts and Boards, 1917. In my opinion the omission above mentioned is not sufficient to invalidate the proceedings.

"It is also noted that the sentence is irregular and does not conform to that sanctioned by Naval Courts and Boards, 1917, in that it unnecessarily specifies the performance of hard labor during imprisonment.

"It is recommended that the naval prison at the Navy Yard, Portsmouth, N. H., be designated as the place for the execution of so much of the sentence as relates to confinement."

Action of the Secretary of the Navy

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who on July 17, 1918, recommended approval of the endorsement of the Judge Advocate General.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, were approved on July 25, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Pharmacist (T) Henry Top, U. S. Navy, was submitted to the President of the United States with the recommendation that the sentence be confirmed.

Action of the President

On August 4, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 102—1918

[P. 1] Lieutenant (junior grade) Robert W. Jester, U. S. Naval Reserve Force, was tried by general court martial on June 21, 1918, on board the U. S. S. *Baltimore*, by order of the Commander, Mine Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Conduct unbecoming an officer and a gentleman (one specification).

Findings

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "proved in part," and the accused "guilty" of the second charge.

Sentence

"The court therefore sentences him, Lieutenant (junior grade) Robert W. Jester, United States Naval Reserve Force, to be dismissed from the United States naval service."

Action of the Convening Authority

The convening authority, on July 4, 1918, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Robert W. Jester, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

[C. M. O. 103—1918]

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

The specification of Charge II (conduct unbecoming an officer and a gentleman) alleged that the accused did "roughly seize and tear the garments of a Miss _____." The court found that [P. 2] the words "roughly" "and tear" were not proved. By its finding the court eliminated the words, which but poorly expressed the gravamen of the act charged. The specification as drawn was weak in that it did not definitely set forth that the act was maliciously committed.

It was therefore recommended that the findings on Charge II and the specification thereunder be disapproved.

ACTION OF THE SECRETARY OF THE NAVY

The Bureau of Navigation concurred in the action of the convening authority as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, were approved on August 20, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings in the foregoing case was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On August 23, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 103—1918

[P. 1] Carpenter (T) Lon C. Penney, U. S. Navy, was tried by general court martial on June 17, 1918, on board the U. S. S. *Great Northern*, by order of the Commander, Cruiser Force, U. S. Atlantic Fleet, and acquitted of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (two specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

RETURNED FOR REVISION

On July 9, 1918, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its findings, and the acquittal, which in the opinion of the convening authority were not in accord with the evidence adduced.

FINDINGS IN REVISION

The court decided to revoke its former findings and found, in substitution therefor, the specifications of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge.

SENTENCE IN REVISION

"The court therefore sentences him, Carpenter (T) Lon C. Penney, U. S. Navy, to be dismissed from the United States naval service."

[C. M. O. 104—1918]

RETURNED FOR REVISION

On July 29, 1918, the convening authority, by direction of the Department, returned the record in the foregoing case to the court with the direction that the court reconvene for the purpose of reconsidering its sentence. The Department was of the opinion that the sentence was totally inadequate for the offenses found proved.

[P. 2] SENTENCE IN REVISION

The court decided to revoke its former sentence in revision and substituted therefor the following:

> "The court therefore sentences him, Carpenter (T) Lon C. Penney, U. S. Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year."

ACTION OF THE CONVENING AUTHORITY

On August 5, 1918, the convening authority approved the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Carpenter (T) Lon C. Penney, U. S. Navy. The naval prison at the Navy Yard, Portsmouth, N. H., was designated as the place for the execution of so much of the sentence as relates to confinement, and, in conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

ACTION OF THE SECRETARY OF THE NAVY

The Bureau of Navigation, on August 13, 1918, concurred in the action taken by the convening authority.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) the record in the foregoing case was, on August 15, 1918, submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On August 23, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 104—1918

[P. 1] Lieutenant James A. Ledgett, U. S. Naval Reserve Force, was tried by general court martial on July 5, 1918, on board the U. S. S. *Agamemnon*, by order of the Commander, Cruiser Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Drunkenness on duty (one specification).

Charge II.—Leaving station before being regularly relieved (one specification).

Charge III.—Absence from station and duty after leave had expired (one specification).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge; the specification of the third charge "proved," and the accused "guilty" of the third charge.

[C. M. O. 104—1918]

SENTENCE

"The court therefore sentences him, Lieutenant James A. Ledgett, U. S. Naval Reserve Force, to be reduced to the rating of seaman, second class, U. S. Naval Reserve Force, and to be discharged from the U. S. Naval Reserve Force with a dishonorable discharge."

RETURNED FOR REVISION

On July 8, 1918, the convening authority returned the record in the foregoing case to the court, with the recommendation that the court reconvene for the purpose of reconsidering its finding on the first charge and the specification thereunder, and the sentence. In the opinion of the convening authority, the finding of the court on the first charge and the specification thereunder [P. 2] was not in accord with the evidence adduced, and the sentencing of the accused to reduction to the rating of seaman, second class, was illegal.

ACTION IN REVISION

The court decided to revoke its former finding on the first charge and the specification thereunder, and found, in substitution therefor, the specification of the first charge "proved in part," and the accused of the charge "guilty in a less degree than charged, guilty of drunkenness."

For its former sentence the court decided to substitute the following:

"The court therefore sentences him, Lieutenant James A. Ledgett, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of six (6) months."

ACTION OF THE CONVENING AUTHORITY

On July 30, 1918, the convening authority approved the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Lieutenant James A. Ledgett, U. S. Naval Reserve Force; designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place of execution of so much of the sentence as relates to confinement; and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On August 13, 1918, the Bureau of Navigation recommended that the confinement be remitted.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the court in the foregoing case, and the action of the convening authority thereon were approved on August 15, 1918, but in view of the [P. 3] recommendation of the Bureau of Navigation that portion of the sentence involving confinement was remitted, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence, as mitigated, be confirmed.

ACTION OF THE PRESIDENT

On August 23, 1918, the President of the United States confirmed the sentence, as mitigated, in the foregoing case.

C. M. O. 106—1918

[P. 1] Pay Clerk (T) Webster W. Gillespie, U. S. Navy, was tried by general court martial on June 13, 1918, at the U. S. Naval Training Station, Great Lakes, Ill., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Stealing property of the United States intended for the naval service thereof (one specification).

Sentence

"The court therefore sentences him, Pay Clerk (T) Webster W. Gillespie, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following recommendation to clemency, signed by five of the seven members of the court, was spread upon the record:

> "In consideration of his previous good record and character and the importance of his work we recommend Pay Clerk (T) Webster W. Gillespie, U. S. Navy, to the clemency of the reviewing authority."

Remarks and Recommendation of the Judge Advocate General

On August 7, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, in substance, as follows:

The accused in this case is charged with "stealing property of the United States intended for the naval service thereof," the specification alleging thefts, at various times between certain specified dates, of commissary stores, the property of the United States, from the Naval Training Station, Great Lakes, Ill.

A careful review of this case appears to indicate that the accused was one with others involved in the theft of commissary stores at the station mentioned and that the acts were accomplished with the knowledge, collusion and assistance of [P. 2] those having the same temporarily in their custody. These latter included the ship's cooks, performing duty as butchers, and other enlisted men doing duty as jacks-of-the-dust, who had the handling, doing up, delivering, and charging of articles purchased at the commissary store; and the system mostly employed in the legal procurement thereof was for the accused to visit the place where said stores were issued and either have passed out to him by one of the aforementioned men the desired goods or in their presence to help himself to what he desired, but in neither case was any effort made to take the necessary steps to charge his account with the value thereof. From this it will be seen that without the connivance and help of those employed in the commissary store the thefts could not have occurred, at least in the manner perpetrated.

That the testimony given by these men must be treated in the manner prescribed for that of accomplices is shown by the following:

> "An accomplice * * * is one who is in some way concerned in the commission of a crime. The term includes all who are concerned in the crime, whether as principals in the first or second degree or as accessories. The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense for which the accused is being tried * * *" (12 Cyc., 445, 446).

It should not be overlooked, however, in this connection that this accused was the superior officer of the aforementioned men, had direct supervision of their work, and that insofar at least as he was concerned their participation in these acts was not as censurable as it otherwise might have been.

That an accomplice is a competent witness is shown by the following:

> "An accomplice separately indicted and separately tried is a competent witness against the other defendants" (12 Cyc., 451).

[C. M. O. 106—1918]

As to the credibility of accomplices and the legality of convicting the accused upon uncorroborated testimony of accomplices:

"Although the uncorroborated testimony of an accomplice should be received with caution, yet there is no rule of law forbidding a conviction upon his evidence alone" (*Steinham* v. *U. S.*, Fed. Cas. No. 13355).

[P. 3] "A conviction founded on the uncorroborated testimony of an accomplice is legal, though it is almost universal practice, sanctioned by long usage and deliberate judicial approbation, to instruct juries to be cautious in convicting upon such testimony" (*U. S.* v. *Neverson*, 1 Mackey, 152).

"The jury may convict on the testimony of an accomplice alone, but his testimony should be corroborated in some parts, at least, by other evidence" (*U. S.* v. *Kessler*, Fed. Cas. No. 15528).

"The evidence of an accomplice, when submitted to the jury with proper cautions as to its credibility, is for the jury to weigh; and they, if they please, may act upon it without corroborative testimony" (*State* v. *Stebbins*, 29 Conn. 463; 79 Am. Dec. 223).

"There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them" (*Caminetti* v. *U. S.*, 242 U. S., 495).

The evidence in this case has been carefully considered and weighed, bearing in mind the fact that nearly all of the witnesses introduced by the prosecution should be considered more or less in the light of accomplices, and, furthermore, that certain ones of them appear to have conspired to commit perjury in connection with the proceedings of a court of inquiry previously held to investigate the frauds covered in this case and others, and in which they were called as witnesses. Regarding this latter phase, the motive governing the giving of their previous testimony, which was clearly that of self-protection, they being interested parties, should be considered in according weight to the testimony given before the general court martial in this case. The testimony of these witnesses is, however, in a measure corroborated by evidence showing the condition of the charge account of the accused during the period it was alleged he was stealing, as compared with that when and after the investigation was started; and, furthermore, the testimony of witness M_____ is important and clearly goes to establish the guilt of this accused.

It is noted that several times the judge advocate objected to questions propounded a witness by counsel for the accused on cross-examination on the ground that the answer might tend to incriminate the witness. The privilege to refuse to answer incriminating questions is a personal one and may be claimed by [P. 4] the witness only. It cannot be claimed for him by anyone else. (Naval Digest, 1916, 568, 16.) It was not, therefore, within the province of the judge advocate to object to questions on the ground stated.

Subject to the above remarks and other irregularities of a minor nature which are noted, none of which are so serious as to invalidate the proceedings, I have to recommend that the proceedings, findings, and sentence in the foregoing case be approved.

Action of the Secretary of the Navy

On August 10, 1918, the Chief of the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case and concurred in the endorsement of the Judge Advocate General.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, were approved on August 13, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Pay Clerk (T) Webster W. Gillespie, U. S. Navy, was submitted to the President of the United States with the recommendation that the sentence be confirmed.

Action of the President

On August 23, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 109—1918

[P. 1] Lieutenant (junior grade) Walter M. Toler, U. S. Naval Reserve Force, was tried by general court martial on June 27, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and acquitted of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

Action of the Convening Authority

On July 5, 1918, the convening authority approved the proceedings, findings, and acquittal of the general court-martial in the foregoing case of Lieutenant (junior grade) Walter M. Toler, U. S. Naval Reserve Force, and directed that he be released from arrest and restored to duty.

Remarks

The second charge, "conduct to the prejudice of good order and discipline," is supported by a single specification, which sets forth that the accused had two bottles containing intoxicating liquor unlawfully in his possession within the limits of the French Navy Yard, Brest, France. The evidence adduced before the court conclusively established the fact that the accused had two bottles containing intoxicating liquor in his possession within the limits of the French Navy Yard, Brest, France, but there seemed to be some doubt in the mind of the court concerning whether or not the possession of the said bottles containing intoxicating liquor within the limits of the French Navy Yard, Brest, France, was unlawful at the time when said incident took place.

It is a well-known and accepted principle governing the relations between states that a public vessel may not legally enter a port or the territorial waters of a foreign state without first obtaining actual or implied permission from said state to enter the waters aforesaid. It is equally well known that the duration of the stay of a public vessel within a port or the territorial [P. 2] waters of a foreign state is likewise determined by said foreign state. While the officials of a foreign state may not board a public vessel while within a port or the territorial waters of said state for any purpose whatsoever, and no action may be had in the tribunals of a foreign state against a public vessel, yet if members of the crew go ashore in a foreign port, whether with the tacit or actual consent of the authorities thereof, they are amenable to all the laws and regulations governing the port or territorial waters while ashore, and may be cited before the tribunals of said foreign state for the violation or any law, rule, or regulation thereof; or the officials of said foreign state may return any such member or members of the crew of a public vessel whom they have apprehended violating the rules governing the port or the territorial waters to the proper authorities of said ship for such action as the officers thereof may deem advisable.

The jurisdiction of a naval court martial or other naval court of the United States is not restricted territorially in the manner that civil courts are restricted, but its jurisdiction is dependent wholly upon whether or not the individual charged with having committed an offense was a member of the naval personnel of the United States at the time of committing the offense charged, and it is a matter of little consequence whether said offense was committed within the territorial jurisdiction of the United States, upon the high seas, or within the territorial jurisdiction of a foreign state. (See Naval Digest, p. 325, sec. 128.)

Article 1645 (1), Navy Regulations, 1913, prescribes in effect that members of the naval service scrupulously respect and observe the territorial authority of foreign civilized states in amity with the United States. While naval courts of the United States will take judicial notice of certain matters, a number of which are set forth in section 110 of Naval Courts and Boards, 1917, yet such courts may not take judicial notice of a foreign law, the existence of said foreign law being a question of fact which must be proved by competent evidence the same as any other fact—i. e., the purport or the actual

[C. M. O. 111—1918]

wording of the law or regulation must be introduced into the evidence, and it must be further shown that said law or regulation was in force at the time when the alleged act in violation thereof took place (Naval Digest, p. 43, sec. 11). This, of course, does not prevent [P. 3] a naval court from exercising jurisdiction over an offense against any of the laws or regulations governing a foreign port or the territorial waters thereof committed by a member of the naval forces while on liberty ashore or going on or returning from liberty ashore in a vessel belonging to said foreign state under the charge of "scandalous conduct tending to the destruction of good morals" or "conduct to the prejudice of good order and discipline," but merely requires that said foreign law or regulation be proved as any other fact before the court.

In the foregoing case it nowhere appears as a fact in the evidence that the regulation of the port of Brest, France, which makes it unlawful to have intoxicating liquors within one's possession except for the purposes therein provided, was in force on that date, and acquittal of the accused upon the second charge necessarily and properly followed.

C. M. O. 111—1918

[P. 1] Ensign Basil O. J. Finnigan, U. S. Naval Reserve Force, was tried by general court martial on July 8, 1918, at a U. S. Naval Air Station in France, by order of the Commander, U. S. Naval Aviation Forces, Foreign Service, and found guilty of the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (one specification).

Sentence

"The court therefore sentences him, Ensign Basil O. J. Finnigan, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Recommendation to Clemency

In consideration of his previous good conduct and the attending circumstances the accused was recommended by two of the six members of the court to the clemency of the reviewing authority.

Action of the Convening Authority

Subject to remarks concerning irregularities in the record, which did not, in the opinion of the convening authority, invalidate the proceedings, the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Basil O. J. Finnigan, U. S. Naval Reserve Force, were approved on August 3, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

Opinion of the Judge Advocate General

On August 21, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, in part, as follows:

> "A significant feature in this record is the recommendation to clemency signed by the two medical officers who were members of the court, one of whom had testified as an expert witness [P. 2] for the prosecution. This recommendation is based upon the previous good record of the accused 'and to the circumstances attended upon the offense of which he was found guilty.' Had the first reason been omitted the second might raise a doubt as to whether, in view of the position taken by these medical officers, who were cognizant of the physical condition of the accused and the nature of his act, a conviction was warranted; but this view can hardly be accepted, as the other reason given for clemency is without foundation, no evidence of a previous good record having been presented for consideration of the court. I am therefore of the opinion that there was no proper basis for the recommendation to clemency and do not concur therein."

[C. M. O. 113—1918]

ACTION OF THE SECRETARY OF THE NAVY

On August 22, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case, and concurred in the endorsement of the Judge Advocate General.

The foregoing remarks and recommendations of the Judge Advocate General and the Bureau of Navigation were approved on August 24, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Ensign Basil O. J. Finnigan, U. S. Naval Reserve Force, was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On August 28, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 113—1918

[P. 1] Lieutenant Commander Alexander F. Ogilvie, U. S. Naval Reserve Force, was tried by general court martial on July 25, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charge, proved by plea:

Charge.—Drunkenness (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Commander Alexander F. Ogilvie, United States Naval Reserve Force, to be dismissed from the United States Naval Reserve Force."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In view of the circumstances as set forth in the statement of the accused, and in view of the great mental and physical strain which the accused had undergone just previous to this offense, we recommend Alexander F. Ogilvie, lieutenant commander, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On August 4, 1918, the convening authority placed the following endorsement on the record in the foregoing case:

> "When the accused committed the excesses of which he is charged he had recently landed from a four-day trip in an open boat after his ship had been torpedoed. During this trip his sufferings were great, and his mental and physical condition was necessarily inevitable under the circumstances.
>
> "In considering the recommendation for clemency it may be said:
>
> "First. That the convening authority, when exercising the discretion conferred on him in the premises, is not limited to the information contained in the record of the court martial. In this particular instance a very thorough study of the cir [P. 2] cumstances surrounding the torpedoing of the U. S. S. _____ is presented to the convening authority by the record of a court of inquiry appointed to inquire thereinto. Reading the two records in conjunction, the convening authority is not convinced that this particular case is one which calls for the exercise of clemency toward the accused.

[C. M. O. 114—1918]

"Second. That, although it is a common experience that excesses and indulgences often follow periods of hardship, the standard set for commissioned officers of the Navy is strength in time of adversity, and, in the opinion of the convening authority, the conduct of the accused has not measured up to that standard. Indeed, it has fallen far short of that standard.

"Subject to these remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Alexander F. Ogilvie, U. S. Naval Reserve Force, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

ACTION OF THE SECRETARY OF THE NAVY

On August 27, 1918, the Bureau of Navigation concurred in the action taken by the convening authority.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings in the foregoing case was, on August 28, 1918, submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On August 30, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 114—1918

[P. 24] ARGUMENT OF JUDGE ADVOCATE: INCONSISTENT WITH PLEA OF GUILTY OF ACCUSED WITHOUT COUNSEL.

The accused in a recent case, who was without counsel, pleaded guilty to all the charges and specifications against him. No witnesses were called either for the prosecution or defense.

The record discloses that the judge advocate made an argument in part, as follows:

"May it please the court: The accused has pleaded guilty to these charges for the reason that he remembers nothing at all about the occurrences. The situation on the 14th of July was briefly as follows:

"It was the first liberty of the accused after an exceedingly hard voyage on a destroyer of 13 days, and he went ashore for liberty and recreation and for the first time since last March ordered liquor. The accused took a drink of Madeira because he thought it was a mild wine. It must, however, have been a very poor quality of wine, for after drinking two or three small glasses the next thing he remembers was when he was awakened the morning of the following day on board the destroyer, having absolutely no memory of any events which transpired in the meanwhile."

Whether this argument is classed as a statement of the accused or, in the absence of an entry indicating that it was offered in his behalf, as an admission on the part of the prosecution, its effect is practically the same. It avers that the accused had pleaded guilty to the charges "for the reason that he remembers nothing at all about the occurrences;" and later in the second paragraph, after admitting having taken two or three small glasses of very poor quality wine, states that "the next thing he remembers was when he was awakened the morning of the following day on board the destroyer, having absolutely no memory of any events which transpired in the meanwhile."

Two inferences might be drawn from the last-quoted excerpt—to wit, that the accused was unusually susceptible to the effects of wine or that the wine was "doped." If the first inference was true the accused might be held guilty of "conduct to the prejudice of good order and discipline (drunk and disorderly)," while if the second were true he should have been acquitted of said charge, which was one of several laid against him.

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In reference to the charges of "Threatening to assault his superior officer while in the execution of the duties of his office," "Disobeying the lawful order of his superior officer," and "Resisting arrest," the argument was clearly inconsistent with the pleas on arraignment. By the argument the accused says (through the judge advocate) that he knows nothing of what transpired, yet by the plea he in effect says that he knows that he committed the offenses charged. For [P. 25] the proper procedure to follow in such a case see Naval Digest, 1916, page 585, section 19; and Naval Courts and Boards, 1917, sections 310 and 312 (File 26262–4880, G. C. M. Rec. No. 39584).

CHARGE: CONVENING AUTHORITY SHOULD SELECT APPROPRIATE CHARGE AND NOT ONE LESS SERIOUS THAN SPECIFICATION WOULD SUSTAIN.

In a recent case the specification alleged facts which would have sustained a much more serious charge.

The Department held that, whereas it is recognized to be entirely within the discretion of the officer empowered to convene a court martial to direct what portions of the complaint against an accused shall be charged against him, he having deemed the accused guilty of having committed certain unlawful acts and set same forth in a specification for purposes of trial, it devolved upon the convening authority to select an appropriate charge and not one which acts of a less serious nature would support (File 26262–4693, G. C. M. Rec. No. 39035; see also G. C. M. Recs. Nos. 39037 and 39039).

CHARGE OF THEFT: NOT SUPPORTED BY SPECIFICATION ALLEGING RECEIPT OF STOLEN GOODS.

Under the charge of "theft" in a recent case the specification alleged in support thereof that the accused did unlawfully receive the sum of _____ dollars, or thereabouts, lawful money of the United States, well knowing that said money had been feloniously stolen from one _____ and one _____, both seamen, U. S. Navy, serving on board the U. S. S. _____, and did then and there appropriate said money to his own use.

Reference to the Criminal Code of the United States under which this charge and the specification thereof were laid shows that larceny (theft) and receiving stolen goods are made separate and distinct offenses (secs. 287 and 288). From this it is evident that a specification which sets forth that the accused received stolen goods cannot be held to support the charge of theft (Naval Dig., 1916, p. 67, sec. 74, and p. 68, sec. 92; File 26262–4937, G. C. M. Rec. No. 39734).

CHARGES AND SPECIFICATIONS: IMPROPER FINDINGS UPON.

The accused in a recent case pleaded guilty to part of the specification of a charge. The court accepted the plea, warned the accused of the effect thereof, and allowed evidence to be introduced to prove the rest of the specification. The court found part of the specification "proved by plea" and the rest of the specification "proved." In the Department's opinion such a finding indicates that the court accepted the plea as made by the accused and furthermore, considered the evidence adduced as going to prove the portion of the specification to which he had pleaded not guilty. Such a plea as offered in this case must be wholly accepted or rejected, and if accepted the findings should be in accordance therewith. It was [P. 26] improper for the court to have accepted the plea as offered in this case as a confession of guilt of so many of the allegations contained in the specification as were covered by it and then to have found the specification proved in its entirety, and to have recorded a finding as partially proved by plea and the balance by evidence as was in effect done in this case. Such finding was illegal and was set aside by the Department (File 26262–4604. G. C. M. Rec. No. 38848).

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DUTY OF JUDGE ADVOCATE: APPRISED OF FACTS CONSTITUTING A DEFENSE, AND WHEN ACCUSED IS WITHOUT COUNSEL, JUDGE ADVOCATE SHOULD ADVISE HIM AGAINST PLEADING GUILTY.

In a recent case, the accused being without counsel the judge advocate presented an argument in his behalf in which he set forth facts inconsistent with the plea of the accused, and which if introduced in evidence would have accrued to his benefit in defense of the offenses for which he was brought to trial. The Department held in this case it was obvious that the judge advocate failed in the performance of the important duty resting upon him, in that by his argument it is clearly shown he was apprised of facts which should have caused him to advise the accused, who was without counsel, against pleading guilty, and have assisted him in properly presenting his case to the court and guarding his interests. The court also was at fault, in that when the judge advocate made the assertion he did at the opening of his argument it devolved upon the court to have immediately halted the proceedings, inquired into the basis for the judge advocate's statements, and, if it was found to have emanated from the accused, the latter should have been advised of the inconsistency thereof and the court should then have caused his rearraignment (File 26262–4880, G. C. M. Rec. No. 39584).

HANDWRITING EXPERT: MUST BE PROPERLY QUALIFIED AS SUCH.

Over the objection of the counsel for the accused a witness for the prosecution was permitted to state that certain letters were in the handwriting of the accused.

If this witness had seen the accused write or was familiar with his handwriting, he might have been competent to identify said handwriting, or qualified to give an opinion as to whether or not the same was that of the accused, but otherwise he was incompetent unless qualified as a handwriting expert (File 26262–4736, G. C. M. Rec. No. 39161).

MAYHEM: BITING OFF PARTS OF EAR OF ANOTHER IS NOT.

At common law mayhem is such an injury to any part of a man's body as may render him less able in fighting, either to defend himself or to annoy his adversary. Therefore the cutting off, disabling, or weakening of a man's hand or finger, or striking out his eye or [P. 27] foretooth or emasculating him, was said to be mayhem, but the cutting off of his ear or nose was not mayhem at common law, because such injuries did not disable or weaken him, but merely disfigured. It was therefore held that a specification which alleged that the accused had, in a fight, bitten off a portion of the right ear of another, did not allege the common law offense of mayhem charged (File 26262–4864, G. C. M. Rec. No. 39466).

PRECEPT SHOWS JURISDICTION: ESSENTIAL THAT COPY THEREOF BE ATTACHED TO RECORD.

The authority for officers to sit as members of a general court martial, as also to show the jurisdiction of the court, and, when not specifically provided for by statute, the authority of a particular officer to convene a general court martial for the trial of offenders, is contained in the precept, and, to complete a record, it is essential that a certified copy of this document be attached thereto. Otherwise no jurisdiction is shown to have been legally acquired for the officers acting in the capacity of members of a court to try an accused (File 26262–4894, G. C. M. Rec. No. 39598).

PRECEPT SHOWS JURISDICTION: SHOULD ANTEDATE ORDER DIRECTING TRIAL.

The record in a recent case disclosed that the order to the judge advocate directing the trial of an accused was dated June 4, 1918, whereas the precept convening the court before which the case was tried and appointing the judge

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advocate thereof was dated June 18, 1918. The jurisdiction for the trial of a person is acquired by reason of the convening authority referring the case to a specific court convened by him. It is usually accomplished by said authority referring to the judge advocate thereof the original of the charges and specifications, informing him of the jurisdiction conferred, and directing him to notify the president of the court and to inform the accused of the date set for his trial and empowering him to summon the necessary witnesses. Such action presupposes that the precept convening the court has been issued, otherwise there would be no court or judge advocate. The precept is the order of appointment of the members and judge advocate of a general court martial and is the only authority for them to act as such during the trial (File 26262–4753, G. C. M. Rec. No. 39225).

PRISONER AT LARGE: IS A PERSON UNDER ARREST.

An accused charged with "breaking arrest," admitted that he was a prisoner at large, but denied that he was "under arrest." As this was apparently a misunderstanding of fact on the part of the accused, in that it is well recognized that when a man is made a prisoner at large by competent authority he is in fact under arrest, an explanation and warning should have been given him by the court, instructing him as to the status of a prisoner at large and that [P. 28] his admission of that fact carried with it an admission of his being at the time under arrest (File 26251–17529, G. C. M. Rec. No. 39574).

RECOMMENDATION TO CLEMENCY: SHOULD NOT BE BASED ON DOUBT AS TO GUILT OF ACCUSED.

The court, in a recent case, found the accused guilty of the charge and specification laid against him, and then all the members signed a recommendation to clemency "in consideration of the testimony given and especially the uncertainty with which testimony was given by one of the witnesses for the prosecution."

The reasons given for recommending clemency were clearly inconsistent with the findings of the court. In arriving at a finding of guilty a majority of the members of a court in effect say that the evidence adduced proves the specification beyond a reasonable doubt. For all the members to then assert their doubt as to the efficacy of the evidence as a reason for the exercise of clemency is inconsistent, to say the least. It indicates that a doubt exists in the minds of all the members regarding the proof offered, and such a grave doubt as to warrant the incorporation of a statement to that effect in a recommendation for clemency.

For these and other reasons (see under Precept Shows Jurisdiction, etc., p. 27, supra) the department disapproved the proceedings, findings, and sentence of the court in the foregoing case (File 26262–4894, Sec. Nav., Aug. 22, 1918; G. C. M. Rec. No. 39598).

RECORD: SHOULD SHOW THAT PRIVILEGE OF CROSS-EXAMINATION WAS ACCORDED.

It is the constitutional right of an accused to be afforded opportunity to cross-examine witnesses upon the evidence they may give against him. The cross-examination of a witness is an important step in the proceedings of a court, and if not availed of for any reason the record should affirmatively show, by suitable entry, that the privilege was accorded the party whose right it was to so examine (File 26262–4696; G. C. M. Rec. No. 39038).

SEAMAN, THIRD CLASS: NOT ESTABLISHED RATING.

It was noted by the convening authority in a recent case that the sentence involved the reduction of the accused, a seaman, second class, to seaman, third class. In his action on the case the convening authority rightly stated that "seaman, third class" is not an established rating; but that the classification

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"seaman, third class," shown in Naval Courts and Boards, 1917 (see pp. 240–242), and Navy Regulations, 1913 (R–619), is used merely to show the successive steps to be employed in disrating men in the various branches of the service (File 26262–4860, Sec. Nav., Aug. 20, 1918; G. C. M. Rec. No. 39462).

[P. 29] SENTENCE: REDUCING SEAMEN, SECOND CLASS, TO SEAMEN, THIRD CLASS, ILLEGAL.

Where a general court martial sentenced a seaman, second class, among other things to be reduced to the rating of seaman, third class, the Department held the sentence to be void and of no legal effect, it being impossible of execution for the reason that there is no such rating in the Navy (File 26262–4860, Sec. Nav., Aug. 20, 1918; G. C. M. Rec. No. 39462).

STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

The accused in a recent case pleaded "guilty" to the charge of "leaving post before being regularly relieved." He made the following oral statement:

> "I stood my watch all right and went to wake my relief at about five minutes before that, and gave him my belt, as we had always been in the habit of doing."

The statement was held to be inconsistent with the plea, and failure of the court to follow the procedure outlined in Naval Digest, 1916, page 585, was held to be a fatal error. See Naval Courts and Boards, 1917, sections 310 and 312 (File 26262–4902, G. C. M. Rec. No. 39636).

STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

An accused was charged with "using abusive, obscene, and profane language toward another person in the Navy," and "disobeying the lawful order of his superior officer." He plead guilty to all the charges and specifications against him, and made a statement to the effect that he had become intoxicated and did not know what he was doing at the time the offenses were committed, and did not know he was on the report until he was afterwards told about it. It was held that the statement was inconsistent with the pleas to the charges set forth above (File 26262–4795; G. C. M. Rec. No. 39328).

TESTIMONY OF ACCOMPLICE: WEIGHT TO BE GIVEN.

In the absence of a statute the credibility of an accomplice is for the jury. No common-law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if such evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Nevertheless, the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the court should, and usually does, instruct them to that effect (12 Cyc. 445, 446, and 455; File 26251–16163; G. C. M. Rec. No. 39204).

TESTIMONY OR STATEMENT OF ACCUSED: RULE FOR DETERMINING IF INCONSISTENT WITH PLEA OF GUILTY AND PROCEDURE TO BE FOLLOWED IF IN DOUBT.

In order to adjudge a statment of accused inconsistent with a plea of guilty it must be clear that the assertions embraced in the former would be sufficient, if conclusively proved by evidence, to have been grounds [P. 30] for acquittal of the charge or charges to which he had pleaded guilty. A mere contradictory statement, not sufficient in character to meet this requirement, should not be recognized as such an inconsistency as to necessitate disapproval of findings

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in the event of the court's not following the procedure laid down in Naval Courts and Boards, section 310, which provides for a substitution of plea. Whereas, if any doubt is raised regarding the consistency of the testimony or statement of an accused with his plea on arraignment and there is reason to believe that his averments are made in good faith the Department rules that the ends of justice suggest that the accused be properly instructed in the premises and a new plea entered; when this is not done it devolves upon the reviewing authority to decide whether such failure warrants disapproval and this is determined upon considering all the attending circumstances in each particular case (File 26262–4604, G. C. M. Rec. No. 38848).

WRITTEN STATEMENTS: NOT ADMISSIBLE IN EVIDENCE IN SUBSTITUTION FOR TESTIMONY OF WITNESS BEFORE COURT.

It was noted, in a recent general-court-martial case, that several statements, apparently prepared and signed by witnesses who were before the court, were offered and received in evidence. The witness in each instance while on the stand was shown a statement, asked if he had signed it, and if it were true; the statement was then offered in evidence by the judge advocate. In one instance the witness was not further questioned. These statements were recitals of what the witnesses knew of the case on trial. In another instance the statement was read to the witness before it was submitted to the accused or the court and opportunity afforded either to object to its use or introduction as evidence. The course thus adopted in this case was highly irregular and contrary to all recognized legal procedure and most prejudicial to the interests of the accused. The introduction of these statements, which were simply recitals of what the witnesses knew relative to the case on trial, was contrary to all recognized legal procedure and the fundamental rules of evidence (File 26262–4918, G. C. M. Rec. No. 39689).

[P. 31] CITIZENSHIP: NOT FORFEITED BY MARRIAGE TO DESERTER WHO HAS LOST SAME.

A man who had lost his rights of citizenship by reason of conviction of the offense of desertion from the Navy was afterward married to a citizen of the United States.

In the case of the marriage of a woman, a citizen of the United States, to an alien, it was held that such marriage alone did not deprive the wife of American citizenship, for such marriage produced no dissolution of the native allegiance of the wife. But such marriage coupled with actual removal from the country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage, would be competent to effectuate this result (*Shanks* v. *Dupont*, 28 U. S. 242).

In accordance with the above, it was held that in the absence of acts on the part of the wife showing renouncement of her allegiance to the United States, her marriage alone did not forfeit her rights of citizenship (File 26282–349, Sec. Nav., Aug. 6, 1918).

COAST GUARD OFFICERS: CONSTRUCTION OF PROVISIONS OF ACT OF JULY 1, 1918, IN REGARD TO PROMOTION OF.

The act of July 1, 1918 (Public, No. 182), authorizes the temporary promotion of officers in the Coast Guard to such ranks and grades not above captain "as correspond to the rank and grade that may be attained in accordance with law, either permanently or temporarily, by line officers of the Regular Navy of the same length of total service"; with the proviso:

> "That nothing contained in this paragraph shall operate to disturb the relative position of officers in the Coast Guard with reference to precedence or promotion, but all such officers otherwise qualified shall be advanced in rank with or ahead of officers in the Coast Guard who were their juniors on the date of this act."

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Certain officers of the Coast Guard have such total length of service that, under the above proviso, they would be eligible for promotion to the rank of captain, but such officers are outranked in the Coast Guard by others who have not had sufficient service to be so promoted. Longer service was occasioned by failure to qualify upon examination for promotion and by reason of taking more than three years time to complete the course prescribed for cadets. Would such officers, if otherwise qualified, be eligible for promotion at this time, thus carrying with them, if promoted, their seniors whose length of service would not entitle them to promotion?

[P. 32] It is an established rule in the Navy that officers who lose numbers are to be regarded as losing length of service accordingly for purposes of promotion. Thus in the cases of ensigns, assistant surgeons, and warrant officers, all of whom were under various laws then in effect entitled to promotion upon the completion of a prescribed period of service, it was decided in numerous instances that loss of numbers due to sentences of courts-martial operated to delay the promotion of the officer concerned until the officer next below whom he was reduced had completed the required period of service; in other words, that the loss of numbers in those cases resulted constructively in the loss of such period of service for promotion purposes as might be necessary to conform the service of the one reduced to that actually rendered by the officer next above him in his reduced position in the Navy list (File 17789–20, Dec. 18, 1913, Opinion of the Judge Advocate General concurred in by the Secretary of the Navy, and sustained by the President on appeal, Feb. 18, 1914). Conversely, it has been held that an officer who is advanced or gains numbers in the Navy list is to be regarded as gaining length of service accordingly (17 Op. Atty. Gen. 56).

For purposes of precedence this rule—viz, that "officers who have been advanced or lost numbers on the Navy Register shall be considered as having gained or lost length of service accordingly"—has been recognized and adopted by Congress in statutory enactments (Sec. 1486, R. S., act of Mar. 3, 1871, sec. 10, 16 Stat. 537).

Under settled rules of construction the controlling purpose of a statute should govern, and a secondary purpose which from the nature of things would defeat the controlling purpose of the statute should not be ascribed to Congress; also, the specific intent of the legislature is to be found in the leading provisions of a statute. In the present case the controlling purpose of the statute, as shown by its leading provisions, was obviously to confer upon officers of the Coast Guard during the present war the same benefits of promotion as had already been given officers of the Navy of the same length of service; in other words, to place the two branches of the service upon an equality with reference to promotions, and not to grant officers of the Coast Guard greater benefits in this respect than those enjoyed by officers of the Navy. The secondary purpose of the act, as gathered from the proviso, was to prevent a disturbance of the precedence list, which might result, for example, in exceptional cases where an officer of the Coast Guard had for any reason been advanced to a position ahead of those with longer service, in which case the proviso required that the officer who had received such special advancement should retain his relative position when promotions were made instead of being overslaughed by his juniors, notwithstanding their longer service.

In accordance with the above the Judge Advocate General was of the opinion that the officers of the Coast Guard in question who had [P. 33] suffered loss of rank are ineligible for temporary promotions under the act of July 1, 1918, until all officers senior to them became due for such promotion by length of service (File 28762–402:1, J. A. G., Aug. 3, 1918).

CONTINUOUS SERVICE OF ENLISTED MAN IN NAVY: BROKEN BY SERVICE AS OFFICER IN NAVAL RESERVE FORCE.

The right of continuous service pay flows from continuous enlisted service, the continuity of which is broken by the acceptance of a commission in the Naval Reserve Force. This is distinguished from the rights of an enlisted man to continuous-service pay, reenlistment pay, service for transfer to the Fleet

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Naval Reserve, retirement, etc., which by express statutory provision are safeguarded while such man is serving temporarily as an officer of the Navy under the act of May 22, 1917 (File 26254–2249:26, J. A. G., Aug. 23, 1918).

CONTINUOUS-SERVICE PAY, REENLISTMENT MONEY, AND TRANSFER TO FLEET NAVAL RESERVE FORCE: WHAT SERVICES MAY BE COUNTED FOR.

Men enrolling in enlisted ratings in the Naval Reserve Force after previous service in the Naval Reserve Force, National Naval Volunteers, or Marine Corps, should be credited with such previous service for the purposes of continuous-service pay and additional pay under G. O. 34, but no service, except in the Navy and Marine Corps, should be counted in computing the length of service necessary to authorize the transfer of an enlisted man from the Navy to the Fleet Naval Reserve Force. Credit for previous service in the Naval Reserve Force, National Naval Volunteers, and Marine Corps for the purpose of continuous-service pay and additional pay under G. O. 34, so far as concerns members of the Naval Reserve Force in active service, is clearly authorized by the following provisions of the act of July 1, 1918.

> "Members of the Naval Reserve Force when employed in active service, ashore or afloat, under the Navy Department shall receive the same pay and allowances as received by the officers and enlisted men of the Regular Navy of the same rank, grades, or ratings and of the same length of service, which shall include service in the Navy, Marine Corps, Naval Reserve Force, Naval Militia, National Naval Volunteers, or Marine Corps Reserve."

The method of counting service for the purposes of G. O. 34 and continuous-service pay is set forth in a decision of the Comptroller, dated August 16, 1918. The foregoing provision does not, however, apply to members of the Regular Navy so as to give them credit for service in the Naval Reserve Force for the purposes stated (File 26254–2249:26, J. A. G., Aug. 23, 1918).

[P. 34] DENTAL OFFICERS: SERVICE OF, FOR PROMOTION UNDER THE ACT OF JULY 1, 1918.

The opinion of this office was requested as to the character of the service of dental officers for promotion under the above-mentioned act, with particular reference to active service in the Dental Reserve Corps.

Acting assistant dental surgeons, assistant dental surgeons, and acting dental surgeons for temporary duty in the Navy were first authorized by the act of August 22, 1912, and the Navy Dental Reserve Corps was first authorized by the act of March 4, 1913 (35 Stat. 903). The act of August 29, 1916, authorizes appointments to the Dental Corps of the Navy and also to the Dental Reserve Corps; but, as a matter of fact, no appointments have ever been made to the Dental Reserve Corps except under the act of March 4, 1913. The act of July 1, 1918, prescribes the rank and precedence of dental officers now in the Dental Corps, appointed under the act of August 22, 1912, and the act of August 29, 1916, and fails to mention the act of March 4, 1913, or officers appointed thereunder.

"Original appointments to the Navy Dental Corps shall be made in the grade of assistant dental surgeon with the rank of lieutenant (junior grade), and all dental officers now in the Dental Corps appointed under the provisions of the act of Congress approved August twenty-second, nineteen hundred and twelve (Statutes at Large, volume thirty-seven, page three hundred and forty-five), or under the provisions of the act of Congress approved August twenty-ninth, nineteen hundred and sixteen (Statutes at Large, volume thirty-nine, page five hundred and seventy-three), or who may hereafter be appointed, shall take rank and precedence with officers of the Naval Medical Corps of the same rank according to the dates of their respective commissions or original appointments, * * * *And provided further*, That dental officers who shall have gained or lost numbers on the Navy list shall be considered to have gained or lost service accordingly; and the time served by dental officers on active duty as acting assistant dental surgeons and assistant dental surgeons under provisions

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of law existing prior to the passage of this act shall be reckoned in computing the increased service pay and service for precedence and promotion of dental officers herein authorized or heretofore appointed" (act of July 1, 1918, Public, No. 182).

By referring specifically to dental officers appointed under the acts of August 22, 1912, and August 29, 1916, and omitting all reference to officers appointed under the act of March 4, 1913, it seems clear that Congress intended to include only service rendered by dental officers appointed under the acts of August 22, 1912, and August 29, 1916, and to exclude service rendered by dental officers of the Reserve Corps appointed under the act of March 4, 1913. A well-known rule, frequently applied by the courts in construing statutes is "expresio unius est exclusio alterius," which means that "the expression of one thing is the exclusion of another."

[P. 35] The act of July 1, 1918, expressly provides how officers "now in the Dental Corps appointed under the provisions of the act of Congress approved August twenty-second, nineteen hundred and twelve (Statutes at Large, volume thirty-seven, page three hundred and forty-five), or under the provisions of the act of Congress approved August twenty-ninth, nineteen hundred and sixteen (Statutes at Large, volume thirty-nine, page five hundred and seventy-three), or who may hereafter be appointed, shall take rank and precedence," and does not fix a rule for determining the rank and precedence of reserve dental officers appointed under the act of March 4, 1913, thereby clearly indicating an intent that only active service of dental officers actually appointed or commissioned in the Navy is to be reckoned in determining the rank and precedence of officers now in the Dental Corps and those hereafter appointed.

In accordance with the foregoing:

(*a*) Thomas Jones, who was appointed a dental surgeon to rank from August 29, 1916, and had no prior service as an officer of the Dental Corps, should take rank and precedence from August 29, 1916, the date of his commission in the Dental Corps, provided his service since that date has been continuous.

(b) John Doe, who was appointed an assistant dental surgeon, Dental Reserve Corps, December 29, 1913; reported for active duty March 31, 1914, appointed acting assistant dental surgeon August 21, 1914; appointed dental surgeon August 29, 1916, and who has been continuously on active duty since March 31, 1914, should take rank and precedence from August 21, 1914, the date of his "original appointment" as a dental officer of the Navy under the act of August 22, 1912 (File 13707–69:1, J. A. G., Aug. 14, 1918).

DISMISSAL AND REVOCATION OF TEMPORARY APPOINTMENT: WHEN EFFECTIVE.

A temporary commissioned officer of the Navy (commissioned from regular chief machinist's mate) was reported for misconduct and it was recommended that "his appointment be revoked." Subsequently, upon being reported for certain additional offenses, he was tried by general court martial (fleet case) and "sentenced to be dismissed from the United States naval service."

The Department's communication revoking his temporary appointment was duly mailed to the officer concerned; and subsequently the President confirmed the sentence of the general court martial in his case.

Upon presentation of the question as to the status of the officer referred to, under the peculiar circumstances of his case, it was stated by the Judge Advocate General:

> "The whole case, so far as revocation of appointment or dismissal is concerned, depends upon which was first communicated to Ensign ------. If he was informed of the revocation of his appointment prior to receipt of [P. 36] notice of the confirmation of his sentence by the President, then he reverted to his enlisted status. If, however, he received notice of his dismissal prior to the receipt of information that his appointment had been revoked by the Secretary of the Navy, it is my opinion that his dismissal is valid. In other words, notice to Mr. ------ was necessary to consummate either the revocation of his appointment or the dismissal; and notice of either one received by ------ would be legally effective for the purpose. It

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is therefore my opinion that Ensign _____ reverted to his status as a chief machinist's mate upon receipt of notice of revocation of his appointment provided such notice was received prior to notification that his sentence of dismissal was confirmed by the President. If, on the other hand, he was informed of his dismissal prior to notification of his appointment having been revoked, it is my opinion that he was, as an ensign, legally dismissed from the naval service (File 26262–4631 : 1, J. A. G., Aug. 14, 1918).

DRAFT BOARDS: SHOULD NOT PREVENT HONORABLY DISCHARGED MEN FROM REENLISTING WITHIN FOUR MONTHS.

The order of the President dated August 8, 1918, prohibiting further enlistments in the Navy and enrollments in the Naval Reserve Force applies only to original enlistments and the enlistment of men who have been out of the service for more than four months, and does not apply to the reenlistment of men who have been discharged with honorable discharges or with ordinary discharges with recommendation for reenlistment within the past four months.

The Selective Draft Act of May 18, 1917, requires that men, except those in the military and naval service of the United States, between the ages of 21 and 30, inclusive, must register. This requirement of law applies with equal force to all men of draft age who have been discharged from the naval service, whether they intend to reenlist within four months or not. Such men should not, however, be prevented by local draft boards from reenlisting in the Navy within four months from the date of discharge (File 28798–635, Sec. Nav., Aug. 27, 1918.)

ENLISTED MAN GIVEN TEMPORARY WARRANT OR COMMISSION: RIGHTS AND PRIVILEGES OF, UPON REVERSION TO ENLISTED STATUS.

It is the intent of the act of May 22, 1917 (providing for temporary appointments, etc.), that none of the rights, benefits, privileges, and gratuities of enlisted men are to be lost or abridged in any respect whatsoever by acceptance of temporary commissions or warrants; and on the termination of their temporary warrants or commissions, when they revert to their enlisted status, they are to receive all the rights, benefits, privileges, and gratuities that they would have received had their services been in an enlisted status rather than as warrant or commissioned officers.

[P. 37] It was accordingly held that an enlisted man who has been appointed a warrant or commissioned officer under the act of May 22, 1917, is entitled on discharge, after reverting to his enlisted status on the termination of his temporary warrant or commission, to a good-conduct medal, if he would have been entitled thereto on the expiration of his enlistment had he served his full term as an enlisted man. He is not, however, entitled to receive a good-conduct medal while serving under his temporary warrant or commission. (See Comp. Dec., June 20, 1918.)

The Department holds that when an enlisted man accepts a temporary warrant or commission his enlistment contract is held in abeyance until the termination of his temporary appointment as an officer, at which time he reverts to the enlisted status and receives all the benefits and gratuities that he would otherwise have received, except that he is not entitled to pay and allowances as an enlisted man during the period of time he serves as an officer (See 24 Comp. Dec. 179; File 7657–445 : 4, J. A. G., Aug. 7, 1918).

MAN TURNED OVER TO FEDERAL CIVIL AUTHORITIES: PAYMENT OF RETURN TRANSPORTATION OF, UPON DISMISSAL OF CASE AGAINST.

A man in the Naval Reserve Force serving at Seattle, Wash., was turned over to a United States marshal for trial by the Federal civil authorities upon a criminal charge in San Francisco, Calif. The case against him was dismissed by the court, and the man was left stranded in San Francisco without funds to pay his transportation back to Seattle.

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The Attorney General was requested by the Secretary of the Navy to instruct the United States marshal at San Francisco to pay the necessary transportation and other expenses of the man's return to Seattle (File 26524–600: 1, Sec. Nav.).

This request was complied with and the necessary expenses of the man's return to Seattle were paid from an appropriation under the control of the Department of Justice (File 26524–600: 2). The question as to payment of such expenses of return, referred to in paragraph 13, General Order No. 121 of September 17, 1914, may thus be regarded as settled.

MEDAL PRESENTED BY FOREIGN GOVERNMENT PRIOR TO WAR: MAY BE NOW TURNED OVER BY STATE DEPARTMENT TO DONEE.

A naval officer was presented with a Legion of Honor medal by the French Government prior to the outbreak of the present war. As required by the Navy Regulations and the act of January 31, 1881 (21 Stat. 604), the medal was turned over to the custody of the State Department.

Upon presentation of the question as to whether or not authority of law now existed for the State Department to turn this medal over to the officer concerned, it was the opinion of the Judge Advocate [P. 38] General of the Navy that such authority was contained in a proviso of the Army appropriation act of July 9, 1918, reading as follows:

> "That any officer or enlisted man of the military forces of the United States is hereby authorized to accept and wear any medal or decoration heretofore bestowed by the Government of any of the nations concurrently engaged with the United States in the present war" (File 9644–45, Aug. 30, 1918).

INVOLUNTARY RETIREMENT OF OFFICER OF NAVY: NOT AUTHORIZED AFTER 45 YEARS' SERVICE.

By an act of Congress approved December 21, 1861, section 1 (12 Stat. 329), it was provided:

> "That whenever the name of any naval officer now in the service, or who may hereafter be in the service of the United States, shall have been borne on the Naval Register forty-five years, or shall be of the age of sixty-two years, he shall be retired from active service, and his name entered on the retired list of officers of the grade to which he belonged at the time of such retirement."

Various amendments were made to the law above quoted, among others being the act of March 3, 1873 (17 Stat. 556), which provided that the above-quoted enactment of December 21, 1861, "shall not be hereafter construed to retire any officer before sixty-two years of age."

When the draft of the Revised Statute was submitted to Congress by the Commissioners for the Revision of the United States Statutes, said draft contained the following section:

> "When any officer below the rank of vice admiral is sixty-two years old, *or when his name has been borne on the Naval Register for a period of forty-five years since he arrived at the age of sixteen years*, he shall, except in the case provided in the next section, be retired by the President from active service."

However, the Revised Statutes as adopted by Congress and approved by the President omitted the words *italicized* in the above-quoted section of the commissioners' draft, and with this modification the section was carried into the Revised Statutes as section 1444, which is now existing law except for the recent change by Congress of the retiring age to 64 years.

By another section of the Revised Statutes as adopted by Congress and approved by the President all acts of Congress passed prior to December 1, 1873, any portion of which were embraced in the Revised Statutes, were repealed (sec. 5596, R. S.).

[C. M. O. 114—1918]

It follows from the foregoing that the law originally providing for the involuntary retirement of naval officers after 45 years' service is not now in effect.

By the laws relating to the Army it is provided that "when any officer has served forty-five years as a commissioned officer, or is [P. 39] sixty-two years old, he may be retired from active service at the discretion of the President" (sec. 1244, R. S.). This provision is made applicable to the Marine Corps by section 1622 of the Revised Statutes, which provides that "the commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army, except as is otherwise provided in the next section." The Army statute quoted, however, has no application to the retirement of officers of the Navy.

While there is no authority of law for the involuntary retirement of an officer in the Navy on the ground that he has completed 45 years' service, section 1442 of the Revised Statutes provides that "the Secretary of the Navy shall have authority to place on furlough any officer on the active list of the Navy." The pay of officers placed on furlough by the Secretary of the Navy under this section is one-half of the pay to which they would be entitled on active duty (sec. 1557, R. S.; act of May 13, 1908; File 27231–120, J. A. G., Aug. 10, 1918).

OFFICERS: COMPENSATION FOR SERVICES RENDERED TO ANY PERSON IN CONNECTION WITH ANY CONTRACT, CLAIM, CONTROVERSY, ETC., OR IN ANY MATTER IN WHICH THE UNITED STATES IS A PARTY.

The opinion of this office was requested as to the application of section 113 of the Criminal Code of the United States to certain officers and men of enlisted rating in the Naval Reserve Force who were formerly patent attorneys, and who still retain their former connections with law firms engaged in patent law practice, the business being carried on by their partners except for consultations and correspondence in their own time.

Section 113 of the Criminal Code of the United States (act of Mar. 4, 1909, 35 Stat. 1109), which supersedes section 1782 of the Revised Statutes, provides that—

> "Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

[P. 40] In view of the wording of section 113 of the Criminal Code which makes it applicable to "a Senator, Member of or Delegate to Congress, or a Resident Commissioner, * * * the head of a department, or other officer or clerk in the employ of the United States," it is doubtful if enlisted members of the Naval Reserve Force are included within its provisions. It is clear, however, in its application to officers of the Naval Reserve Force; and it would be the function of this office, on a showing that the above-mentioned section of the Criminal Code has been or is being violated by officers in any branch of the naval service, to take the necessary steps looking to the trial by court martial of those accused, if such action should be decided upon by the Department.

The act is very broad in its provisions, and, in my opinion, applies to an officer of the Navy or Naval Reserve Force who receives or agrees to receive, either directly or indirectly, compensation for services rendered by him, or

[C. M. O. 11–1918]

any other person in relation to patent matters pending in the Patent Office. It is important, therefore, that the Naval Reserve officers referred to should be cautioned against any act which might constitute a violation of the statute quoted, as it is the duty of the Department to take whatever steps may be necessary to punish violation thereof (File 28550–373:1, J. A. G., Aug. 22, 1918).

PARDON: DOES NOT RENDER PERSONS WHO HAVE BEEN CONVICTED OF CRIME ELIGIBLE FOR ENLISTMENT IN THE NAVY.

It is the opinion of this Department that R–3686, U. S. Navy Regulations, 1913, which provides that "No person who has been convicted of crime or is of known bad character shall be enlisted," should be viewed as prescribing qualifications of applicants for enlistment in the naval service, rather than as punishment of individual offenders, and that the incidental disabilities which such offenders may suffer by reason of the above regulation are not removed by a pardon. While the foregoing regulation, which was issued pursuant to section 1547 of the Revised Statutes, might be changed or waived in individual cases, it is not the policy of the Department to do so (File 28798–165:1, Sec. Nav., Aug. 2, 1918).

PROMOTION BY SELECTION OF STAFF OFFICERS: EFFECT OF ACT OF JULY 1, 1918, UPON.

The act of July 1, 1918, provides as follows:

> "The provisions of existing laws with reference to promotion by selection in the line of the Navy are hereby extended to include and authorize advancements to the ranks of commander, captain, and rear admiral in the Staff Corps of the Navy under the same conditions, in all respects, except as may be necessary to adapt the said provisions to such Staff Corps: *Provided*, That boards of selection shall in each case be composed, when practicable, of not less than five [P. 41] members of the corps concerned and promotions shall be made on the basis of fitness alone by selection from among the officers of the rank next below: *Provided further*, That the requirements for sea service in grade, length of service in grade, and maximum age in grade, for promotion shall not apply."

The act of July 1, 1918, quoted above, extends the provisions of existing laws governing promotion by selection in the line to include advancements to the higher ranks in the staff corps of the Navy with certain modifications authorized in said act. The act of August 29, 1916, thus made applicable to the Staff Corps, provided in part that "hereafter all promotions to the grades of commander, captain, and rear admiral of the line of the Navy * * * shall be by selection only." Under said act it was held that examinations and promotions by seniority under prior laws, which were not consummated prior to the date of said act, were of no legal effect in view of the change in the law (File 26260–3663:2, Oct. 9, 1916; File 26260–3648:3, Sept. 22, 1916; see also File 26521–203, July 31, 1917, concerning changes made in the promotion laws governing the Staff Corps by act of May 22, 1917, sec. 20).

In the case presented of a certain paymaster it appears that he had been examined for promotion by seniority, found qualified, nominated by the President, and confirmed by the Senate, all before July 1, 1918. No commission has been issued to him in the higher grade, and the office of pay inspector has not therefore vested in him. However, there is authority for holding that the confirmation, and even the nomination, of an eligible is sufficient to support a commission, although his eligibility for the office may cease before the commission is actually issued or even before he is confirmed (10 Op. Atty. Gen. 308; File 8622–2, Feb. 10, 1908). It has even been held by the Attorney General that an officer who reached the retiring age and was placed on the retired list after he had been nominated for promotion on the active list but prior to his confirmation by the Senate might, if afterwards confirmed by the Senate, be issued a commission in the higher grade from the date when the vacancy occurred (18 Op. Atty. Gen. 393).

[C. M. O. 114—1918]

The case presented of a certain medical inspector differs from that of the paymaster above considered in that the former, although found qualified for promotion by seniority prior to the act of July 1, 1918, has not been nominated for such promotion. In this case the precedents cited above with reference to the act of August 29, 1916, are applicable; as is also a ruling of the Attorney General that the President could not appoint an ineligible to office, although before the passage of an act prescribing qualifications which the candidate did not possess, the President had instructed the Secretary of the Navy to prepare a nomination of the person in question to the Senate for the office, which nomination had not, however, actually been made [P. 42] upon the passage of the act prescribing new qualifications. (10 Op. Atty. Gen., 324.) In that case the Attorney General remarked that if the nomination had actually been made by the President prior to the passage of the act prescribing new qualifications for the office in question the appointment might lawfully have been made after confirmation by the Senate, whether such action of the Senate had been taken before or after the date of said act (File 26521-280:3, J. A. G., Aug. 8, 1918).

PROMOTIONS IN MEDICAL CORPS: LEGALITY OF SUSPENDING.

Under the act of August 29, 1916, the actual number of commissioned officers on the active list of the Medical Corps at any one time, exclusive of commissioned warrant officers and additional numbers in grade, must be distributed between the various grades and ranks of the Medical Corps in the proportions specified by said act as determined by computations made by the Secretary of the Navy. Accordingly, it would be clearly illegal to stop all promotions to the rank of commander and above in the Medical Corps until such time as the actual strength of the line shall equal the same proportion of its total authorized strength as that now obtaining in the Medical Corps, as this would result in an excess in the actual number of officers in the Medical Corps with the rank of lieutenant commander and below.

It was further held that under the act of May 22, 1917, section 4, as amended and reenacted by the act of July 1, 1918, temporary promotions may be made to the rank of commander and above in the Medical Corps, provided a sufficient number of officers shall not be available for regular promotion to such ranks; but to make such temporary promotions when a sufficient number of officers are available for permanent promotion would be unauthorized (File 26521-282:1, J. A. G., Aug. 22, 1918).

RETIRED ENLISTED MAN: REVERTS TO RETIRED LIST AS SUCH UPON TERMINATION OF TEMPORARY APPOINTMENT AS OFFICER.

If appointed a temporary commissioned or warrant officer under the provisions of the act of May 22, 1917, an enlisted man on the retired list will revert, on the termination of his temporary appointment, to the rating held by him on the retired list at the time of his appointment, unless while holding such temporary appointment he becomes entitled pursuant to law to a higher rating on the retired list, in which case he will revert to the higher rating. If appointed a permanent commissioned or warrant officer, he does not revert, nor should he be relieved from active duty, as such an appointment takes him off the retired list and destroys his status as an enlisted man (File 7657-634:1, J. A. G., Aug. 30, 1918).

[P. 43] RETIRED ENLISTED MAN TRANSFERRED TO FLEET NAVAL RESERVE: DOES NOT REVERT TO RETIRED LIST AT END OF ACTIVE DUTY.

A retired enlisted man might be transferred from the Navy to the Fleet Naval Reserve, but such transfer would be of doubtful advantage to the man, as he would have no right, under the present laws, to revert to his former status on the retired list of the Navy on being relieved from active service in the Fleet Naval Reserve (File 7657-634:1, J. A. G., Aug. 30, 1918).

[C. M. O. 114—1918]

RETIRED ENLISTED MEN: CANNOT BE ENROLLED IN NAVAL RESERVE FORCE.

Upon opinion requested as to whether or not a retired enlisted man, who is over 50, can be enrolled in the Fleet Naval Reserve, or in any other class of the Naval Reserve Force, it was held a retired enlisted man is already in the naval service, and consequently cannot be enrolled in the Fleet Naval Reserve or in any other class of the Naval Reserve Force, unless first discharged from the retired list. The only class of the Naval Reserve Force in which age limits are fixed by law is the Naval Reserve. In this class the act of August 29, 1916, as amended by the act of April 25, 1917, fixes the maximum age limit for enlisted men at 35 years and for officers at 50 years. (File 7657–634: 1, J. A. G., Aug. 30, 1918).

RETIRED ENLISTED MEN ORDERED TO ACTIVE SERVICE: CANNOT BE APPOINTED EITHER PERMANENTLY OR TEMPORARILY TO COMMISSIONED OR WARRANT RANK UNDER ACT OF JULY 1, 1918.

The act of July 1, 1918, provides:

> "That any enlisted man of the Navy or Marine Corps upon the retired list who has been ordered into active service since April sixth, nineteen hundred and seventeen, or who may hereafter be ordered into active service, shall be eligible for promotion and he shall be entitled to the pay and benefits of continuous service of such rank and for such length of time as he is or has been employed in active service, and when relieved of active service shall retain upon the retired list the rank and service held by him at the time of such relief, with the pay and allowances of such rank on the retired list; and the accounting officers of the Treasury are hereby directed to allow in the accounts of any enlisted man of the Navy or Marine Corps who resigned from the retired list in order to reenlist for appointment in a higher grade, the same continuous-service pay and the benefits of such rank to which he may have been appointed upon reenlistment, as if his service had been continuous, and any difference in pay from the date of reenlistment shall be credited to his account."

The Judge Advocate General was of the opinion that the above-quoted provision contained no authority whereby an enlisted man on the retired list of the Navy may be appointed either permanently or temporarily to commissioned or warrant rank.

[P. 44] That the law under consideration refers only to advancements to higher enlisted ratings is shown by the fact that it confers "benefits of continuous service" upon retired enlisted men who have been advanced in rating. The benefits of continuous service apply only to enlisted men, and the use of such language by Congress in the law referred to, and the purpose of its enactment, indicate that it had in mind the advancement of retired enlisted men to higher enlisted ratings only.

It may be remarked in this connection that the promotions referred to in the above-quoted statute are advancements to higher positions on the retired list of enlisted men of the Navy. The appointment of a retired enlisted man to a commissioned or warrant office on the retired list would involve his transfer from the retired list of enlisted men to the retired list of officers, and under the statute, if such transfers are authorized, they would be permanent, although if appointed as officers on the active list, they would, under the act of May 22, 1917, revert to their status as retired enlisted men upon the termination of such appointments. It has many times in the past been held that the retired list of officers is intended for persons who have served honorably as officers on the active list, and that one who has not served as an officer on the active list of the Navy cannot, without specific authority of Congress, be placed on the retired list of officers. Had Congress intended to create new offices on the retired list to be filled by the appointment thereto of retired enlisted men, it would have done so in clear and unmistakable language (File 7657–634, J. A. G., Aug. 12, 1918).

[C. M. O. 115—1918]

RETIRED OFFICERS: ACCEPTANCE OF CIVIL EMPLOYMENT BY.

This office has held repeatedly that the question as to whether or not a retired officer (not on active duty) may or may not accept any civil position is one to be determined by him upon his own responsibility, as the Government would not become interested in the matter unless and until he has accepted illegal employment. (See par. 42, p. 543, Naval Digest, 1916.) Attention is also invited to the act of June 10, 1896 (29 Stat. 361), referred to in paragraphs 34, 35, 36, and 37, page 542, Naval Digest, 1916 (File 9736–73, J. A. G., Aug. 23, 1918).

SERVICE OF FORMER ENLISTED MAN AS AN OFFICER IN THE NAVAL RESERVE FORCE: SHOULD NOT BE COUNTED AS "NAVAL SERVICE" FOR PURPOSE OF TRANSFER TO FLEET NAVAL RESERVE.

It is the opinion of the Judge Advocate General that, under the act of August 29, 1916, service as an officer in the Naval Reserve Force should not be counted as "naval service" for the purpose of transfer from the Navy to the Fleet Naval Reserve, as authorized in the case of an enlisted man having a total of 20 years' naval service, [P. 45] or at the termination of an enlistment, after 16 years' naval service (See General Order No. 231, page 23; File 26254–2249: 26, J. A. G., Aug. 23, 1918).

TEMPORARY PROMOTION: EFFECT OF, UPON ELIGIBILITY FOR PERMANENT AND TEMPORARY PROMOTION OF OFFICER OF PAY CORPS.

A pay inspector was given a temporary appointment as pay director, with the rank of captain, to fill a permanent vacancy. Said temporary appointment has not been revoked or superseded by the permanent appointment of any officer to fill said vacancy.

The Judge Advocate General was of the opinion that the temporary appointment now held by the above-mentioned pay director would continue in force until six months after the termination of the present war, unless in the meantime otherwise directed by the President or superseded by the permanent appointment of any officer to fill the same vacancy. (See act of May 22, 1917, secs. 4 and 8.) So long as the temporary appointment of the aforesaid pay director continues in effect he is eligible for selection not only to the permanent grade of pay director with the rank of captain, but also to the temporary grade of pay director with the rank of rear admiral (File 26521–280: 2, J. A. G., Aug. 8, 1918).

C. M. O. 115—1918

[P. 1] Ensign (T) Ray W. Marsh (NL), U. S. Navy, was tried by general court martial on August 12, 1918, on board the U. S. S. *Georgia*, by order of the Commander, Battleship Force One, U. S. Atlantic Fleet, on the following charge:

Charge.—Absence from station and duty after leave had expired (one specification).

FINDINGS

The court found the specification of the charge "proved in part," and the accused "guilty" of the charge.

SENTENCE

"The court therefore sentences him, Ensign (T) Ray W. Marsh (NL), U. S. Navy, to be dismissed from the United States naval service."

[C. M. O. 116—1918]

ACTION OF THE CONVENING AUTHORITY

On August 16, 1918, the convening authority placed the following endorsement on the record:

"The accused, upon being arraigned, pleaded 'not guilty' to the specification, and 'guilty' to the charge. In view of the fact, however, that the prosecution introduced evidence which proved beyond a reasonable doubt the offenses alleged, this irregularity does not invalidate. This case is distinguished from that set forth in Naval Digest, 1916, page 34, paragraph 15, by the fact that in this case evidence was introduced by the prosecution which conclusively proved the offense.

"Subject to the above remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign (T) Ray W. Marsh (NL), U. S. Navy, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

ACTION OF THE SECRETARY OF THE NAVY

On August 29, 1918, the Bureau of Navigation concurred in the action taken by the convening authority.

[P. 2] In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings in the foregoing case was, on August 31, 1918, submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On September 3, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 116—1918

[P. 1] Lieutenant (junior grade) Frank A. Poe, U. S. Naval Reserve Force, was tried by general court martial on April 12, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Culpable negligence and inefficiency in the performance of duty (two specifications).

Charge II.—Absence from station and duty without leave (one specification).

Charge III.—Scandalous conduct tending to the destruction of good morals (two specifiations).

SENTENCE

"The court therefore sentences him, Frank A. Poe, lieutenant (junior grade), United States Naval Reserve Force, to be dismissed from the United States naval service, and to be imprisoned at hard labor in such prison or penitentiary as the Secretary of the Navy may designate for a period of fifteen (15) years."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On August 30, 1918, the Bureau of Navigation, in a letter to the Secretary of the Navy, recommended that, in view of the recommendation to disenroll the accused made by a Board of Medical Survey, the accused be honorably discharged from the U. S. Naval Reserve Force. The board was of the opinion that the accused's inferior mentality was, to a large extent, responsible for his delinquencies.

ACTION OF THE SECRETARY OF THE NAVY

On August 31, 1918, the recommendation of the Bureau of Navigation was disapproved.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Frank A. Poe, U. S. Naval Reserve

[C. M. O. 123—1918]

Force, were approved, but the period of confinement was reduced to five (5) years, and [P. 2] the naval prison at the Navy Yard, Portsmouth, N. H., was designated as the place for the execution of so much of the sentence, as reduced, as relates to confinement. In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence, as reduced, be confirmed.

ACTION OF THE PRESIDENT

On September 7, 1918, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

C. M. O. 122—1918

[P. 1] Keeper Thomas L. Stitt, U. S. Coast Guard, was tried by general court martial on July 5, 1918, at the Navy Yard, Mare Island, Calif., by order of the Secretary of the Navy, and acquitted of the following charge:

Charge.—Drunkenness on duty (two specifications).

RETURNED FOR REVISION

On August 9, 1918, the record of proceedings in the foregoing case was returned to the court, with the direction that the court reconvene for the purpose of reconsidering its findings and the acquittal. In the opinion of the Department the findings and acquittal were not in accord with the evidence adduced.

ACTION IN REVISION

The court decided, respectfully, to adhere to its former findings and acquittal.

RECOMMENDATION OF THE CAPTAIN COMMANDANT, U. S. COAST GUARD

On September 10, 1918, the Captain Commandant, U. S. Coast Guard, recommended that the findings and acquittal be disapproved.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

In view of all the circumstances set forth in the record of testimony in this case, the Judge Advocate General, on September 10, 1918, recommended that the proceedings of the court in the foregoing case be approved; that the findings and acquittal be disapproved; and that the accused be released from arrest and restored to duty.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendations of the Judge Advocate General are approved and Keeper Thomas L. Stitt, U. S. Coast Guard, will be released from arrest and restored to duty.

C. M. O. 123—1918

[P. 1] Keeper Orick P. Britt, U. S. Coast Guard, was tried by general court martial on July 30, 1918, at the Navy Yard, Mare Island, Calif., by order of the Secretary of the Navy and found guilty of the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (three specifications).

Charge II.—Neglect of duty (one specification).

Charge III.—Using abusive, profane, and obscene language toward another person in the service (one specification).

[C. M. O. 126—1918]

SENTENCE

"The court therefore sentences him, Keeper Orick P. Britt, United States Coast Guard, to be dismissed from the United States Coast Guard and from the United States naval service."

APPLICATION FOR REHEARING

The accused applied for a reopening and a rehearing of the case, giving as reasons that he was virtually tried on a charge totally different from that laid; that he was surprised and not prepared to meet said different charge; that he could upon rehearing fully exonerate himself; that he had newly discovered evidence; and that he was able to produce additional evidence.

RECOMMENDATION OF THE CAPTAIN COMMANDANT, U. S. COAST GUARD

On September 4, 1918, the Captain Commandant, U. S. Coast Guard, recommended that the application for a rehearing be denied. In the opinion of the Captain Commandant the accused had ample opportunity and time to bring all his witnesses before the court, the findings of the court were sustained by the evidence before it, and the sentence was just.

It was further recommended that said sentence be approved.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

In an endorsement to the record in the foregoing case, the Judge Advocate General, on September 4, 1918, was, after a [P. 2] careful examination of the record in the foregoing case, of the opinion that the case should not be reopened for a rehearing, and recommended that the proceedings, findings, and sentence be approved.

ACTION OF THE SECRETARY OF THE NAVY

The remarks and recommendations of the Judge Advocate General were approved on September 5, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Keeper Orick P. Britt, U. S. Coast Guard, was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On September 10, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 126—1918

[P. 1] Assistant Paymaster Matthew A. Mackie, U. S. Navy, was tried by general court martial on June 26, 1918, at Base Six, by order of the Commander, U. S. Naval Forces Operating in European Waters, on the following charges:

Charge I.—Drunkenness on duty (three specifications).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

Charge III.—Violation of a lawful regulation issued by the Secretary of the Navy (three specifications).

Charge IV.—Culpable inefficiency in the performance of duty (one specification).

Charge V.—Embezzlement (one specification).

Charge VI.—Absence from station and duty without leave (one specification).

Charge VII.—Negligence in obeying orders (one specification).

[C. M. O. 126–1918]

FINDINGS

The court found the first specification of the first charge "proved," the second and third specifications of the first charge "proved by plea," and the accused "guilty" of the first charge; the specification of the second charge "proved in part," and the accused "guilty" of the second charge; the specifications of the third charge "not proved," and the accused "not guilty" of the third charge; the specification of the fourth charge "proved by plea," and the accused "guilty" of the fourth charge; the specification of the fifth charge "proved," and the accused "guilty" of the fifth charge; the specification of the sixth charge "proved by plea," and the accused "guilty" of the sixth charge; the specification of the seventh charge "proved by plea," and the accused "guilty" of the seventh charge.

SENTENCE

"The court therefore sentences him, Assistant Paymaster Matthew A. Mackie, U. S. Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of five (5) years."

[P. 2] ACTION OF THE CONVENING AUTHORITY

On July 21, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Assistant Paymaster Matthew A. Mackie, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

REMARKS AND RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL

On September 11, 1918, the Judge Advocate General, in an endorsement to the record in the foregoing case, noted the following irregularities:

The precept bore a date later than the order for trial and the reference of the charges and specifications to the judge advocate.

Only one of the six members of the court was of the same corps as the accused. (See sec. 221, Naval Courts and Boards, 1917.)

In the opinion of the Judge Advocate General the above irregularities did not invalidate the proceedings.

There was no notation in the record by appropriate entry that the accused was afforded his right of cross-examining certain witnesses for the prosecution. The Judge Advocate General was of the opinion, however, that the notation in each instance that "neither the judge advocate, the accused, nor the court desired further to examine this witness" might, in this case, be held to cover such omission.

The record shows that the court found the accused "not guilty" of charge III, but the prescribed notation setting forth his acquittal thereof was omitted. (See Naval Courts and Boards, 1917, sec. 322; Naval Digest, 1916, p. 242, par. 67.)

The Judge Advocate General was further of the opinion that the findings of the court on charge III and the specifications thereunder were not in accord with the evidence adduced, and it was therefore recommended that said findings be disapproved. It was further recommended that the naval prison at the Navy Yard, Portsmouth, N. H., be designated as the place of confinement.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, [P. 3] were approved on September 20, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On September 20, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

[C. M. O. 128—1918]

C. M. O. 127—1918

[P. 1] Boatswain James Douglas, U. S. Naval Reserve Force, was tried by general court martial on August 7, 1918, at Base Two, by order of the Commander, Train, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Absent from station and duty without leave (two specifications).

Charge II.—Disobeying the lawful order of his superior officer (two specifications).

Sentence.

"The court therefore sentences him, Boatswain James Douglas, U. S. N. R. F., to be dismissed from the United States naval service."

Action of the Convening Authority

On August 11, 1918, the convening authority, subject to remarks concerning the introduction of evidence on behalf of the accused, which, in the opinion of the convening authority, was not inconsistent with the plea of guilty, approved the proceedings, findings, and sentences of the general court martial in the foregoing case of Boatswain James Douglas, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion of the Judge Advocate General

In the opinion of the Judge Advocate General the testimony of the accused when he was on the stand as a witness in his own behalf, presumably to show extenuating circumstances, was inconsistent with his plea of guilty to the first specification of the second charge. It was therefore recommended that the finding of the court on said specification be disapproved.

[P. 2] Action of the Secretary of the Navy

The remarks and recommendations of the Judge Advocate General, concurred in by the Acting Chief of the Bureau of Navigation, were approved on September 16, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record in the foregoing case was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

Action of the President

On September 20, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 128—1918

[P. 1] Ensign (E) Tenus M. Docken, U. S. Naval Reserve Force, was tried by general court martial on July 18, 1918, at the Navy Yard, Norfolk, Va., by order of the Commandant, Fifth Naval District, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

Charge III.—Conduct to the prejudice of good order and discipline (one specification).

Sentence

"The court therefore sentences him, Ensign (E) Tenus M. Docken, United States Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of ten (10) years."

[C. M. O. 128—1918]

RETURNED FOR REVISION

On August 14, 1918, the convening authority returned the record in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering its finding on the second charge and the specification thereunder, which, in in the opinion of the convening authority, was not in accord with the evidence adduced.

ACTION IN REVISION

The court decided "respectfully to adhere to its former finding on the second charge and the specification thereunder."

ACTION OF THE CONVENING AUTHORITY

In an endorsement to the record in the foregoing case the convening authority expressed his disapproval of the finding of the court on the second charge and the specification thereunder as follows:

[P. 2] "The specification of the second charge, 'Scandalous conduct tending to the destruction of good morals,' alleges that the accused 'was, on the public streets of the city of Norfolk, Virginia, on or about May 4, 1918, the United States then being in a state of war, so much under the influence of intoxicating liquor while in uniform, in the presence of several persons, as to cause himself to be arrested by the civil authorities." In proof of said specification the prosecution offered J. R. Anderson, the policeman who made the alleged arrest. Anderson testified, in substance, that while standing at the corner of Granby and Freemason Streets, he saw a naval officer's hat knocked off, and on going over to investigate the trouble found that the accused had struck the other officer and knocked his hat off. The witness saw no violence. He arrested the accused on the other officer's statement that he wanted accused arrested because accused had struck him and knocked his hat off. Witness phoned for the patrol wagon, and while awaiting its arrival, the officer making the complaint against the accused stated that he desired to withdraw the charges. Witness replied that it was too late; that it would be necessary to go to the station house, and if the captain saw fit, he could turn the accused loose. The accused, complainant, and witness thereupon proceeded to the station house, where witness told the captain that he had no charges against the accused and that the officer who had preferred the charges didn't want anything done, whereupon the accused was allowed to go. Witness was emphatic that he had no charges against the accused. In answer to Q. (Did you assist in placing him in the automobile?) he states, 'I never placed him in the automobile as a prisoner. The other man had the charges against him. I didn't have any charges at all.' It appears clear that for whatever reason the accused was arrested, if arrested at all, it was not because of being very much under the influence of intoxicating liquor, as alleged in the specification. In view of the foregoing, the findings of the court on the second charge and the specification thereunder are disapproved."

The convening authority further expressed the opinion that certain testimony impeaching a witness for the defense was improperly allowed to be given.

Subject to the above comments, the convening authority, on September 4, 1918. approved the proceedings and findings on the [P. 3] first and third charges and the specifications thereunder; disapproved the finding on the second charge and the specification thereunder; approved the sentence of the court in the foregoing case of Ensign (E) Tenus M. Docken, U. S. Naval Reserve Force; and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

ACTION OF THE SECRETARY OF THE NAVY

On September 21, 1918, the Secretary of the Navy approved the proceedings and findings on the first and third charges and the specifications thereunder in the foregoing case; disapproved the finding on the second charge and the

[C. M. O. 129—1918]

specification thereunder; approved the sentence; but, in view of all the circumstances of the case, reduced the period of imprisonment to three (3) years; designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for execution of so much of the sentence, as reduced, as relates to confinement; and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence, as reduced, be confirmed.

ACTION OF THE PRESIDENT

On September 30, 1918, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

C. M. O. 129—1918

[P. 21] ARGUMENT OF COUNSEL: SHOULD BE RESTRICTED TO MATTERS BROUGHT OUT IN EVIDENCE.

It was noted in a recent case that the court permitted the accused's counsel to make up his closing argument almost wholly of material facts which were not in evidence, and which, had they been duly proven, would have constituted a valid defense to the charge.

The court should confine the argument of counsel to the facts adduced in the case. While it is true that a reasonable latitude should be allowed counsel in his closing argument, such argument should not be made a vehicle of evidence nor embrace averments of material facts, which, if properly introduced, would be evidence (File 26262–4993, G. C. M. Rec. No. 39891).

INADEQUATE SENTENCE.

An accused was found guilty of "absence from station and duty without leave," and was sentenced, by the general court martial which tried him, to be discharged as undesirable. The court adhered to the sentence in revision.

The sentence of the court can hardly be regarded as a compliance with the statutory requirement that courts martial in all cases of conviction adjudge an adequate sentence. (See art. 51, A. G. N.) A discharge other than dishonorable or bad conduct is not considered a punishment (File 26251–16741, G. C. M. Rec. No. 39327).

JURISDICTION OF COURT: ESTABLISHED BY GOING OUTSIDE RECORD.

The accused in a recent general court-martial case was improperly described in the specifications as "formerly chief printer, U. S. Navy." By an examination of the Department's records it was discovered that, although the accused's enlistment had expired, he was being held for trial by court martial and had never been given a [P. 22] discharge. The accused was therefore still in the Navy and subject to the court's jurisdiction.

Although it should not be necessary to go outside the record to establish the jurisdiction of the court, it was held that the above-mentioned irregularity was not fatal. (See sec. 21, Naval Courts and Boards, 1917; File 26251–16178, G. C. M. Rec. No. 38992.)

STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

The accused in a recent case was charged, inter alia, with "using abusive, obscene, and profane language toward his superior officer," and "using abusive, obscene, profane, and threatening language toward another person in the service." He pleaded guilty to all charges and specifications thereunder, which pleas were accepted by the court. He then made the following statement, which in

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the opinion of the Judge Advocate General was inconsistent with his pleas to the charges above set forth, and the court made a material error in not following sections 310 and 312, Naval Courts and Boards, 1917: "On this afternoon that I returned, I * * * drank something * * * it knocked me out, and I didn't remember anything until the following morning when I woke up in the American brig" (File 26262–5103, G. C. M. Rec. No. 40103).

TESTIMONY OF ACCUSED: INCONSISTENT WITH PLEA OF GUILTY.

The accused in a recent case pleaded guilty to the charge of "desertion." He then took the stand to testify in extenuation and gave testimony in substance as follows: That he suffered from a lapse of memory and remembered nothing during the period of his absence; that he had been subject to similar attacks since he was about 10 years old as a result of an injury to his head.

The Judge Advocate General was of the opinion that the accused's testimony was inconsistent with his plea of guilty, and that the failure of the court then to proceed in accordance with sections 310 and 312, Naval Courts and Boards, 1917, was fatally irregular (File 26251–17510, G. C. M. Rec. No. 39589).

ADVANCEMENT IN RANK AUTHORIZED BEFORE COMPLETION OF INSTRUCTION FOR PROMOTION: CANNOT BE CONSUMMATED AFTER DEATH OF PERSON TO BE PROMOTED.

A chief quartermaster in the Naval Reserve Force was under instruction for commissioned rank in class 5, U. S. Naval Reserve Force. Proper authority had been granted his commanding officer [P. 23] to enroll him as an ensign in class 5, U. S. Naval Reserve Force. He was accidentally killed before said enrollment and before the completion of his course of instruction.

Held: That the Department is not now authorized to take any action in the direction of consummating the deceased's advancement in rank, nor could it recognize him as holding the rank of ensign when killed, because he did not in law or fact hold such rank, such steps as had been taken with a view to his advancement having been anticipatory and conditional upon the final completion of his training period (File 26983–840, J. A. G., Sept. 24, 1918, citing 29 Op. Atty. Gen., 254, 12 Op. Atty. Gen., 229, and 175 S. and A. Memo. 3780).

COAST GUARD, PROMOTIONS IN: PROVISIONS OF ACT OF JULY 1, 1918, RELATING TO, CONSTRUED.

Constructor A of the Coast Guard, prior to July 1, 1918, took precedence immediately ahead of first lieutenant of Engineers B. B was promoted to the rank of captain of Engineers under the act of July 1, 1918, with rank from the date of the act.

The act of July 1, 1918, provides "that nothing contained in this paragraph shall operate to disturb the relative position of officers in the Coast Guard with reference to precedence or promotion, but all such officers otherwise qualified shall be advanced in rank with or head of officers in the Coast Guard who were their juniors on the date of this act."

It was accordingly held that A was entitled to promotion even though he had not served the length of time prescribed by the same act in the following provision:

> "That constructors of the Coast Guard now authorized by law who shall have had as much total service in the Coast Guard as the officer of the Construction Corps of the Navy at the foot of the permanent or temporary list of those with the rank of lieutenant commander may be temporarily promoted to the rank of captain in the Coast Guard" (File 28762–402: 2, J. A. G., Sept. 24, 1918).

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LIGHTHOUSE SERVICE, MEMBERS OF, TRANSFERRED TO NAVY: AMENABLE TO NAVAL DISCIPLINE.

The act of August 29, 1916, provides:

> "That any of the personnel of the Lighthouse Service who may be transferred as herein provided shall, while under the jurisdiction of the Navy Department or War Department, be subject to the laws, regulations, and orders for the government of the Navy or Army, as the case may be, insofar as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law."

In accordance with the above it was held that the members of the Lighthouse Service now under the jurisdiction of the Navy are amenable to naval discipline (File 28765–118, J. A. G., Sept. 4, 1918).

[P. 24] NAVAL JURISDICTION AND MILITARY CONTROL: PERSONS SUBJECT TO.

The classes of persons in the naval service and subject to the naval jurisdiction of the United States include all members of the following organizations:

The Regular Navy (including the Navy Nurse Corps).

The Naval Reserve Force.

The Marine Corps and Marine Corps Reserve (when not detached for duty with the Army.)

The Coast Guard, the Lighthouse Service, the Coast and Geodetic Survey, and the Public Health Service of the United States (while serving as a part of the Navy in time of war or national emergency).

The American merchant ships engaged in the transportation of troops and Government supplies from the United States to Europe are under the jurisdiction of the Navy Department or the War Department. The officers and crews of such ships have been or are being as rapidly as possible enrolled in the Auxiliary Naval Reserve, and all officers and members of the crews of such ships so enrolled and so serving are at all times subject to the naval jurisdiction of the United States.

The foregoing are the only classes of persons who are, by express statutory provisions, subject to the Articles for the Government of the Navy and amenable to naval discipline. The status of civilians on duty with or attached to the naval forces of the United States and entering the war zone on board American merchant vessels can only be determined by examination of the decisions of the Federal courts of the United States, the purport of which decisions it would be difficult to state briefly, as the principles laid down therein were applied to varying facts. There is no provision of law for the Navy corresponding to the second article of war (Rev. St., sec. 1342, as amended by act of Aug. 29, 1916, 39 Stat. 651). It might be stated, however, that the decisions of the Federal courts seem clearly to support the general proposition that all civilians attached to the naval forces of the United States in the actual theater of war are subject to naval jurisdiction and liable to trial by court martial (*Ex parte Milligan*, 4 Wall, 3, 123; *Ex parte Reed*, 100 U. S. 13; *Johnson* v. *Sayre*, 158 U. S. 109; *In re Bird*, 3 Fed. Cas. No. 1428; *Ex parte Gerlach*, 247 Fed. 616; *Barrett* v. *Hopkins*, 7 Fed. 312).

The officers, members of crews, and passengers on board merchant ships of the United States, although not in the naval service of the United States, are, under the laws of the United States, the decisions of the courts, and, by the very necessities of the case, subject to military control while in the actual theater of war (*Griffen* v. *Wilcox*, 21 Ind. 370; *In re Kemp*, 11 Wis. 359; *Jones* v. *Seward*, 40 Barb. (N. Y.) 563; *In re Egan*, 8 Fed. Cas. No. 4303; File 5806–221, J. A. G., Sept. 12, 1918).

[P. 25] NAVAL RESERVE FORCE: (a) ACCEPTANCE AND OATH OF OFFICE OF OFFICERS OF, MAY NOT BE ANTEDATED; (b) INCREASE IN RANK ALONE DOES NOT NECESSITATE NEW OATH OF OFFICE; (c) PERSONNEL OF, ENTITLED TO SAME PAY AND ALLOWANCES AS MEMBERS OF REGULAR SERVICE WHILE ON LEAVE.

The following holdings in regard to the status of persons in the Naval Reserve Force were set forth in an opinion of the Judge Advocate General on September 6, 1918:

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(*a*) It is not permissible to antedate an acceptance and oath of office of officers of the Naval Reserve Force.

(*b*) Promotion in rank, but not in grade, does not involve an appointment to a new office and therefore does not necessitate a new oath.

(*c*) It is provided by the act of August 29, 1916, that "all members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service." In a decision dated May 21, 1917, the Comptroller of the Treasury said:

> "Leave of absence to officers of the Regular Navy is governed by statute and is incident to active service, and in view of the provisions quoted from the act of August 29, 1916, I am of the opinion that an officer of the Naval Reserve Force when actively employed as set forth in that act is entitled to leave of absence under the same conditions and subject to the same statutory restrictions as are officers of the Regular Navy, the granting of leave of absence to an officer of such Naval Reserve Force not revoking his order to active duty nor in any way changing his status as an officer of the Naval Reserve Force employed on active duty within the meaning of the act of August 29, 1916."

Officers and enlisted men of the Naval Reserve Force are entitled to leave under the same circumstances as officers and enlisted men of the Regular Navy, and are entitled while on leave to the rate of their full active-duty pay for such period of leave in all cases where, under similar circumstances, persons in the Regular Navy are entitled to full active-duty pay. (See also 18 Comp. Dec. 446, and 21 Comp. Dec., 628; File 28550–433, Sec. Nav., Sept. 4, 1918.)

PRECEDENCE: OF TEMPORARY OFFICERS.

An officer in the permanent Navy serving under a temporary appointment in a higher grade has a dual status. His precedence for the purpose of determining his right to permanent promotion is fixed by the date stated in his permanent commission or warrant, and his precedence for the purpose of determining his temporary rank is fixed by the date of his highest temporary commission or warrant. The acceptance by such an officer of a temporary promotion does not bar him from accepting a permanent promotion, and if the permanent promotion is to a lower rank than the temporary [P. 26] rank already held by him his acceptance does not reduce his rank, pay, or allowances. For example, a permanent boatswain serving as a temporary lieutenant (junior grade) may accept a permanent promotion to the rank of ensign without losing rank or precedence. (See C. M. O. 15, 1918, 19 (Bul.); File 11130–57:1, J. A. G., Sept. 21, 1918.)

PRECEDENCE OF ASSISTANT NAVAL CONSTRUCTORS: ANTEDATING COMMISSIONS OF LINE OFFICERS TRANSFERRED TO CONSTRUCTION CORPS.

In the opinion of the Judge Advocate General commissions of ensigns of the line transferred to the Construction Corps may be antedated so as to retain their former precedence as ensigns with relation to one another and to other officers of the Navy, without regard to the dates of their actual transfer to the Construction Corps and appointment as assistant naval constructors, such transfers being, in effect, promotions "in grade or rank pursuant to law" within the meaning of the act of March 4, 1913, 37 Stat. 891, 892 (File 11130–58, J. A. G., Sept. 18, 1918.)

PROMOTION: PROVISIONS OF ACT OF AUGUST 29, 1916, AFFECTING, CONSTRUED.

An officer of one of the Staff Corps claimed to be entitled to promotion which he would have received except for the act of August 29, 1916, increasing the length of service necessary for retirement, with the result that an officer

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of a higher rank was not retired, and consequently the necessary vacancy was not created. The act provided that "nothing contained in this act shall be construed to reduce the rank, pay, or allowances of any officer in the Navy or Marine Corps as now provided by law."

Held: That although the act might have operated to delay the advancement of the officer in question, yet it did not operate to reduce his rank, pay, or allowances, and he was not entitled to promotion by reason of the above-quoted provision of the act (File 15721–20, J. A. G., Sept. 24, 1918).

SELECTIVE-SERVICE MEN ALLOTTED TO NAVY: STATUS OF.

Under the terms of section 4 of the act approved August 31, 1918, neither the Army, the Navy, nor the Marine Corps, has any claim to the services of a registrant as such until he has been allotted to the particular organization "under regulations to be prescribed by the President." In the meantime the voluntary enlistment of registrants may as lawfully be permitted as it was prior to the new enactment; that is to say, there is nothing in the act of August 31, 1918, which renders unlawful the voluntary enlistment of registrants such as was the practice under the previous law. The statutes relating to voluntary enlistments in the regular Navy and enrollments in the Naval Reserve Force are not repealed by the act of August 31, 1918, nor are such voluntary enlistments or enrollments affected by said act except as the source of supply may be reduced by the actual allotment of registrants for service in the Army or Marine Corps. [P. 27] Pending such allotments to the Army or Marine Corps, any registrant may be voluntarily enlisted in the Navy or enrolled in the Naval Reserve Force unless otherwise provided by regulations issued by the President subsequent to the act of August 31, 1918.

Should sufficient men not be obtained by the Navy through voluntary enlistments as above indicated, and resort thus become necessary to the statutory provisions relating to draft and allotment, then by the terms of the act "all persons *drafted and allotted* to the Navy or the Marine Corps in pursuance hereof shall, from the date of *allotment*, be subject to the laws and regulations governing the Navy and the Marine Corps, respectively." In the cases of such men, contracts of enlistment or enrollment are dispensed with, but there is no necessity for creating a distinct organization in which they are to serve; they may be assigned to the Naval Reserve Force or to fill deficiencies in the regular Navy, as desired, their status thereafter being in no essential particular different from that of men who voluntarily enlist or enroll. They will be required to serve in the Navy under such draft and allotment "for the period of the existing emergency unless sooner discharged." If men so drafted and allotted to the Navy desire to enroll in the Naval Reserve Force or to enlist in the regular Navy for the periods prescribed by statute for those branches of the service, no legal objection is known to their being so enrolled or enlisted if permitted by regulations (File 28798–684, J. A. G., Sept. 19, 1918).

VIRGIN ISLANDS OF THE UNITED STATES, LEGISLATION BY COLONIAL COUNCILS FOR—NEED NOT BE SUBMITTED TO PRESIDENT FOR APPROVAL.

The following excerpt is taken from an opinion of the Judge Advocate General of September 27, 1918, re certain enactments of the government of the islands of St. Croix, St. John, and St. Thomas:

> "Under the terms of Executive Order No. 2777, dated December 26, 1917, amendments of local laws of the Virgin Islands of the United States are valid when enacted by the colonial council having jurisdiction and approved by the Governor. Said Executive order, however, contains a provision that 'The President reserves the right to disapprove and set aside any enactment of the colonial councils.' Accordingly, the approval of the President is not required to validate acts of the several colonial councils approved by the Governor, and it is therefore unnecessary to submit to the President for his personal action any ordinance, resolution, or law which appears

to have been duly enacted, unless there appears to have been an improper exercise of the legislative powers of the colonial councils and the Governor, or the subject matter of such legislation is contrary to the laws of the United States or inconsistent with the principles upon which our Government is founded" (File 28759–292, J. A. G., Sept. 27, 1918).

C. M. O. 137—1918

[P. 1] Captain Paul Brown, U. S. Marine Corps, was tried by general court martial on June 26, 1918, at the naval station, Guantanamo Bay, Cuba, by order of the Brigade Commander, Third Provisional Brigade, U. S. Marine Corps, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Assault (one specification).

Sentence

"The court therefore sentences him, Captain Paul Brown, U. S. Marine Corps, to be dismissed from the United States Marine Corps and from the United States naval service."

Action of the Convening Authority

On July 6, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Captain Paul Brown, U. S. Marine Corps, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion and Recommendation of the Judge Advocate General

The Judge Advocate General being of the opinion that the case of the accused was greatly prejudiced by hostility of certain witnesses and other circumstances, and that the findings of the court were not in accord with the evidence adduced, recommended that the proceedings, findings, and sentence in the foregoing case be disapproved and that the accused be released from arrest and restored to duty.

Concurrence of the Major General Commandant, U. S. Marine Corps

On August 2, 1918, the Major General Commandant, U. S. Marine Corps, concurred in the recommendation of the Judge Advocate General.

[P. 2] Action of the Secretary of the Navy

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Major General Commandant, U. S. Marine Corps, are approved, and Captain Brown will be released from arrest and restored to duty.

C. M. O. 140—1918

[P. 1] Passed Assistant Paymaster John L. Chatterton, U. S. Navy, was tried by general court martial on August 9, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (two specifications).

Charge III.—Violation of a lawful general order of the Secretary of the Navy (one specification).

Charge IV.—Conduct unbecoming an officer and a gentleman (four specifications).

Findings

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the specifications of the second charge "proved in part," and the

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accused "guilty" of the second charge; the specification of the third charge "not proved," the accused "not guilty" of the third charge, and acquitted the accused of the third charge; the specifications of the fourth charge "proved," and the accused "guilty" of the fourth charge.

SENTENCE

"The court therefore sentences him, John L. Chatterton, passed assistant paymaster, U. S. Navy, to be placed at the foot of the passed assistant paymaster's list with rank of lieutenant commander of present date and to there remain until he shall have lost thirty (30) numbers in his grade, and to lose one hundred dollars ($100) per month of his pay for a period of six (6) months."

RETURNED FOR REVISION

On September 13, 1918, the Department returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its sentence, which, [P. 2] in the opinion of the Department, was not adequate for the offenses found proved.

The Department instructed the court as follows:

> "In this connection the attention of the court is invited to Court-Martial Order 49, 1915, (23), in which the following language is used: 'Congress by law has provided that any officer of the Army convicted of "Conduct unbecoming an officer and a gentleman" "shall be dismissed from the service" (sec. 1342, art. 61, Rev. Stats.), thus making a sentence of dismissal mandatory upon conviction of the offense named in Army cases.'
>
> " 'While there is no similar statutory enactment with reference to the Navy, the foregoing is sufficient evidence of how seriously this particular offense has been regarded by Congress.'
>
> " 'A court martial composed of naval officers should not refuse to accept for the service of which they are members the standard fixed by law to which officers of the Army must conform in order to retain their commissions (File 26251–11181, Sec. Navy, Dec. 17, 1915, G. C. M. Rec. No. 31436).' "

ACTION IN REVISION

The court decided to revoke its former sentence and to substitute therefor the following:

> "The court therefore sentences him, John L. Chatterton, passed assistant paymaster, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by three of the five members of the court, was spread upon the record:

> "In consideration of the fact that the court acquitted the accused of the first charge, viz, drunkenness, which would seem to admit of the possibility that the unusually excessive language used by the accused was the result of the incipiency of the pneumonia, which shortly after developed in full force; and inviting attention to the testimony of the accused, which was positively to the effect that he had no recollection of having used the language with which he was charged; and in further consideration of the accused's previous good record in about 12 years' service, we recommend Passed Assistant Paymaster John L. Chatterton, U. S. Navy, to the clemency of the reviewing authority."

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

On October 21, 1918, the Chief of the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Passed Assistant Paymaster John L. Chatterton, U. S. Navy,

[C. M. O. 141—1918]

were approved on October 25, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On October 29, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 141—1918

[P. 16] CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE: HOW ABSENCE FROM SHIP MAY BE ALLEGED TO CONSTITUTE.

A specification which alleges that the accused was absent without leave one hour and thirty minutes, and did thereby miss the sailing of his ship, alleges the offense of "Absence without leave" and not the offense of "Conduct to the prejudice of good order and discipline." In order to support the latter charge under such circumstances the specifications should allege that the accused, well knowing that the ship was about to sail, did deliberately and willingly [P. 17] remain absent therefrom until after she had sailed. See sample specification, page 90, Naval Courts and Boards, 1917 (File 26262–4806, G. C. M. Rec. No. 39342; File 26262–4808, G. C. M. Rec. No. 39344; see also File 26262–5309, G. C. M. Rec. No. 40667).

ENTRIES IN SERVICE RECORD: ARE COMPETENT EVIDENCE ONLY WHEN MADE BY PROPER OFFICER.

A review of the record in a recent case disclosed that the prosecution placed in evidence the current service record of the accused, reading extracts from same, to establish the date of the beginning of his unauthorized absence. It was noted that the above-mentioned extracts were signed by the commanding officer of the U. S. Naval Detention Training Camp, Deer Island, Mass., whereas the commanding officer of the accused, at the time of his alleged desertion, was the commanding officer of the naval training station, Newport, R. I. While "service records" are such documents as may properly be admitted in evidence, entries therein, however, must be made either by or under the direction of the officer whose duty it is to make same. In the case at hand, the proper officer to make the entries in the service record of the accused was his commanding officer at the time of the alleged desertion, and not the commanding officer at Deer Island. Accordingly it was held that the entries in the service record of the accused relative to his alleged absence were not competent evidence against him (File 26251–16947: B., G. C. M. Rec. No. 39429).

FORMER JEOPARDY: WHAT CONSTITUTES.

The accused in a recent case was charged with fraudulent enlistment, the specification setting forth that on December 15, 1916, he procured himself to be accepted, and did fraudulently enlist as a private in the Marine Corps by falsely representing that he was born in Carbonsville, Pa., and by deliberately and willfully concealing from the recruiting officer the fact that he was born in Dusseldorf, Germany, and that he had, since said enlistment, received pay and allowances thereunder.

The record submitted with this case shows that the accused was previously tried on May 20, 1918, for the same offense, but that the offense was improperly and insufficiently alleged in that the specifications omitted to charge the receipt of pay and allowances under the alleged fraudulent enlistment. The accused made no objection to the charge or specification thereof, but pleaded guilty, and was convicted and sentenced. The convening authority, however, disapproved the proceedings, findings, and sentence, assigning as a [P. 18] reason for disapproval the invalidity of the specification. The accused was thereafter, on June 6, 1918, again brought to trial before a general court martial

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for the same offense alleged in a specification properly amended to charge the receipt of pay and allowances under the alleged fraudulent enlistment. Without pleading "former jeopardy" or any other plea in bar of trial, the accused entered a plea of guilty to the charge and specification, and was convicted and sentenced. The convening authority approved the proceedings, findings, and sentence. The question now arises as to whether the first trial constituted "former jeopardy."

So far as concerns the administration of justice in the Navy, the legal bar to a second trial for the same offense is founded upon the fifth amendment of the Constitution of the United States, which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." There is no law expressly applying the benefit of this constitutional provision to persons tried by naval courts martial, but the fifth amendment applies to them of its own force without requiring expression in an act of Congress (*Grafton* v. *United States*, 206 U. S. 345). With relation to persons subject to trial by Army courts martial it is provided by article 40 of the Articles of War (39 Stat. 657) that "no person shall be tried a second time for the same offense." The article correctly defines the meaning of the constitutional provision, which, while its main purpose is to prevent a second punishment for the same offense, has been repeatedly construed to prohibit a second trial where the accused has been previously acquitted or convicted of the same offense, except with his consent or at his request (*Ex parte Lange*, 18 Wall. 163; *In re Nielson*, 131 U. S. 176, 188; *Kepner* v. *United States*, 195 U. S. 100; 1 Op. Atty. Gen. 233).

The rule of "former jeopardy" is a benignant one, intended for the protection of the accused and, as stated by Mr. Attorney General Wirt (1 Op. Atty. Gen. 233, 240), "there is no principle in law better settled than that a party has a right to waive a rule designed for his own benefit." In the criminal courts of the United States the rule is well established that in order to avail himself of the benefit of this defense it must be specially pleaded by the defendant in bar of trial, otherwise he is presumed to have waived it (*United States* v. *Wilson*, 7 Pet. 150). This rule, however, has not been, and cannot in justice be, strictly applied to an enlisted man of the Navy brought to trial before a naval court martial, because of the fact that such a defendant rarely has the services or the opportunity of obtaining the services of skilled counsel for his defense. In recognition of this fact it is provided by section 255 of Naval Courts and Boards, 1917, that—

> "In the event that the accused has no counsel the judge advocate shall protect his interests, having in mind, however, at all times his duties as prosecutor. Under such circumstances he shall not fail [P. 19] to advise the accused against advancing anything which may tend either to criminate him or prejudice his cause; he shall see that no illegal evidence is brought against the accused, and shall assist him in presenting to the court in proper form the facts upon which his defense is based, including such evidence as there may be in extenuation or in mitigation as well as evidence of previous good conduct and character."

In view of the foregoing and the fact that the accused was without counsel it was the duty of the judge advocate to protect the interests of the accused to the extent of advancing in his behalf the plea of former conviction, or at least of calling the attention of the court to the fact that the accused had been previously tried for the same offense. Inasmuch as this was not done the presumption is that the accused was not properly advised as to his constitutional rights, and consequently he can not be said to have knowingly waived the benefit of the plea of former conviction.

Where the accused has once been tried and acquitted or convicted by a court of competent jurisdiction he cannot be again brought to trial for the same offense, even though the specification on which he was previously tried was substantially bad, unless he objected at the time of the first trial to the insufficiency of the specification (*United States* v. *Ball*, 163 U. S. 662; *Kepner* v. *United States*, 195 U. S. 100, 129 *Serra* v. *Mortiga*, 204 U. S. 470), or expressly requests a new trial or otherwise waives his right to avail himself of the plea (1 Op. Atty. Gen. 233).

The court which first tried the accused was a legal court, having jurisdiction of the person and the cause. The accused was, at the time of the trial, a person

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in the naval service and subject to trial by naval court martial. The cause was an offense against naval law; and although the offense was improperly and insufficiently alleged, that fact did not render it any the less an offense against naval law for the trial of which the court had jurisdiction. The court tried the accused for the alleged offense, found him guilty, and entered judgment. The reviewing officer, however, by reason of the defective specification to which the accused had not objected, disapproved the proceedings, findings, and sentence of the court. The effect of such disapproval was to acquit the defendant (13 Op. Atty. Gen. 459; 1 Winthrop's Mil. L. and Prec. 390). In the language quoted by Mr. Justice Gray, in the case of *United States* v. *Ball, supra*, at page 667, from *People* v. *Barrett*, 1 Johns, 56:

> "This case, in short, presents the novel and unheard of spectacle of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming too from the officer who drew the indictment, seem not to com- [P. 20] port with that universal and humane principle of criminal law, 'that no man shall be brought into danger more than once for the same offense.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? If a conviction take place, whether the indictment be good, or otherwise, it is ten to one that judgment passes; for, if he read the bill, it is not probable he will have penetration enough to discern its defects. * * * Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits."

While it is stated in Winthrop's excellent work on Military Law and Precedents, at page 391, that "it has further been uniformly held that the indictment upon which the accused was first brought to trial must have been valid and sufficient in law, and that if it was materially and in substance defective there has been no jeopardy upon which the plea can be based," the statement is not supported by the present weight of authority. In fact, it has been directly held by the Supreme Court of the United States in cases decided since and at about the time Col. Winthrop's book was published that, "although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of habeas corpus. * * * If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot" (*United States* v. *Ball*, supra; *Ex parte Parks*, 93 U. S. 18; and *United States* v. *Sanges*, 144 U. S. 310; see also *Serra* v. *Mortiga*, 204 U. S. 470). In *Commonwealth* v. *Purchase* (2 Pick. 521, 526), Chief Justice Parker, in speaking of the old doctrine which allowed a man to be tried again after being acquitted on an indictment substantially bad, said that "ingenuity has suggested that he never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgment"; but as stated by the court in *United States* v. *Ball*, supra, "this is bottomed upon an assumed infallibility of the courts, which is not admitted in any other case." Section 298, Naval Courts and Boards, 1917, contains the statement: "Proceedings upon a 'fatally defective' specification do not constitute former jeopardy"; and cites C. M. O. 22, 1916, 6–8, as authority for the statement. This statement may have influenced the convening authority in the action taken by him and may justify such action. The statement, however, to too broad, and is not supported by the court-martial order cited. The statement should be amended to read: "Proceedings upon a 'fatally defective' specification if objected to by the accused at the trial do not constitute former jeopardy"; and, as so amended, would be supported [P. 21] by the opinion of the Judge Advocate General expressed in Court-Martial Order 22, 1916, 6–8.

Under the practice, both in the Army and the Navy, it seems to have been long settled that where the accused has been once duly acquitted or convicted he has been "tried" in the sense of the Articles of War and the fifth amendment of the Constitution, although no action may have been taken upon the findings or proceedings by the reviewing authority. "Nor has he been any the less 'tried'

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where the finding has been formally disapproved by such authority. For the finding is not less a consummation in law of the trial, though, from a cause beyond the control both of the accused and the court, such finding has been rendered ineffectual" (1 Winthrop's Mil. L. and Prec. 390; Naval Courts and Boards, 1917, sec. 298).

The Judge Advocate General was of the opinion that the second trial was illegal, in that it placed the accused in jeopardy a second time for the same offense (File 26262–5117, G. C. M. Rec. No. 40139).

HEARSAY EVIDENCE: AN EXAMPLE OF.

In a case where it became necessary to establish at what time the accused returned to his ship, the prosecution called the commanding officer of the U. S. S. _____ as a witness, who testified that he was not on board when the accused reported, but that the next morning Boatswain K_____, whom he presumed was on board at the time of the alleged return of the accused, had officially reported to him the return of the accused. This evidence was purely hearsay, and should have been excluded by the court. Boatswain K_____ should have been required to take the stand, so that the return of the accused might be proved by primary evidence (File 26251–17363, G. C. M. Rec. No. 39590).

LETTER SUPPOSEDLY WRITTEN BY ACCUSED: IMPROPERLY INTRODUCED IN EVIDENCE.

In a recent case the judge advocate took the stand for the prosecution; asked himself if he was the official custodian of the official files relating to the case, and if there was in the files a letter alleged to have been written by the accused—whereupon he read the letter and appended a copy to the record. This was a gross error. The letter, which was not signed, was in no way identified as a letter written by the accused; neither was the accused given an opportunity to inspect same and object to its admission if he so desired. The court, however, was given opportunity to object to the introduction of the letter, and should have done so (See Naval Digest, 1916, p. 333, sec. 17; File 26251–17206, G. C. M. Rec. No. 39402).

[P. 22] LETTER TRANSMITTING CHARGES: MAY ANTEDATE PRECEPT.

Although the letter transmitting the charges and specifications to the judge advocate antedates the precept, the irregularity is not such as to invalidate (File 26262–5187; G. C. M. Rec. No. 40381; File 26262–4808; G. C. M. Rec. No. 39344; see also G. C. M. Rec. No. 39225).

LETTERS TESTIMONIAL TO GOOD CONDUCT OF ACCUSED SUBSEQUENT TO RECOMMENDATION FOR TRIAL: SHOULD NOT BE INTRODUCED IN EVIDENCE.

It is improper for a court to allow the introduction in evidence of letters testimonial to the good conduct of the accused subsequent to his being recommended for a general court martial. Such letters should be forwarded by the judge advocate to the convening authority for consideration in final action on the case (File 26262–4808, G. C. M. Rec. No. 39344).

MAKING INCONSISTENT STATEMENTS BEFORE AND AT GENERAL COURT MARTIAL AS A WITNESS: DOES NOT CONSTITUTE OFFENSE.

The accused in a recent case was found guilty of the only charge against him, "Conduct to the prejudice of good order and discipline." The only specification of the charge set forth in substance that the accused made certain statements to his superior officers, which statements he subsequently failed to uphold with an equal degree of certainty in testifying before a general court

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martial, and that the statements made before the court were contrary to the statements previously made to his superior officers, but it did not set forth wherein and how these statements constituted an offense or that the facts which were well known to the accused were false and misleading.

It is too well understood to require argument or explanation that the making of merely inconsistent statements by an individual does not constitute any offense known to the naval service. This is fully supported by the procedure before naval courts martial, which affords a witness an opportunity to subsequently correct, alter, or amend the statements made by him before the court (Naval Courts and Boards, 1917, secs. 175 and 176).

The proceedings, findings, and sentence of the court in the aforementioned case were held to be illegal (File 26262–5119; G. C. M. Rec. No. 40141; see also File 26262–5120, G. C. M. Rec. No. 40142).

MANUAL FOR GOVERNMENT OF NAVAL PRISONS: TO WHAT CLASS OF PRISONERS CERTAIN SECTIONS OF, APPLY.

A court recently convicted an accused of a serious crime and imposed a sentence of 15 years' imprisonment and dishonorable discharge, together with other accessories.

[P. 23] The convening authority in his action mitigated the sentence in accordance with articles 114 to 122, inclusive, Manual for the Government of the U. S. Naval Prisons.

Article 114 of the above-mentioned manual divides men undergoing confinement pursuant to sentence of general courts martial into two general classes—to wit, (*a*) Criminals: Those guilty of acts involving moral turpitude which would be punishable by a term in prison if the offender were a civilian; and (*b*) naval prisoners, comprising offenders convicted of strictly military offenses. Articles 115 to 122, inclusive, of the said manual apply only to those in status (*b*).

As the accused was in class (*a*), above mentioned, the Department held that the mitigation prescribed by the convening authority was a nullity (File 26262–4793, G. C. M. Rec. No. 39301).

MEMBERS OF COURT: ABSENCE OF.

From a review of a recent case it was noted that two members of the court were absent from the trial, and that the judge advocate appended to the record copies of their requests for leave, approved by the president of the court and by the commandant of their naval district (not the convening authority), as explanatory of their absence.

Except in case of sickness, absence from duty by a member of a court martial is not warranted unless with the knowledge and approval of the convening authority. (See Naval Courts and Boards, 1917, sec. 87; and Naval Digest, 1916, pp. 376 and 377, Members of Courts Martial, secs. 1 and 4; File 26251–17725, G. C. M. Rec. No. 40289.)

MEMBERS OF COURT: EFFECT OF ABSENCE OF, UPON VALIDITY OF PROCEEDINGS.

Even though absence of members of a general court martial be not warranted by section 87, Naval Courts and Boards, 1917, in that consent of the convening authority to such absence was not obtained, still, if the court is not reduced below a legal quorum (five), its proceedings are not invalidated by such absence of some of its members (File 26251–17883, G. C. M. Rec. No. 40277).

MULTIPLICITY OR PLURALITY OF CHARGES: SHOULD BE AVOIDED.

The accused in a recent case was found guilty of "Absence from station and duty after leave had expired," and "Conduct to the prejudice of good order and discipline." The specification in support of the charge, "Conduct to the prejudice of good order and discipline," alleged practically the identical facts

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set out in the specification under the charge of "Absence from station and duty after leave had expired."

[P. 24] Multiplicity or plurality of charges for the same offense should be avoided. It is proper to charge an accused with both "Absence from station and duty after leave had expired," or "Absence from station and duty without leave," and "Conduct to the prejudice of good order and discipline" when the unauthorized absence was with a manifest intention of evading some particular duty (as coaling ship or a landing party), or service on some particular ship (as by missing his ship) (Naval Digest, p. 7, sec. 12; Naval Courts and Boards, 1917, sec. 61).

The specification in the case in hand failed to allege that the accused absented himself with the intent to avoid any particular duty, nor were any circumstances of an aggravating nature set forth therein. The finding of the court on the second charge and the specification thereunder was therefore disapproved (File 26262–479S, G. C. M. Rec. No. 39331).

PRESIDENT OF COURT: ALTHOUGH REQUIRED TO TESTIFY SHOULD REMAIN UNBIASED.

The record in a recent general court-martial case disclosed that the president of the court took the stand as a witness for the prosecution, and testified that he had conducted an investigation of the case on trial, implicating the accused therein.

Thereafter the said president of the court warned a witness for the defense that he would be liable for perjury if he did not cease giving conflicting statements and that the next time he gave evidence of untruthful testimony he would be held for perjury.

This conduct on the part of the president of the court seemed to indicate, first, a fixed bias or opinion concerning the guilt of accused, and second, lack of appreciation of the duties and responsibilities of his position. Further, that he sat in judgment in this case, not in that fair, unbiased, and impartial frame of mind so desired under our system, but, on the contrary, entered into the trial with a bias and an opinion concerning the guilt of accused.

The warnings given the witness were highly improper and amount to no less than a threat—an attempt to force the witness to testify to facts, not as the witness saw them, but as the president of the court desired (File 26262–5214, G. C. M. Rec. No. 40446).

SENTENCES WHICH MAY BE ADJUDGED: IN CASES OF ENLISTED MEN ADVANCED TEMPORARILY TO COMMISSIONED RANK.

The Department has ruled that the following forms of sentence may be adjudged and are legal cases where men are temporarily promoted to commissioned rank:

(*a*) The court therefore sentences him, Ensign (T) ------, U. S. Navy, to have his temporary appointment as an Ensign, U. S. Navy, revoked.

[P. 25] (*b*) The court therefore sentences him, Ensign (T) ------, U. S. Navy, to have his temporary appointment as an Ensign, U. S. Navy, revoked, and then to be reduced to the rating of—(quartermaster, first, second, or third-class seaman, U. S. Navy, or other rating in the branch in which the man served prior to his temporary promotion).

(*c*) The court therefore sentences him, Ensign (T) ------, U. S. Navy, to have his temporary appointment as an Ensign, U. S. Navy, revoked, and then to be reduced to the rating of ------ and to lose ------ dollars ($------) per month of his pay for a period of ------ months (File 26251–16939, G. C. M. Rec. No. 39184).

SPECIFICATION UNDER CHARGE OF DESERTION: MUST ALLEGE DESERTION FROM NAVY.

A specification which alleges that the accused deserted from a certain ship and remained a deserter until he surrendered on board another ship, and which does not further allege that he deserted from the United States Navy, is not sufficient to sustain a charge of desertion. (See C. M. O. 49, 1910, 9.)

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The very essence of the military offense of desertion is the unauthorized absence of the accused with the intent permanently to abandon the naval service or to cancel the pending contract of enlistment (File 26251–17117, G. C. M. Rec. No. 39093).

TESTIMONY OF FILING OF ORDER ON SHIP: NOT SUFFICIENT TO CHARGE SHIP'S COMPANY WITH COGNIZANCE THEREOF.

The single specification of a charge against the accused in a recent case alleged that the accused entered a restricted area in a certain city "in violation of a Special Order Number 41, dated December 4, 1915," etc.

Under such a specification it was incumbent upon the prosecution to prove not only the issuance and provisions of said Special Order Number 41, but also that the aforesaid order had been duly published to the accused, or that the accused was cognizant thereof.

The only testimony introduced to show that the accused had such cognizance was that of one witness who testified that a copy of said order was on file on the U. S. S. ——, to which ship the accused was attached.

It was the opinion of the Judge Advocate General that testimony that an order is on file on board a ship is not sufficient to prove the publication of said order to a member of the said ship's company, or that such member was cognizant or chargeable with cognizance of said order.

In view of the foregoing, the court's finding (adverse to the accused) on the above-mentioned charge and specification was disapproved ——— 165, G. C. M. Rec. No. 40322).

[P. 26] TO SUPPORT CHARGE OF NEGLECT OF DUTY: MUST BE SHOWN THAT DUTY WAS ASSIGNED AND ENTERED UPON.

The accused in a recent case was charged with "Neglect of duty." The single specification of the charge alleged, in effect, that having been regularly posted as lookout in the after fire-control station of his ship he did neglect and fail to keep a strict lookout. In order to prove the offense charged it was essential that the prosecution show that the accused had been assigned to and entered upon the duty alleged. A careful examination of the evidence introduced failed to disclose such evidence. The Judge Advocate General was of the opinion that the findings of the court, which were adverse to the accused, were not sustained by the evidence. Said findings were thereupon disapproved by the Department (File 26262–5130, G. C. M. Rec. No. 40194; File 26262–5137, G. C. M. Rec. No. 40229).

VALID OBJECTION OF ACCUSED TO SPECIFICATION NOT SUSTAINED BY COURT: HELD GROUNDS FOR SETTING ASIDE PROCEEDINGS, ETC.

In reviewing the summary court martial in the case of a certain man, it was noted that two different offenses were alleged in the one and only specification against the accused.

Each different offense shall have been made the subject of a separate specification. (See Naval Courts and Boards, 1917, secs. 65, 411; and C. M. O. 17, 1916, 9.)

It was also noted that objection was made to the specification by the accused on account of the above error but that such objection was overruled by the court, and the specification was pronounced in due form and technically correct by the court.

Since the above-mentioned objection by the accused was a valid one, the trial should have been suspended and the convening authority advised of the reasons for such objection.

The proceedings, findings, and sentence of the court in the foregoing case were set aside by the Department (File 26287–5115, Sec. Nav., S. C. M. Rec. No. 6265 (1919)).

VERIFICATION OF TESTIMONY OF WITNESSES: NOT SUBJECT TO WAIVER.

It was noted in a recent case that two character witnesses testified for the defense, and, at the conclusion of their respective testimony, the record states

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that the "witness and counsel for the accused waived the reading of the testimony to the witness."

The verification of the testimony of witnesses is not a matter to be waived at the discretion of a court, even if consented to by the witness, the accused or his counsel, and the judge advocate. (See C. M. O. 3, 1917, 5.) The waiving of the reading of the testimony to the witnesses in the case in hand, although irregular, was held not to invalidate the proceedings as no rights of the accused were prejudiced thereby (File 26251–17168, G. C. M. Rec. No. 39173).

[P. 27] ENLISTED MEN OF COAST GUARD: MAY NOT COMPETE WITH ENLISTED MEN OF NAVY IN EXAMINATION FOR MIDSHIPMEN.

Upon opinion requested as to whether enlisted men of the Coast Guard are eligible to compete in the examination for midshipmen which is given enlisted men of the Navy who have had one year's service and who are under 20 years of age, the following opinion was rendered:

The act of June 30, 1914 (38 Stat. 410), provides:

"'Hereafter, in addition to the appointments of midshipmen to the United States Naval Academy as now prescribed by law, the Secretary of the Navy is allowed fifteen appointments annually from the enlisted men of the Navy who are citizens of the United States and not more than 20 years of age on the date of entrance to the Naval Academy, and who shall have served not less than one year as enlisted men on the date of entrance,' etc.

"From the foregoing it appears that enlisted men of the Coast Guard, in order to be considered as entitled to the privilege of competing in the examination aforesaid, must be shown to occupy the status of enlisted men of the Navy.

"The act of January 28, 1916 (38 Stat. 800), creating the Coast Guard, provides that the Coast Guard 'shall constitute a part of the military forces of the United States * * * which shall *operate* * * * as a part of the Navy * * * in time of war or when the President shall so direct.'

"(*a*) The naval appropriation act, approved August 29, 1916 (39 Stat. 556,600), contains the following provision:

"'Whenever, in time of war, the Coast Guard *operates* as a part of the Navy in accordance with law, the personnel of that service shall be subject to the laws prescribed for the government of the Navy,' etc.

"(*b*) The Coast Guard is now, by the terms of Executive order dated April 7, 1917 (No. 2587), *operating* 'as a part of the Navy.'

"This office has heretofore held, whenever it has been called upon to construe the phraseology, that the terms 'subject to the laws prescribed for the government of the Navy' simply gave to the Navy Department complete jurisdiction over said service for 'discipline, command, and effective military administration.' (See Files 7014–321; 2; 5252–91.) These opinions were rendered in construing similar provisions concerning the Lighthouse Service and the National Naval Volunteers, respectively. It is obvious, therefore, that nothing contained in a provision that the Coast Guard shall be [P. 28] subject to the laws for the government of the Navy would operate to give enlisted men of that service a status in all respects equivalent to that of enlisted men of the Navy. The provision that the Coast Guard shall be a part of the military forces of the United States, which shall *operate* as a part of the Navy is plainly inoperative to produce the above status for enlisted men of the Coast Guard.

"There being nothing in the law which can be construed to give enlisted men of the Coast Guard a status other than as being of their own distinctive branch of the military forces, subject temporarily to discipline, command, and effective military administration by the Navy Department (see File 28762–40:1), I am of the opinion that enlisted men of the Coast Guard are not eligible to compete in the examination for midshipmen which is given enlisted men of the Navy who have had one year's service and who are under 20 years of age" (File 28762–457, J. A. G., Oct. 10, 1918).

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OFFICERS OF NAVAL RESERVE FORCE: MAY BE RETIRED FOR PHYSICAL DISABILITY INCURRED IN LINE OF DUTY.

The Act of August 29, 1916, provides:

> "All members of the Naval Reserve Force shall, *when actively employed* as set forth in this act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service" (39 Stat. 588).
>
> "Members of the Naval Reserve Force may be ordered in active service *in the Navy* by the President in time of war or when, in his opinion, a national emergency exists" (39 Stat. 587).
>
> "Enrolled members of the Naval Reserve Force may, in time of war or national emergency, be required to perform active service in the Navy, throughout the war or until the national emergency cease to exist" (39 Stat. 588).

An analysis of so much of the act of July 1, 1918, as provides that "no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in the line of duty," indicates an intention on the part of Congress to extend the privilege of retirement for physical disability incurred in the line of duty, which is enjoyed by the officers of the Regular Navy, to those members of the Naval Reserve Force in like situations, and while they are in the active service of the United States, and not to extend to them the privilege of retirement for length of service. This conclusion is borne out by the negative proviso "that no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in the line of duty," which operates as a prohibition on all members of the Naval Reserve Force save those enlisted men of the naval service who have been transferred to the Fleet Naval Reserve and are expressly excepted. The [P. 29] retirement for physical disability of an officer of the Naval Reserve Force will not change his status to that of an officer of the Regular Navy, as such a change in office could be accomplished only by an exercise of the appointing power. Thereupon such officer will continue to be a member of the Naval Reserve Force, although on the retired list thereof, and entitled to the same benefits as though he were an officer on the retired list of the Regular Navy.

The word "member" as used in the retirement legislation for the Naval Reserve Force is broad enough to include those enrolled in enlisted ratings. However, there is no statutory provision for the retirement of enlisted men of the Regular Navy on account of physical disability, which would indicate that the word "member" was used in this connection in a more limited sense intended to include only officers of the Naval Reserve Force. Furthermore, if it was the intention of Congress to authorize the retirement for physical disability of members of the Naval Reserve Force enrolled in enlisted ratings, the clause quoted must be regarded as incomplete legislation so far as concerns the latter, and incapable of enforcement without further enactment, there being no class in the Regular Navy which may be taken by analogy as a basis for determining what benefits it was intended to confer upon such members of the Naval Reserve Force who might claim retirement for physical disability.

While the question of pay is one for determination by the Comptroller of the Treasury, the suggestion is made that the pay of an officer of the Naval Reserve Force eligible to be retired for physical disability incurred in the line of duty should be computed the same as if he were an officer of corresponding rank and of the same length of service in the Regular Navy, and any prior service such officer may have had in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia should be counted in computing such pay.

The Judge Advocate General was further of the opinion that if certain officers of the Naval Reserve Force were physically disabled in the line of duty while officers of the Naval Reserve Force in the active service of the United States, and that if, after the approval of the act of July 1, 1918, they were still on the active list of the Naval Reserve Force, they would be eligible for retirement for physical disability incurred in the line of duty within the meaning of the act of July 1, 1918 (File 27231–115: 1, J. A. G., Oct. 19, 1918).

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OFFICERS OF THE NAVAL RESERVE FORCE: PROMOTION OF, ABOVE THE RANK OF LIEUTENANT COMMANDER.

Under the following provision of the naval appropriation act of July 1, 1918:

"That no officer of any class of the Naval Reserve Force shall in time of peace be promoted above the grade of lieutenant commander, but in time of war or other national emergency officers of the [P. 30] Naval Reserve Force of and above the rank of lieutenant commander in active service shall be elegible for selection for promotion to the next higher grade or rank by the same board of officers that selects officers of the United States Navy for promotion to such higher ranks and grades, under the same rules and regulations as apply to the selection for promotion of officers of the United States Navy. The promotion of officers of the Naval Reserve Force below the rank of lieutenant commander shall at all times be in accordance with such regulations as the Secretary of the Navy may prescribe."

The following questions arose:

1. Considering the clause "under the same rules and regulations as apply to the selection for promotion of officers of the United States Navy," are the "rules and regulations" referred to, the provisions for age, grade, and length of service in grade prescribed for promotion of officers of the Regular Navy?

2. For the purpose of the law does confirmation in grade of a member of the Naval Reserve Force correspond to a permanent commission in the regular service?

3. Assuming that provisional assignment of rank in the Naval Reserve Force corresponds to temporary appointment in the regular service, may the selection board therefore be empowered to select for promotion such officers of the rank of lieutenant commander, commander, and captain as the Department considers eligible?

4. May a board whose composition is different from the board of selection of the Regular Navy—for instance, a board of five captains in the United States Navy—be empowered to select Reserve Officers holding provisional appointments in the grades of lieutenant commander and commander for provisional promotion to the next higher grade?

The opinion of the Judge Advocate General was as follows:

"The 'rules and regulations' referred to, mean all the rules and regulations governing promotions, both permanent and temporary, above the rank of lieutenant commander in the Regular Navy. Permanent promotions in the Regular Navy are governed by statutory rules and regulations prescribed by the act of August 29, 1916, and amendments thereto, while temporary promotions in the Regular Navy are governed by executive rules and regulations adopted pursuant to the opinion of this office dated June 14, 1917 (File 28687–22), wherein it was held that the statutory rules governing permanent promotions above the rank of lieutenant commander do not control the appointing power in making temporary promotions, but that the latter may be regulated by the President in his discretion, and accordingly that the restrictions in the act of August 29, 1916, as to length of service in grade, etc., need not be regarded in determining the qualifications of officers for temporary promotion.

[P. 31] "In an opinion of this office, September 11, 1917, concurred in by the Attorney General, October 20, 1917 (File 28550–123), provisional advancements in the Naval Reserve Force were treated as corresponding to 'temporary' promotions, while advancements to confirmed ranks in the Reserve were regarded as corresponding to permanent promotions in the ordinary sense. Applying this distinction to the present question, it would follow that provisional or 'temporary' advancements above the rank of lieutenant commander in the Naval Reserve Force should be governed by the rules and regulations applicable to temporary promotions in the Regular Navy, that is, by the executive rules and regulations adopted by the administrative department with reference to such temporary promotions, while advancements to permanent commander should be governed by the rules and regulations applicable to permanent promotions in the Regular Navy, that is, by the rules and regulations prescribed in the act of August 29, 1916, and its amendments.

"Congress, in enacting the above-quoted provision in the act of July 1, 1918, is presumed to have known of the construction which had been

[C. M. O. 142—1918]

placed by this Department upon the selective laws and the rules and regulations which had been adopted with reference to temporary promotions made by the President with the Senate's concurrence, and to have intended that said rules and regulations be applied to provisional advancements in the Naval Reserve Force which the Attorney General had concurred with this Department in describing as 'temporary' promotions."

In view of the foregoing the Judge Advocate General was of the opinion that the assumption in question 3 above was a proper one to make, and that questions 1, 2, and 3 should be answered in the affirmative.

With reference to question 4 above, the opinion of the Judge Advocate General continued as follows:

"It may be stated that the above provision in the act of July 1, 1918, requires that the selection of officers of the Naval Reserve Force be made 'by the same board of officers that selects officers of the U. S. Navy for promotion.' Accordingly should the Department decide to have a board of officers composed of five captains, as may legally be done, to select officers of the Navy for temporary promotion to the ranks of commander and captain, then that same board may be empowered and is the proper board under the law to select Reserve officers for provisional promotion to such ranks. The provision of the statute * * * clearly requires that the 'same board' select officers for promotion above the rank of lieutenant commander in the regular Navy and the Naval Reserve Force" (File 28550–464, J. A. G., Oct. 2, 1918).

[P. 32] STAMPED FACSIMILE, INITIALED BY AUTHORIZED SUBORDINATES: LEGAL EFFECT OF USE OF.

On September 7, 1918, an opinion of the Attorney General was requested on the following:

Whether the signature of the Chief of the Bureau of Navigation in the form of a facsimile stamp affixed by an officer on duty in the Bureau pursuant to the orders and under the direction of the Chief of the Bureau of Navigation, and initialed by the officer authorized to affix the same, is a valid signature and conveys the authority of the Chief of the Bureau in all cases where he is authorized to act.

The Attorneyl General's opinion, rendered September 23, 1918, contained the following conclusion:

"In my opinion * * * the affixing of this facsimile signature properly initialed by officers duly authorized thereto, under the direction and control of the Chief of the Bureau of Navigation, is a sufficient approval by the Chief of the Bureau of Navigation of the orders, vouchers, etc., which are the subject of this opinion.

"I do not mean by this, of course, that the Chief of the Bureau of Navigation can transfer to others any duty which the law imposes upon him in connection with the approval of orders, vouchers, etc. What I do mean is, that the Chief of the Bureau, having in some appropriate way passed judgment in such cases, the manual act of affixing his signature in evidence of that fact may be done by others thereunto duly authorized by him." (See C. M. O. 92, 1918, 26 (Bul.); File 22724–39:3).

C. M. O. 142—1918

[P. 1] Lieutenant William P. Bacon, U. S. Navy, was tried by general court martial on September 11, 1918, on board the U. S. S. *Baltimore*, by order of the Commander, Mine Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Using provoking and reproachful words and menaces toward another person in the Navy (one specification).

Charge III.—Conduct unbecoming an officer and gentleman (two specifications).

[C M. O. 145—1918]

SENTENCE

"The court therefore sentences him, Lieutenant William P. Bacon, U. S. Navy, to lose fifty (50) numbers, in his grade.

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the peculiar circumstances of this case; of the excellent character and performance of duty of the accused, as testified to by his commanding and executive officers; his youth and inexperience; the frankness of his manner and testimony; and the very favorable impression made by the accused upon the court; we recommend Lieutenant William P. Bacon, U. S. Navy, to the clemency of the reviewing authority."

RETURNED FOR REVISION

On September 18, 1918, the convening authority returned the record in the foregoing case to the court with the direction that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was not adequate for the offenses found proved.

ACTION IN REVISION

"The court decided respectfully to adhere to its former sentence in the case of Lieutenant William P. Bacon, U. S Navy.

[P. 2] ACTION OF THE CONVENING AUTHORITY

On September 28, 1918, the convening authority placed the following endorsement on the record in the foregoing case:

> "The Commander, Mine Force, regrets that the court takes so light a view of the very serious offenses of which the accused has been proved guilty, and that they further emphasized this estimate by a unanimous recommendation to clemency. Their treatment of the case will hardly tend to sustain the standard of conduct which the service strives to maintain.
>
> "Subject to the above remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant William P. Bacon, U. S. Navy, are approved."

REMARKS

The sentence recorded in this case does not correspond with the specimen sentence set out in Circular Letter No. 11130–51, paragraph 3, which prescribes the following form for sentencing to loss of numbers permanent officers serving in a higher grade:

> "The court therefore sentences him, Lieutenant Commander X ------ Y ------, U. S. Navy, to lose ____ numbers in his temporary grade of lieutenant commander."

The sentence as recorded is construed as depriving the accused of fifty numbers in his temporary grade.

The remarks of the convening authority as to the inadequacy of the sentence in this case are concurred in.

C. M. O. 145—1918

[P. 1] Ensign George S. Barker, U. S. Naval Reserve Force, was tried by general court martial on September 6, 1918, on board the U. S. S. *Oklahoma*, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charge, proved by plea:

Charge.—Drunkenness (one specification).

[C. M. O. 148—1918]

SENTENCE

"The court therefore sentences him, Ensign George S. Barker, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his youth and previous good record we recommend Ensign George S. Barker, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

The convening authority, on September 26, 1918, subject to remarks concerning certain incidents of the trial, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign George S. Barker, U. S. Naval Reserve Force, and in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

It was noted by the convening authority that after the accused's plea of guilty much testimony was introduced on the part of the defense, not properly testimony in extenuation, and which, although not necessarily contradictory to the plea of the accused, was sufficiently inconsistent with his plea to make it the duty of the court to instruct the accused that he might withdraw his plea of "guilty" and substitute therefore a plea of "not guilty." The accused's counsel, in his argument, stated, however, that, [P. 2] although the accused during his return to his ship showed no ill effects of the liquor he had drunk, it was "some time after dinner that he lost control of himself," thus admitting that the accused was "on board * * * ship under the influence of intoxicating liquor," to which fact the accused had pleaded "guilty."

It was the opinion of the convening authority that since the accused had pleaded "guilty," this subsequent admission of his counsel, in the presence of the accused, was, in legal contemplation, made with the accused's implied authority. And, although it would have been preferable for an express authorization to have been shown, rather than an implied one, yet this admission affirmed the accused's plea of "guilty" to the charge and specification.

OPINION OF THE JUDGE ADVOCATE GENERAL

Subject to the remarks of the convening authority, which were concurred in, the Judge Advocate General was of the opinion that the proceedings, findings, and sentence in the foregoing case were legal.

ACTION OF THE SECRETARY OF THE NAVY

On October 30, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case was, on October 31, 1918, submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 7, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 148—1918

[P. 1] Surgeon Allan E. Peck, U. S. Navy, was tried by general court martial on March 2, 1918, at the U. S. naval station, Guam, by order of the Commandant, U. S. naval station, Guam, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (three specifications).

[C. M. O. 14S—1918]

Charge II.—Causing to be presented to a person in the naval service for approval and payment claims against the United States, knowing said claims to be false and fraudulent (two specifications).

Charge III.—Violation of a lawful regulation issued by the Secretary of the Navy (one specification).

Charge IV.—Falsehood (one specification).

Findings

The court found the first specification of the first charge "proved," the second specification of the first charge "proved in part," the third specification of the first charge "proved," and the accused "guilty" of the first charge; the first specification of the second charge "proved in part," the second specification of the second charge "proved in part," and the accused "guilty" of the second charge; the specification of the third charge "proved in part," and the accused "guilty" of the third charge; the specification of the fourth charge "proved," and the accused "guilty" of the fourth charge.

Sentence

"The court therefore sentences him, Surgeon Allan E. Pack, U. S. Navy, to be dismissed from the United States naval service."

Returned for Revision

On March 21, 1918, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its findings on the two specifications of the second charge, which in the opinion [P. 2] of the convening authority were contrary to the evidence and inconsistent with the second charge, of which the accused was found "guilty."

Action in Revision

The court on March 22, 1918, revoked its former findings on the two specifications of the second charge, and in substitution therefor found both specifications of the second charge "proved," and the accused "guilty" of the second charge.

Action of the Convening Authority

The convening authority, on March 28, 1918, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Surgeon Allan E. Peck, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion and Recommendation of the Judge Advocate General

On November 7, 1918, the Judge Advocate General, in an endorsement to the record in the foregoing case, expressed the opinion that the proceedings, findings, and sentence in the foregoing case were illegal, and recommended that the accused be released from arrest and restored to duty.

The accused (through his counsel) objected to each of the charges and specifications thereunder, except the fourth charge and its supporting specifications, and such objections should have been sustained by the court.

As to the first charge—not only were the specifications thereof fatally defective in that they were not drawn with definiteness and precision, but the findings of the court thereon were not supported by the evidence adduced. The second specification was a mere repetition of the first, with the addition of certain facts, which, at most, were only the natural and probable consequences of the facts alleged in the first specification, and did not constitute an additional offense. The allegations as to "time" and "place" in the first and second specifications were vague and indefinite, and lacked the degree of precision required by the Department. (See Naval Courts and Boards. 1917, sec. 73.) Among other instances of such indefiniteness, certain acts of the accused were alleged to have been committed [P. 3] "during the months of October and November." The

instructions and decisions of the Department require that a specification should allege that the acts constituting an offense were committed on a day certain, or "on or about" a day certain. The third specification did not allege or disclose, except possibly as a deduction to be arrived at indirectly, that there was any duty or obligation resting on the accused to do, or refrain from doing, certain acts specified. (See Naval Courts and Boards, 1917, sec. 71; Naval Digest, 1916, p. 70, sec. 103.) The necessity for requiring a specification to set forth with minuteness and precision the material elements of the offense charged is the complement of the right of the accused to be fully informed concerning the particular offense with which he is being charged, so that he may have an opportunity to prepare his defense, or to enter the plea of "former jeopardy" if subsequently charged with the same offense. (See Naval Courts and Boards, 1917, sec. 63: Naval Digest, 1916, p. 69), sec. 93.)

As to the second charge—the specifications were so poorly drawn that it was not possible to ascertain what acts of the accused constituted the alleged violation of the Articles for the Government of the Navy. And, furthermore, the findings of the court on each of the two specifications were not supported by the evidence adduced.

As to the third charge—the single supporting specifications was so vague and indefinite as to time (the period covered being three months for what is alleged to be one offense and two months for another) and was so vague as to the circumstances of the alleged offense that it was fatally defective. The evidence adduced in support thereof failed to show that the territory into which it is alleged that the accused permitted the introduction of alcoholic liquor was under the control of the accused as commanding officer, or that the letter of the Secretary of the Navy, the provisions of which the accused is alleged to have violated, was ever published or brought to the attention of the accused.

The fourth charge, that of "falsehood," is supported by a single specification. The decisions of the Department require that a specification, to support the charge of "falsehood," must show wherein the false statement made could have had no other motive than to accomplish the result which it actually did accomplish, and that the result must have deceived a reasonably prudent man (Naval Digest, p. 235, sec. 3). The most that could [P. 4] have been charged against the endorsement of the accused to the letter of the Governor of Guam (upon which endorsement the fourth charge was based) was, that it did not squarely answer the question asked in the Governor's letter. The evidence adduced in support of this specification likewise failed to show that the accused intended to deceive or that the Governor was deceived by said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

The record in the foregoing case was referred to the Chief of the Bureau of Navigation, who, on September 19, 1918, concurred in the endorsement of the Judge Advocate General.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, in the foregoing case of Surgeon Allan E. Peck, U. S. Navy, are approved, and he will be released from arrest and restored to duty.

C. M. O. 149—1918

[P. 1] Pay Clerk Paul C. Hutcheson, U. S. Naval Reserve Force, was tried by general court martial on September 6, 1918, on board the U. S. S. *Oklahoma*, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charge, proved by plea:

Charge.—Drunkenness (one specification).

SENTENCE

"The court therefore sentences him, Pay Clerk Paul C. Hutcheson, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

[C. M. O. 150—1918]

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by six of the seven members of the court, was spread upon the record:

"In consideration of the favorable impression made on the court by the accused we recommend Pay Clerk Paul C. Hutcheson, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On September 30, 1918, the convening authority, subject to remarks concerning the introduction by the defense of testimony of certain witnesses to show certain mitigating circumstances, which tetimony, although not inconsistent with the plea of guilty, so approached a contradiction thereof as to impose a duty on the court and the judge advocate to conduct a searching examination of said witnesses, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Pay Clerk Paul C. Hutcheson, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION OF THE JUDGE ADVOCATE GENERAL

On October 23, 1918, the Judge Advocate General concurred in the remarks of the convening authority.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

On October 30, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was, on October 31, 1918, submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 7, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 150—1918

[P. 1] Ensign Royal W. Locke, U. S. Naval Reserve Force, was tried by general court martial on September 9, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Conduct to the prejudice of good order and discipline (two specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

SENTENCE

"The court therefore sentences him, Ensign Royal W. Locke, United States Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned at hard labor in such prison or penitentiary as the convening authority may designate for a period of five (5) years."

ACTION OF THE CONVENING AUTHORITY

On September 16, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Royal W. Locke, U. S. Naval Reserve Force; designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement; and in conformity with article 53

[C. M. O. 151—1918]

of the Articles for the Government of the Navy referred the record to the Secretary of the Navy for transmission to the President.

ACTION OF THE SECRETARY OF THE NAVY

On November 4, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record in the foregoing case was, on November 5, 1918, submitted to the President of the United States, with the recommendation that the sentence be confirmed.

[P. 2] ACTION OF THE PRESIDENT

On November 11, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

REMARKS

It was noted in the foregoing case that the precept bore a date later than the letter transmitting the charges and specifications, that the pages on which the charges and specifications were written were not marked in accordance with section 84 of Naval Courts and Boards, 1917, and that the record did not state that the prosecution offered no evidence. (See Naval Courts and Boards, 1917, p. 349). While irregular, the aforementioned defects were not sufficiently serious to invalidate the proceedings.

C. M. O. 151—1918

[P. 1] Lieutenant Andrew E. Carter, U. S. Naval Reserve Force, was tried by general court martial on September 9, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Perjury (three specifications).

Charge II.—Conduct to the prejudice of good order and discipline (two specifications).

Charge III.—Scandalous conduct tending to the destruction of good morals (one specification).

Charge IV.—Drunkenness (two specifications).

Charge V.—Disobedience of a lawful order of the Secretary of the Navy (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Andrew E. Carter, United States Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned at hard labor in such prison or penitentiary as the convening authority may designate for a period of fifteen (15) years."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendations to clemency was spread upon the record:

> "In consideration of the inability of the accused, trained as he has been, to appreciate the seriousness of the offenses, with the exception of that of perjury, which, in our opinion, he fully appreciated, to which he has pleaded guilty, we recommend Lieutenant Andrew E. Carter, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

The convening authority on September 16, 1918, subject to certain remarks concerning the unanimous recommendation to clemency, which the convening

[C. M. O. 154–1918]

authority did not favorably consider [P. 2] and the seriousness of the offenses of the accused, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Andrew E. Carter, U. S. Naval Reserve Force, and designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement; and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

ACTION OF THE SECRETARY OF THE NAVY

On November 4, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of the proceedings of the general court martial in the foregoing case of Lieutenant Andrew E. Carter, U. S. Naval Reserve Force, was, on November 5, 1918, submitted to the President of the United States, with the recommendation that the sentence be confirmed. The period of confinement was reduced to eight years.

ACTION OF THE PRESIDENT

On November 11, 1918, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

REMARKS

It was noted in the foregoing case that the precept bore a date later than the letter transmitting the charges and specifications. The pages on which the charges and specifications were written were not marked in accordance with section 84, Naval Courts and Boards, 1917. The record did not state that the prosecution offered no evidence. (See Naval Courts and Boards, 1917, p. 349.) While irregular, the aforementioned defects were not sufficiently serious to invalidate the proceedings.

C. M. O. 154—1918

[P. 1] Captain Joseph H. Crozier, U. S. Coast Guard, was tried by general court martial on September 2, 1918, at Base Twenty, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Absence from command without leave (one specification).

Charge II.—Drunkenness (one specification).

Charge III.—Conduct to the prejudice of good order and discipline (one specification).

FINDINGS

The court found the specification of the first charge "proved" and the accused "guilty" of the first charge; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of the second charge; the specification of the third charge "proved," and the accused "guilty" of the third charge.

SENTENCE

"The court therefore sentences him, Captain Joseph H. Crozier, U. S. Coast Guard, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In view of the previous service of this officer in the U. S. Navy in the Spanish-American War and his previous nineteen years' service in the

[C. M. O. 158—1918]

U. S. Coast Guard, the fact that he was served with credit as testified to by his previous commanding officers for a period of 11 months in the war zone, European waters, and in view of his arduous service in coasting work just previous to the offense, the court unanimously recommends the accused to the clemency of the reviewing authority."

[P. 2] Action of the Convening Authority

The convening authority on September 18, 1918, placed an endorsement on the record in the foregoing case, as follows:

"The members of the court were unanimous in their recommendation for clemency. In dealing with that recommendation it is necessary to consider the findings of the court and to weigh the recommendation against the offense of which the court found this officer guilty.

"The court found that the accused, while acting as commanding officer of a vessel, left his command without leave, remained absent therefrom for a period of about three days, and when he returned on board he was so much the worse for overindulgence in intoxicating liquor that he was unfit for duty.

"The accused has had a long record of honorable service; and unquestionably a good record may be invoked and should be considered. But there are two reasons why the convening authority is not able to exercise clemency in this case. In the first place, with the Nation at war, the value of an officer to the Nation must be judged upon the basis of present worth and not upon past record. The worth of a commanding officer who will leave his vessel and go on a spree is small. In the second place, the record of this officer shows that he has upon a previous occasion been tried and convicted of the offense of drunkenness. This information was not before the court, but it is now before the convening authority. That entry does not make the record of the officer concerned of much value as a basis for the exercise of clemency in this case.

"Subject to the above remarks the proceedings, findings, and sentence of the general court martial in the foregoing case of Captain Joseph H. Crozier, U. S. Coast Guard, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

Recommendation of the Captain Commandant, U. S. Coast Guard

The record in the foregoing case was referred to the Captain Commandant, U. S. Coast Guard, who, on October 21, 1918, concurred in the action of the convening authority.

[P. 3] Action of the Secretary of the Navy

The proceedings, findings, and sentence of the general court martial in the foregoing case of Captain Joseph H. Crozier, U. S. Coast Guard, were approved on November 4, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States with the recommendation that the sentence be confirmed.

Action of the President

On November 11, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 158—1918

[P. 1] Machinist (T) John W. Orr, U. S. Navy, was tried by general court martial on September 10, 1918, on board the U. S. S. *Baltimore*, by order of the Commander, Mine Force, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Gambling (one specification).

[C. M. O. 161—1918]

SENTENCE

"The court therefore sentences him, Machinist (T) John W. Orr, U. S. Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On September 19, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Machinist (T) John W. Orr, U. S. Navy, but reduced the sentence to a loss of pay of fifty dollars per month for a period of one year.

ACTION OF THE SECRETARY OF THE NAVY

Machinist Orr was found guilty of gambling with enlisted men, and the Department considers that a sentence of dismissal is none too severe for an officer who is guilty of such misconduct. The action of the convening authority in mitigating the sentence of dismissal, as adjudged by the court, to the loss of fifty dollars per month of his pay for a period of one year is disapproved in order that an undesirable precedent may not be established.

C. M. O. 159—1918

[P. 1] Machinists (T) Edward F. Fitzpatrick, U. S. Navy, was tried by general court martial on October 21, 1918, at the Navy Yard, New York, by order of the Commander, Cruiser Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Leaving station before being regularly relieved (one specification).

Charge II.—Absence from station and duty without leave (one specification).

Charge III.—Falsehood (one specification).

SENTENCE

"The court therefore sentences him, Machinist (T) Edward F. Fitzpatrick, U. S. Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On October 29, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Machinist (T) Edward F. Fitzpatrick, U. S. Navy, and in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

ACTION OF THE SECRETARY OF THE NAVY

On November 8, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

On November 15, 1918, the Secretary of the Navy mitigated the sentence of the general court martial in the foregoing case of Machinist (T) Edward F. Fitzpatrick, U. S. Navy, to the revocation of his temporary appointment as machinist, U. S. Navy, and to a loss of pay amounting to one hundred dollars.

C. M. O. 161—1918

[P. 1] Ensign John P. Murray, U. S. Naval Reserve Force, was tried by general court martial on September 9, 1918, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy, on the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (two specifications).

FINDINGS

The court found the first specification of the charge "proved in part," the second specification of the charge "not proved," and the accused "guilty" of the charge.

[C. M. O. 162—1918]

SENTENCE

"The court therefore sentences him, Ensign John P. Murray, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency signed by four of the five members of the court was spread upon the record:

> "In consideration of the connivance by the two principal witnesses for the prosecution, whereby he was encouraged and led into acts of which previously formed intent is very doubtful, and, in further consideration of an unusually creditable past record, and the value of his technical ability to the service, we recommend Ensign John P. Murray, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

RETURNED FOR REVISION

On October 22, 1918, the Department returned the record in the foregoing case to the court, with the direction to reconvene for the purpose of reconsidering its sentence. which, in the opinion of the Department, was inadequate for the offense found proved.

[P. 2] ACTION IN REVISION

The court decided to revoke its former sentence and to substitute therefor the following:

> "The court therefore sentences him, Ensign John P. Murray, U. S. Naval Reserve Force, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year and to perform hard labor during such imprisonment."

ACTION OF THE SECRETARY OF THE NAVY

On November 7, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

On November 8, 1918, the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign John P. Murray, U. S. Naval Reserve Force, were approved; the naval prison, at the Navy Yard, Portsmouth, N. H., was designated as the place for the execution of so much of the sentence as relates to imprisonment; and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 16, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 162—1918

[P. 1] Boatswain John J. Harrigan, U. S. Navy, was tried by general court martial on September 11, 1918, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy, and found guilty of the following charge: *Charge.*—Scandalous conduct tending to the destruction of good morals (one specification).

SENTENCE

"The court therefore sentences him, Boatswain John J. Harrigan, U. S. Navy, to be dismissed from the United States naval service."

[C. M. O. 166—1918]

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"The accused has only held his warrant for about seven months when he committed this offense after long, honorable, and distinguished service as an enlisted man. His character, as shown by letters from officers under whom he has served, has been above reproach.

"The court, which views with severity the offense he committed, nevertheless believes that it was committed under sudden impulse for which he immediately endeavored to make amends. Hi faithful industry has made him, during the present war emergency, one of our most valued aviators. For the reasons set forth above, we strongly and earnestly recommend clemency."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On November 6, 1918, the Bureau of Navigation recommended that the proceedings, findings, and sentence in the foregoing case be approved, but, in view of the unanimous recommendation to clemency, that the sentence be mitigated to the revocation of the accused's temporary appointment as boatswain and the loss of twenty (20) dollars per month of his pay for a period of twelve (12) months.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Boatswain John J. Harrigan, U. S. Navy, were approved on November 11, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 16, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 166—1918

[P. 1] Lieutenant Commander Leo L. Lindley, U. S. Navy, was tried by general court martial on September 5, 1918, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Culpable negligence and inefficiency in the performance of duty (one specification).

Charge II.—Culpable inefficiency in the performance of duty (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Commander Leo L. Lindley, United States Navy, to lose fifty (50) numbers in his grade."

RETURNED FOR REVISION

The Department, on October 25, 1918, returned the record of the proceedings in the foregoing case to the court, and directed that the court reconvene for the purpose of recording the sentence as indicated in circular letter No. 11130–51, paragraph 3 of which prescribes the following form of sentence for permanent officers serving under temporary commission in a higher grade: "The court therefore sentences him Lieutenant Commander X_____ Y_____, U. S. Navy, to lose _____ numbers in his temporary grade of lieutenant commander and to lose _____ numbers in his permanent grade of lieutenant."

[C. M. O. 169—1918]

SENTENCE IN REVISION

The court reconvened on October 28, 1918, and decided to revoke its former sentence and to substitute therefor the following:

"The court therefore sentences him, Lieutenant Commander Leo L. Lindley, United States Navy, to lose fifty (50) numbers in his temporary grade of lieutenant commander, and to lose fifty (50) numbers in his permanent grade of lieutenant."

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

On October 4, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Leo L. Lindley, U. S. Navy, are approved. He will be released from arrest and restored to duty.

C. M. O. 169—1918

[P. 1] Pay Clerk (T) Gilbert J. Craver, U. S. Navy, was tried by general court martial on July 24, 1918, at the Naval Training Station, Great Lakes, Ill., by order of the Secretary of the Navy, upon the following charges:

Charge I.—Stealing property of the United States intended for the naval service thereof (one specification).

Charge II.—Unlawfully selling property of the United States intended for the naval service thereof (one specification).

Charge III.—Neglect of duty (one specification).

Charge IV.—Perjury (two specifications).

Charge V.—Scandalous conduct tending to the destruction of good morals (three specifications).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge; the specification of the third charge "proved," and the accused "guilty" of the third charge; the specification of the fourth charge "proved," and the accused "guilty" of the fourth charge; the specifications of the fifth charge "not proved," the accused "not guilty" of the fifth charge, and acquitted the accused of the fifth charge.

SENTENCE

"The court therefore sentences him, Pay Clerk (T) Gilbert J. Craver, United States Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of five (5) years."

RECOMMENDATION OF CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of the excellent record of the accused during his service in the U. S. Navy, and the testimony of many [P. 2] witnesses as to his character and reputation, we recommend Pay Clerk (T) Gilbert J. Craver, U. S. Navy, to the clemency of the reviewing authority."

RETURNED FOR REVISION

On October 23, 1918, the Department returned the record in the foregoing case to the court for the purpose of reconsidering the sentence, and its findings on the first charge and specification thereunder, which, in the opinion of the Department, were not in accord with the evidence adduced.

[C. M. O. 170—1918]

From the evidence it was clearly indicated that the accused was a party to the taking of commissary stores, in some instances as a principal and in others as an accessory before the fact; in the former case when an innocent agent was employed in furtherance of his crime, and in the latter when the same was accomplished through a guilty agent.

> "One who with felonious intent procures a taking of another's property by means of an innocent agent is himself guilty of the larceny as principle * * *. But if he procures the taking through a guilty agent he is not a principal, but an accessory before the fact" (25 Cyc. 58).

ACTION IN REVISION

The court decided "respectfully to adhere to its former findings and sentence."

REMARKS AND RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL

On November 12, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, remarking upon the waiver of certain defects in the specifications by the failure of the accused to object thereto, the fact that the court in revision had adhered to its former findings, and the presence of minor irregularities which did not invalidate the proceedings—and recommending that the finding and acquittal upon the first charge be disapproved, that the proceedings and findings upon the second, third, fourth, and fifth charges and the sentence be approved, and that the naval prison at the Navy Yard, Portsmouth, N. H., be designated as the place for the execution of so much of the sentence as relates to confinement.

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

On November 18, 1918, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, were approved on November 19, 1918, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On November 23, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 170—1918

[P. 1] Captain John J. Mahoney, U. S. Marine Corps, was tried by general court martial on October 24, 1918, at the Naval Ammunition Depot, Dover, N. J., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Neglect of duty (one specification).

SENTENCE

"The court therefore sentences him, Captain John J. Mahoney, U. S. Marine Corps, to lose fifteen (15) numbers in his grade."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In view of the extremely arduous nature of his duties, their extensive scope at the time of this offense and the previous long service and excellent record of the accused, we recommend Captain John J. Mahoney, U. S. Marine Corps, to the clemency of the reviewing authority."

[C. M. O. 171—1918]

REMARKS AND RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL

On November 21, 1918, the Judge Advocate General, by an endorsement on the record in the foregoing case, expressed the opinion that the charge of "neglect of duty" had not been proved because the prosecution did not prove the existence of any unusual circumstances imposing a duty on the accused to give unusual orders which, it is alleged, the accused neglected to give, and recommended that the proceedings be approved, the findings and sentence be disapproved, and that the accused be released from arrest and restored to duty.

RECOMMENDATION OF THE MAJOR GENERAL COMMANDANT, UNITED STATES MARINE CORPS

On November 25, 1918, the Major General Commandant, U. S. Marine Corps, concurred in the recommendations of the Judge Advocate General.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General concurred in by the Major General Commandant, U. S. Marine Corps, are approved.

C. M. O. 171—1918

[P. 1] First Lieutenant Carl W. Meigs, U. S. Marine Corps, was tried by general court martial on October 29, 1918, at the Naval Ammunition Depot, Dover, N. J., by order of the Secretary of the Navy, on the following charges:

Charge I.—Neglect of duty (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

FINDINGS

The court found the specification of the first charge "proved" and the accused "guilty" of the first charge; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and did fully and honorably acquit the accused of the second charge.

SENTENCE

"The court therefore sentences him, First Lieutenant Carl W. Meigs, U. S. Marine Corps, to lose forty (40) numbers in his grade."

REMARKS AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On November 21, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, which, after commenting upon certain irregularities which did not invalidate the proceedings, continued as follows:

> "The specification of the first charge in this case alleges in effect that it was the duty of the accused to issue and see effected such orders as were necessary to prevent the members of a detachment under his command from having ammunition in their possession during a parade and that he did then and there wrongfully neglect and fail to issue and see effected the aforesaid orders. It devolved upon the prosecution to establish by evidence the averments made—to wit:
>
> "(*a*) That the duty of issuing and seeing effected certain orders devolved upon the accused.
>
> [P. 2] "(*b*) That the accused failed to issue said orders; and
>
> "(*c*) That he neglected and failed to see effected said orders.
>
> "The only evidence touching upon (*a*) was that introduced to prove this accused was placed in command of the detachment detailed for the parade in question, but none whatever to show that as commanding officer the situation required his issuing the particular order mentioned, and this fact was, therefore, apparently left entirely for the members of the court to determine. Whereas, a court may take judicial notice of Navy Regulations, general orders and circulars of the Department, court-martial orders

[C. M. O. 171—1918]

and authorized publications, and also what are clearly customs of the service, it does not appear that there is any established rule, regulation, or custom providing that an officer on taking command of a detachment of men for parade shall issue orders prohibiting the carrying of ammunition.

"In view of the above it is my opinion that to secure a conviction in the case now under consideration it would be essential for the prosecution to show by evidence the existence of exceptional circumstances making necessary the issuing of the orders in question—that is, that unusual conditions prevailed; that the command was composed of raw recruits; that the men and non-commissioned officers were inexperienced and unfamiliar with the customs of the service; that they were daily handling and had in their possession live ammunition and were not instructed regarding the keeping of same when not on guard; and that other exceptional circumstances demanded the exercise of more than usual precautions on the occasion of this parade, which not only required the issuing of specific orders to prevent the carrying of live ammunition, but also incurred the necessity of adopting unusual methods of inspection to see that the orders were effectively carried out and that no one surreptitiously had such ammunition in his possession.

"The prosecution, however, clearly failed to take any such course, but apparently concluded that it was only incumbent upon it to show that the members of the command had ammunition in their possession on the day of the parade and during the parade, and that the court would take judicial notice of the custom that such was not an authorized part of a man's equipment for parade purposes, and that the commanding officer of the detachment was responsible if it should be found in possession of the men.

[P. 3] "Orders generally prescribe what a man shall carry or of what his equipment shall consist and not what he shall not carry. It is certainly not the custom to carry live ammunition on drill, but this is so well established that an officer would hardly be considered censurable did he fail on each occasion that he drilled a command to issue an order to prevent the carrying of live ammunition. Exceptional cases may, however, be recognized in which such orders would be deemed essential, but in these the circumstances which require the following of other than the customary course would be unusual, and to prove that issuing of orders was required would necessitate the introduction of evidence to show the conditions at the time existing which demanded the exercise of unusual precautions, which requirement the prosecution has utterly failed to meet.

"Regarding (*b*)—viz, that the accused failed to issue said orders—there was no evidence whatsoever presented to prove that averment, Sergeant D ——— was the only member of the detachment called as a witness; and the only question and answer which might in any way be held to touch upon this feature was * * *:

"Q. Did you receive any instructions from the accused to make any inspections to see that the men had ammunition in their possession?

"A. No, sir; I did not.

"This, however, does not prove that no orders were issued to prevent the members of the detachment from having ammunition; it was simply a step in the direction of seeing the orders effected if such had been issued. Hence, in my opinion, allegation (*b*) has not been proved

"The prosecution having failed to prove (*a*) and (*b*), discussion of (*c*) appears to be unnecessary, for if it is not shown that the accused was under a duty to issue these orders, he can hardly be held for failure to see them effected.

"In view of the above, it is my opinion that the findings of the court upon the specification of charge I and said charge are not sustained by the evidence adduced, and I have therefore to recommend that the same be disapproved; that, subject to the remarks made herein, the proceedings and findings upon charge II and the specification thereunder be approved; that the sentence be disapproved; and that First Lieutenant Meigs be released from arrest and restored to duty."

[P. 4] ACTION OF THE MAJOR GENERAL COMMANDANT, U. S. MARINE CORPS

On November 25, 1918, the Major General Commandant of the U. S. Marine Corps concurred in the recommendations of the Judge Advocate General.

[C. M. O. 174—1918]

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Major General Commandant, U. S. Marine Corps, are approved.

C. M. O. 173—1918

[P. 1] Lieutenant George R. Kalbfus, U. S. Navy, was tried by general court martial on October 23, 1918, at the naval station, Key West, Fla., by order of the Secretary of the Navy, and found guilty of the following charge, proved by plea:

Charge.—Violation of a lawful regulation issued by the Secretary of the Navy (eight specifications).

SENTENCE

"The court therefore sentences him, Lieutenant George R. Kalbfus, U. S. Navy, to lose fifty dollars ($50) per month of his pay for a period of twelve months, and to lose fifty (50) numbers in his grade."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In view of the fact that the accused endeavored in every way known to him to secure a correct interpretation of the regulations from officers more experienced than himself and the further fact that he was approached by the men to whom the instruction was given out of hours, and his evident lack of intent to commit a breach of the regulations, as set forth in his statement, the court unanimously recommends him to the clemency of the revising authority."

RETURNED FOR REVISION

On November 9, 1918, the Department returned the record of the proceedings in the foregoing case to the court and directed that the court reconvene for the purpose of recording its sentence in accordance with circular letter No. 11130–51 of March 28, 1918, which suggests a form of sentence to be followed in adjudging loss of numbers.

ACTION IN REVISION

The court decided to revoke its former sentence and substituted therefor the following:

[P. 2] "The court therefore sentences him, Lieutenant George R. Kalbfus, U. S. Navy, to lose fifty dollars ($50) per month of his pay for a period of twelve (12) months, and to lose fifty (50) numbers in his temporary grade of lieutenant and to lose fifty (50) numbers in his permanent grade of ensign."

ACTION OF THE SECRETARY OF THE NAVY

On November 27, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant George R. Kalbfus, U. S. Navy, are approved. He will be released from arrest and restored to duty.

C. M. O. 174—1918

[P. 15] ACCUSED: IMPROPER QUESTIONING OF, BY THE JUDGE ADVOCATE.

After a plea of "not guilty," the judge advocate asked the accused, who had not taken the stand as a witness, if he was willing to admit on record that he

[C. M. O. 174—1918]

was E_____ L. C_____, ship's cook, third class, U. S. Navy. The accused stated that he was willing to and did make such admission on record.

The Judge Advocate General was of the opinion that such a course of procedure was highly irregular. It too nearly approached the placing of the accused on the stand to testify against himself, which would have been in contravention of his constitutional right. The interests of the accused were not prejudiced in this case, however, becuse he was acquitted of the one charge against him (File 26251–16175, G. C. M. Rec. No. 40635).

[P. 16] CHARGES AND SPECIFICATIONS: CHARGE MUST BE ONE AUTHORIZED BY THE ARTICLES FOR THE GOVERNMENT OF THE NAVY.

One of the charges in a recent case was: "Violation of a lawful order issued by the commander, Naval Forces, Canal Zone." The charge should have been "Disobeying the lawful order of his superior officer" (File No. 26262–5387, G. C. M. Rec. No. 40787).

The charge, "Violation of a lawful order issued by the commandant, Fifteenth Naval District," is not an authorized one. It should be "Disobeying the lawful order of his superior officer" (File 26262–5587, G. C. M. Rec. No. 41352).

CHARGES AND SPECIFICATIONS: SPECIFICATION SHOULD STATE FACTS CONSTITUTING THE OFFENSE CHARGED AND NOT SOME OTHER OFFENSE.

The specification in support of a charge of "Violating the lawful order," etc., after alleging certain provisions of an order issued by the commander, Naval Forces, Canal Zone, forbidding visits of officers and enlisted men to the Republic of Panama except under certain conditions, and that the accused had due notice thereof, set forth that the accused did on July 14, 1918, "unlawfully use, for his own benefit, for entrance into the city of Colon, Republic of Panama, an authorized permit issued on July 15, 1918, by the commanding officer, Coco Solo, C. Z., for the use of A_____ G_____, mess attendant, third class, U. S. Naval Reserve Force." Instead of alleging that the accused entered the Republic of Panama in violation of orders, a different offense is set forth, to wit, that of unlawfully using for his own benefit a pass issued to another enlisted man, which should have been charged as "Conduct to the prejudice of good order and discipline." The charge and the specification thereunder were disapproved by the Department (File No. 26262–5387, G. C. M. Rec. No. 40787).

COUNSEL TO ASSIST JUDGE ADVOCATE: NOT PROPER TO DESIGNATE AS ASSISTANT JUDGE ADVOCATE.

A precept appointed a judge advocate and an "assistant judge advocate." There is no such officer of a general court martial as an "assistant judge advocate." Naval Courts and Boards, 1917, sections 260–262, provides for the detail of counsel to assist the judge advocate, but such counsel has no standing before the court except in the capacity of counsel. As the judge advocate was present at all the sessions of the court and the person detailed to assist him acted merely as counsel to the judge advocate, the above irregularity in the precept and proceedings was held not sufficient to invalidate (File 26262–5215, G. C. M. Rec. No. 40447).

COURT OF INQUIRY: RECORD OF PROCEEDINGS OF, AS EVIDENCE BEFORE COURTS MARTIAL.

The prosecution in a recent case being unable to secure the attendance of a certain witness, introduced, and the court [P. 17] received in evidence, the record of the proceedings of a court of inquiry and the judge advocate read therefrom and incorporated into the record of the case on trial excerpts from the testimony given by said witness. The testimony introduced relative to the court of inquiry proceedings disclosed the fact that at the time the aforementioned witness was testifying, the accused in the case on trial had not been

made an interested party or defendant before the court of inquiry, and it was not shown that when the accused subsequently became a party to the inquiry that this particular witness was called before the court and the accused afforded opportunity to cross-examine him on the evidence given.

Whereas, article 60, of the Articles for the Government of the Navy, provides for the introduction of the proceedings of courts of inquiry as evidence before courts martial, and C. M. O. No. 46, of 1917, sets forth at length the conditions under which the provisions of this article may be made available, it is obvious that in this case the aforementioned statute did not apply. Congress cannot abridge or abrogate the constitutional rights of a person charged with crime, one of which is that he be confronted with the witnesses against him and be afforded opportunity to cross-examine them on the evidence they may give. In legislating that the proceedings of a court of inquiry shall be evidence before a court martial in certain defined cases Congress did not undertake to curtail the rights of an accused, but to enact a law which would render more effective court-martial proceedings when certain needed witnesses were not available by saying in effect that in a court of inquiry the defendant or person made a party thereto, having been present thereat, accorded counsel and afforded opportunity to cross-examine witnesses, and having thereby been accorded his constitutional right of confrontation with and cross-examination of witnesses against him, such evidence as witnesses may, under those conditions, have given, may be used at a subsequent trial, if the witness who has so testified is not available, and in cases not capital or extending to the dismissal of a commissioned or warrant officer.

In view of the above and as it is not apparent that this accused was at the court of inquiry confronted with witness who there testified and the record of whose testimony was introduced by the prosecution in the case on trial, the record of the court of inquiry for the purpose specified was incompetent evidence and therefore inadmissible. In view, however, of the acquittal of the accused and the absence of an objection to the admission of such evidence, the error was held not to be sufficient grounds for disapproving the proceedings (File 26251–16166, G. C. M. Rec. No. 40750).

COURT OF INQUIRY: WHEN TESTIMONY BEFORE, IS ADMISSIBLE AS EVIDENCE IN COURT-MARTIAL PROCEEDINGS.

In order to show the status of the commissary account of the accused during a certain period the judge advocate offered in evidence the record of a court of inquiry and read the testimony [P. 18] given thereat by a certain witness, without the required preliminary proof being made that this witness was unavailable or that other witnesses could not testify before the court as to the same facts. Article 60, A. G. N., provides that the proceedings of courts of inquiry shall, under certain circumstances and conditions, be evidence before a court martial, provided oral testimony cannot be obtained.

In view of the fact, however, that the accused was represented by counsel and no objection was made to the introduction of the above evidence, the irregularity was held to have been waived by the accused and not to invalidate the proceedings (File 26251–16162, G. C. M. Rec. No. 40804; file 26251–16165, G. C. M. Rec. No. 40951).

INTOXICATING LIQUOR: WHEN HAVING IN POSSESSION CONSTITUTES OFFENSE.

The accused in a recent case was charged with "Conduct to the prejudice of good order and discipline." The single specification under said charge alleged that the accused did, "upon returning to said rifle range from liberty, unlawfully have in his possession a flask containing intoxicating liquor."

The court found the above-quoted allegation proved, with the exception of the word "upon," for which word the court substituted the word "while," which word was found proved.

As amended, the specification did not, in the opinion of the Judge Advocate General, allege an offense, because it did not allege that the accused had intoxicating liquor in his possession in one of the following forbidden places:

(*a*) Places under Army jurisdiction, prescribed by the act of May 18, 1917, and regulations thereunder.

(*b*) On board a naval vessel of the United States.

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(*c*) At any naval station, marine barracks, or other command of the United States.

(*d*) At any other place under the exclusive jurisdiction of the Navy Department.

The Department, therefore, disapproved the findings of the court on the above-mentioned charge and specification (File 26251–18237, G. C. M. Rec. No. 40907; see also File 26251–18238, G. C. M. Rec. 40914).

NEGLECT OF DUTY: SPECIFICATION UNDER CHARGE OF, SHOULD SET FORTH FACTS CONSTITUTING, WITH PRECISION AND CERTAINTY.

A commissary steward was charged with "Neglect of duty." The first specification set forth that he allowed certain enlisted men to take and carry away various quantities of subsistence stores placed in his official custody during a period covering six months, without causing the same to be paid for or charged to a proper account, the exact amount and value of said stores being unknown. The second specification alleged, that the accused, having learned of certain enlisted men obtaining supplies of the character and in the manner set forth in the first specification, [P. 19] neglected to inform his superior officer of said fact, as it was his duty to do. The time or period during which the enlisted men unlawfully removed the stores was not specified, nor was any part of the transaction alleged with the certainty and definiteness required (Naval Courts and Boards, 1917, sec. 75). In view, however, of the fact that the accused was represented by counsel and opportunity was afforded him to object to the charge and specifications, and the specific statement recorded that the accused had no objections to make to either, and, furthermore, as he pleaded guilty thereto, it was held that the defects were not fatal (File 26251–16184, G. C. M., Rec. No. 40570).

PREVIOUS CONVICTIONS, EXTRACTS FROM SERVICE RECORD SHOWING: INADMISSIBLE, UNLESS PROPER APPROVALS ARE SHOWN.

The judge advocate in a recent case read extracts from the current service record of the accused showing previous trials and convictions of the accused by summary court martial. No approvals of such convictions by proper authority were shown. In the opinion of the Judge Advocate General, the said extracts should have been excluded by the court. The irregularity was, however, held to be but a minor one (File 26262–5436, G. C. M. Rec. No. 40921).

SPECIFICATIONS: IRREGULARITIES IN, WAIVED BY FAILURE OF ACCUSED (COUNSEL) TO OBJECT THERETO.

The accused in a recent general-court-martial case was charged, inter alia, with "Stealing property of the United States intended for the naval service thereof." The single specification of the charge alleged the stealing of different articles on various occasions, indicating that many thefts were committed, which were all improperly joined in the said specification, making the same duplicitous.

In view of the fact, however, that the accused was represented by counsel and no objection was made to the above-mentioned irregularity, it was held that same had been waived and did not invalidate the proceedings (File 26251–16152, G. C. M. Rec. No. 40804; File 26251–16165, G. C. M. Rec. No. 40951).

STATEMENT INCONSISTENT WITH PLEA OF GUILTY: PROCEDURE WHEN ACCUSED MAKES.

The accused was charged with "Stealing property of the United States intended for the naval service thereof." He pleaded guilty to the charge and specifications thereunder. The prosecution offered no evidence. The accused made a statement with reference to the first specification in substance as follows: That he had asked the cook for the bones and they were given to

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him; as to the second specification, that he was going to be [P. 20] absent from mess at supper time and took the salmon in lieu of the supper he was going to miss.

This statement is clearly inconsistent with the accused's plea of "guilty" to the charge and both specifications thereunder; it is evident that the court made a material error by not proceeding in accordance with sections 310 and 312, Naval Courts and Boards, 1917.

In the absence of evidence to prove the acts alleged by the specifications of the charge, the proceedings, findings, and sentence of the court were disapproved (File 26262–5410, G. C. M. Rec. No. 40875).

THEFT: UNLAWFUL TAKING OF AUTOMOBILE FOR "JOY RIDE" DOES NOT CONSTITUTE.

A review of the record in a recent case disclosed the following state of facts: That the accused, in company with two civilians and two sailors, was stopped by the police while driving an automobile, which had been unlawfully taken a few hours previously by parties unknown. When asked to whom the automobile belonged the accused falsely stated that it belonged to his uncle. Later, before a magistrate, he admitted taking the machine for a joy ride. Testimony by a police sergeant that the accused admitted to him that "he stole it" was verified by the accused in his trial by court-martial with the explanation that he was requested by one of the civilians in the party to make this statement in order to protect the civilian, with the idea that the civilian would later assist him in the event of prosecution by the naval authorities. The accused testified that the machine was in the possession of the two aforementioned civilians when he entered it.

In the opinion of the Judge Advocate General the above was not sufficient to show the necessary felonious intent at the time of taking to constitute the crime of larceny. The term "felonious intent," as used in relation to larceny, means an intent to deprive the owner not temporarily, but permanently, of his property. (*See State* v. *Shepard*, 63 Kans. 545.) The facts in this case tended to show that the automobile was taken for a "joy ride," rather than for the purpose of depriving the owner permanently of his property. The Department, therefore disapproved the findings of the court on the charge of "theft" entered against the accused. (File 26262–5217, G. C. M. Rec. No. 40422; see also File 26262–5216, G. C. M. Rec. No. 40443).

WITNESS: NOT DISQUALIFIED BECAUSE PRESENT IN COURT DURING TESTIMONY OF PREVIOUS WITNESS.

On objection by counsel for the accused in a recent case, the court refused to permit a witness for the prosecution to testify on the ground that she had been present during the testimony of the preceding witness. This ruling of the court was erroneous. [P. 21] A witness who is present in the courtroom during the testimony of previous witnesses, even in violation of the court's order, is not thereby disqualified from testifying, but such fact may be brought out in cross-examination as affecting the credibility of the witness (File 26262–5158, G. C. M. Rec. No. 40307).

WITNESS IN EXTENUATION: WHAT RECORD SHOULD SHOW AS TO.

Where the accused goes on the stand at his own request as a witness in extenuation of his acts, the record should contain the proper notation that he was a witness in extenuation. (See Naval Digest, 1916, Witnesses, 63; File 26251–18252, G. C. M. Rec. No. 40846.)

CLAIMS, PRIVATE: DEPARTMENT WILL NOT LEND AID IN COLLECTION OF.

Upon information requested as to whether there is any branch of the naval service charged with the duty of compelling payment of private debts and claims against its personnel, the reply of the Judge Advocate General was as follows:

> "The executive departments of the Government are not permitted to lend their aid to the collection of private claims against persons in their service. In such cases resort should be had to civil courts.

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"Where a continual and persistent refusal on the part of a person in the naval service to pay an undisputed claim or debt brings scandal and disgrace on the naval service, the question becomes one of conduct unbecoming an officer and a gentleman on the part of an officer, or of conduct to the prejudice of good order and discipline on the part of either an officer or enlisted man, and disciplinary action will be taken by the Department on these questions only" (File 16670–44, J. A. G., Nov. 25, 1918).

COAST GUARD: SERVICE IN, CONSIDERED AS SERVICE IN NAVY UNDER ACT OF AUGUST 31, 1918.

Section 3 of the act of August 31, 1918, provides as follows:

"*And provided further.* That men registered under the provisions of this act who have served in the Navy of the United States shall, upon their own application, be permitted to reenlist in the naval or marine service of the United States with and by the approval of the Secretary of the Navy."

There is no statutory enactment providing in terms what shall constitute the Navy of the United States such as exist with [P. 22] reference to the Army (act June 3, 1916, 39 Stat. 166). But no such statutory enactment is necessary to establish that the Army of the United States and the Navy of the United States is each made up of and embraces its component parts; hence, the Navy of the United States, in law and in fact, embraces the Coast Guard in time of war just as certainly as it does any other military force operating under the orders of the Secretary of the Navy. Accordingly the word "Navy" is broad enough to include the Coast Guard in time of war, service in the Coast Guard at such time is service in the Navy, and enlisted men of the Coast Guard are enlisted men of the Navy.

But the same word may have different meanings as used in different statutes (*Towne* v. *Eisner*, 245 U. S. 418, 425; *Lamar* v. *U. S.*, 240 U. S. 60, 65, Op. Atty. Gen to Sec. Navy, Apr 11, 1918, file 26510–1022: 12), and upon this principle the word "Navy" has been held in certain statutes to include the Marine Corps and in others not (see file 5252–66, May 13, 1915; 26280–61, July 10, 1915, Naval Dig., 363).

It has been said that the Marine Corps is "that part of the Navy which may, upon occasion, become a part of the Army." (*Jonas* v. *U. S.*, 50 Ct. Cls., 281); and again, that the Marine Corps when detached for service with the Army becomes a "corps of the Army" (28 Op. Atty. Gen. 15, 19).

The Coast Guard, when operating as a part of the Navy in time of war, is just as much a "part of the Navy" as the Marine Corps is a "part of the Army" when detached for service with the Army.

Evidence as to the intention of Congress in this case is to be found in the fact that the Selective Draft Act of May 18, 1917, section 5, excepted from the duty of registration "officers and enlisted men of the Navy," while the President in his regulations thereunder excepted from the duty of registration "all officers and enlisted men of * * * the Coast Guard," and administrative construction of the word "Navy" of which Congress is presumed to have been aware when enacting the law now under consideration. The language of the latter law appears on its face to be broader than that used in the act of May 18, 1917. The purpose and spirit of the law in this case and the object which it was intended to accomplish are considerations which lead irresistibly to the conclusion that it was meant to give the Secretary of the Navy the same control over the reenlistment of experienced men in the Coast Guard as he was expressly given over the reenlistment of such men in the Marine Corps, and the language of the law is undoubtedly susceptible of this construction which will produce uniformity in the administration of the law so far as affects the naval service.

In accordance with the above, the Judge Advocate General was of the opinion that a registrant who has served in the Coast Guard in time of war should be considered as having "served in the Navy of the United States" so as to bring him within the purview of section 3 of the Act of August 31, 1918, above quoted (File 28798–773, J. A. G., Nov. 22, 1918).

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[P. 23] FLEET NAVAL RESERVE: EFFECT OF UNAUTHORIZED DISCHARGE OF MEMBER OF.

A boilermaker was transferred from the Regular Navy to the Fleet Naval Reserve on November 3, 1916; he was discharged therefrom by medical survey on July 12, 1917, for disability incurred in line of duty; he was reenlisted in the Navy August 5, 1918; and was, on the same date, again transferred to the Fleet Naval Reserve. Under the act of August 29, 1916 (39 Stat. 591), men transferred to the Fleet Naval Reserve "shall not be discharged from the Naval Reserve Force without their consent, except by sentence of a court martial." There being no evidence that the man in question consented to the medical discharge the attempt thus to discharge him was illegal and of no effect. The statute having pointed out specifically the method of discharge, that is the only method by which discharge can be effected. It follows that this man cannot, by reason of this illegal discharge, be deprived of any of the rights which he would otherwise have, including the right to retainer pay during the time elapsing between said illegal discharge and his purported reenlistment and the right to count such time for the purpose of retirement. The purported discharge and reenlistment being illegal should be canceled on the records (File 28550–544, J. A. G., Nov. 26, 1918).

LINE OF DUTY, DEATH DUE TO HEART TROUBLE: IN LINE OF DUTY ALTHOUGH DECEASED WAS UNDER ARREST.

Deceased, who was under arrest, was found dead in bed July 7, 1918. An autopsy showed death was by reason of "cardiac failure, due to an attack of angina pectoris, accompanied by an acute dilation of the stomach." Deceased had been tried by general court martial, but no final action on the record of proceedings of the court had been taken by the Department up to the time of his death; and on July 11, the Department directed that, in view of the fact that death had occurred no further action would be taken on the proceedings of the court martial.

There was nothing in the record of the board of inquest to show what had brought about the ailment which caused the death and no positive evidence as to the cause of the ailment was available. A careful analysis of the stomach contents of the deceased failed to show any evidence of poisons. The medical record of the deceased showed no previous entries of heart disease and there was nothing in his medical history to indicate that the disease, or a predisposition to it, existed prior to the entrance of the deceased into the service. The medical record of the deceased did show, however, that in March 1908, he had been infected with a disease which is one of the possible causes of angina pectoris, said infection having been incurred in the line of duty from the prick of a needle while the deceased was operating on a patient suffering from the disease. *Held:* Death was in line of duty and not the result of misconduct (File 26250–1436, Sec. Navy, November 23, 1918; see also G. C. M. Rec. No. 38822).

[P. 24] NAVAL AUXILIARY SERVICE: STATUS OF MEMBERS OF, ENROLLED IN NAVAL AUXILIARY RESERVE.

Officers and crews of the Naval Auxiliary Service are civilian employees of the Navy Department. Most of the personnel of this service have been enrolled as members of the Naval Auxiliary Reserve. All officers and men of the Naval Auxiliary Reserve (class 3, U. S. N. R. F.) are in the active service of the naval forces of the United States by virtue of their contract of enrollment (act Aug. 29, 1916) (File 28909–156, J. A. G., Nov. 12, 1918).

NAVAL RESERVE FORCE: DISENROLLMENT OR RELIEF FROM ACTIVE DUTY OF MEMBERS ON THE TERMINATION OF THE PRESENT EMERGENCY.

The whole tenor of the act of August 29, 1916, establishing the Naval Reserve Force shows that said force is to "be composed of citizens of the United States

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who, by enrolling under regulations prescribed by the Secretary of the Navy or by transfer thereto, as in this act provided, obligate themselves to serve in the Navy in time of war or during the existence of a national emergency, declared by the President." The Naval Reserve Force is obviously not intended to form a part of the permanent Navy or to operate as a part of the Navy, except during the existence of a national emergency and for training.

The act also makes it clear that enrolled members of the Naval Reserve Force shall not be required, against their will, to serve in the Navy in time of peace. The act provides "enrollment and reenrollment shall be for terms of four years, but members shall in time of peace, when no national emergency exists, be discharged upon their own request. * * * Enrolled members of the Naval Reserve Force may, in time of war or national emergency, be required to perform active service in the Navy throughout the war or until the national emergency ceases to exist." Further, it is distinctly provided by the act of August 29, 1916, that enrolled members of the Naval Reserve Force shall be subject to the laws, regulations, and orders for the government of the Regular Army only during such time as they may by law be required to serve in the Navy, in accordance with their obligations, and when on active service at their own request, as provided by said act, and when employed in authorized travel to and from such active service in the Navy.

The act of July 1, 1918, Public, No. 182, provides "That in time of peace the Secretary of the Navy is authorized, in his discretion, to order any member of the Naval Reserve Force, with his consent, who has been confirmed in his rank, grade, or rating, to perform any duty afloat for any period of time for which his services may be required: *Provided*, That such members may be relieved from duty by the Secretary of the Navy at any time and shall upon their own application be released from said duty within four months from the date of their application therefor."

From the foregoing provisions it is clear that there is no authority of law for the indefinite retention on active duty of [P. 25] members of the Naval Reserve Force after the termination of the present national emergency, without their consent; and they can be ordered to or retained on active duty, with their consent, only as expressly provided by the above-mentioned acts of Congress. Members of the Naval Reserve Force are not required by law to be disenrolled upon the termination of the present national emergency, except at their request, or by reason of the expiration of their current enrollment.

It does not follow, however, from the foregoing that all members of the Naval Reserve Force on active duty must, immediately upon the termination of the present national emergency, be instantly and in a body relieved from active duty in the Navy. There is nothing in the law which demands such action, and it is unreasonable to suppose that the relief of all Naval Reserve members could be accomplished instantly without seriously disrupting the Navy and impairing its efficiency. There certainly can be no legal objection to the retention of necessary members of the Naval Reserve Force, with or without their consent, for a reasonable period following the termination of the present emergency. What is a "reasonable period" is not a question of law, but a question of fact to be determined by the Secretary of the Navy or the President. Six months was granted by Congress as a reasonable period after the termination of the present emergency within which to terminate the temporary commissions of officers appointed under the act of May 22, 1917 (section 8, Public, No. 17), and might be regarded as a reasonable period within which to relieve from active duty all members of the Naval Reserve Force.

In the opinion of the Judge Advocate General, however, it would be necessary to enact further legislation in order to retain members of the Naval Reserve Force indefinitely on active duty (File 28550–441:1, J. A. G., Nov. 5, 1918).

NAVAL RESERVE FORCE: ELIGIBILITY OF MEMBERS OF, FOR APPOINTMENT TO THE NAVAL ACADEMY BY THE SECRETARY OF THE NAVY.

The first law specially authorizing the appointment of enlisted men of the Navy to the Naval Academy (naval appropriation act of June 30, 1914, 38 Stat. 410) authorized the Secretary of the Navy "to make fifteen appointments annually from the enlisted men of the Navy." Subsequent acts, including that

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which increases the number of such appointments to 100 (act of Dec. 20, 1917, 39 Stat. 9), use the same words, "enlisted men of the Navy," in designating the source from which such appointments shall be made. The existing Naval Reserve Force was created by the naval appropriation act of August 29, 1916 (39 Stat. 556). There was no Naval Reserve Force in existence when the clause "enlisted men of the Navy" was first used in the law (1914). As the identical wording has been used in each subsequent law, it is plain that there was no expressed intention in that manner to include members of the newly created Reserve Force within its scope and give them the right, if otherwise [P. 26] eligible, to compete as "enlisted men of the Navy" for appointment to the Naval Academy.

Neither has the Naval Reserve Force been made such an integral part of the Navy that its members may be considered as "enlisted men of the Navy" and therefore entitled to the privilege or right in question. Members of the Naval Reserve Force, with the exception of comparatively few who are transferred thereto, are "enrolled" as distinguished from "enlisted." In view of the fact that the law has expressly or impliedly given, one by one, many of the rights enjoyed by enlisted men in the Regular Navy to members of the Naval Reserve Force, and has failed to give them other such rights, including the right in question, it is in accordance with well-established rules of statutory construction to conclude that the failure of the law to give members of the Naval Reserve Force all the rights and privileges of enlisted men in the Regular Navy was intentional.

Neither are any of the general provisions of law broad enough to make members of the Naval Reserve Force eligible for appointment to the Naval Academy. (There is a general provision that "all members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service," but the right of an enlisted man of the Navy to compete for an appointment by the Secretary of the Navy to the Naval Academy could not, in the ordinary acceptation of that term, construed to be even an "emolument." There is another general provision in the law to the effect that enrolled members of the Naval Reserve Force, when in active service, shall be subject to the laws, regulations, and orders for the government, of the Regular Navy, but this must be construed to mean only such laws, regulations, and orders as are necessary for discipline, command, and the effective military use and administration of the Naval Reserve Force with the Navy as a combatant force, and it is not believed that the law authorizing the Secretary of the Navy to appoint 100 midshipmen annually from the enlisted men of the Navy is such a law.)

When the Reserve is actively employed its members are in the naval service, but they are not in the Regular Navy, nor are they "enlisted men of the Navy." A specific provision of law is necessary, if it should be determined that members of the Reserve are equitably entitled to compete for appointment by the Secretary of the Navy to the Naval Academy. They are, however, now eligible for appointment by a Member of Congress or by the President (File 5252–92:1, J. A. G.).

NAVAL RESERVE FORCE: LIMITATIONS ON RIGHT OF MEMBERS OF, TO ENGAGE IN CIVIL OCCUPATIONS OR TO HOLD CIVIL OFFICE.

An officer of the Naval Reserve Force, in the active service of the United States, was reelected to the office of county surveyor of a county in Texas. The act of August 29, 1916, provides: [P. 27] "No existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving any pay and allowances incident to such employment in addition to his retainer pay." From the foregoing it appears that it was the desire of Congress not to interfere with or restrict the civil rights and privileges of those citizens who should enroll in the Naval Reserve Force in the matter of accepting employment in any branch of the public service with the exception of other military engagements, either State or National. When ordered into active service members of the Naval Reserve Force become subject to the laws,

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regulations, and orders for the government of the Navy, and in this event civilian engagements must give way for the period of such active service to military obligations.

Whether or not the duties of the office to which the above-mentioned reserve officer was reelected would interfere with his naval duties was held to be a matter he must settle on his own responsibility, taking into consderation the fact that he is subject to naval laws, regulations, and orders. The consideration of an application for disenrollment or transfer to inactive service is within the discretion of the Secretary of the Navy (File 28550–547, Sec. Nav., Nov. 18, 1918).

OATH OF ALLEGIANCE: ONE MAY BE INDUCTED INTO NAVAL SERVICE WITHOUT TAKING.

One J. F. S. _____ made application for induction into the Military service for the naval section, Students' Army Training Corps; he was ordered to report to the mobilization officer at West Virginia University. He was in all respects qualified for induction and was inducted, but was taken sick and died before taking the oath of allegiance.

That the taking of the oath of allegiance is not a prerequisite to enlistment in the Navy or Marine Corps has been decided at various times by the Department and sustained by the Comptroller of the Treasury, and the taking of the oath of allegiance was not necessary to complete the induction of the above-named man into the naval service.

In accordance with the above the Judge Advocate General was of the opinion that the deceased was in the naval service at the time of his death (File 28909–155, J. A. G., Nov. 23, 1918).

PRECEDENCE: OF OFFICERS, TEMPORARY AND PERMANENT.

It is the opinion of the Judge Advocate General that permanent officers do not take precedence over temporary officers of the same rank, merely by reason of the fact that they hold a permanent commission, but that precedence between permanent and temporary officers of the same rank is determined by the dates of their respective commissions (File 11130–60, J. A. G., Nov. 6, 1918).

[P. 28] VOTING UNDER STATE LAWS AT STATE ELECTIONS: BY MEN IN THE SERVICE.

Upon inquiry made by a certain commanding officer in regard to the voting of men under his command in elections held in the State of New York, he was instructed as follows:

> "The Department has issued no instructions governing the procedure to be following by commanding officers in allowing persons in the Navy under their command to vote in State elections, under the act of the legislature of the State of New York of August 29, 1917 (140th sess., vol. 3, p. 815), or under the election laws of any other State except such as are contained in Alnav 127, of August 29, 1918.
>
> "The above-mentioned act of the legislature of the State of New York prescribes how the law shall be put into effect, and all necessary instructions should be given you by the secretary of the State of New York. His instructions are, of course, not binding upon you if they interfere in any way with the proper administration of your duties or the duties of those under your command; but, as stated in Alnav 127, you are authorized to cooperate with State officials as far as practicable without interference with the needs of the service.
>
> "If the instructions received by you from the secretary of the State of New York are incomplete or unintelligible, you should request further instructions, if time permits" (File 9212–100, J. A. G., Nov. 6, 1918).

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[P. 1] Ensign Charles L. Andrews, Jr., U. S. Navy, was tried by general court martial on October 30, 1918, at the U. S. Submarine Base, New London, Conn., by order of the Secretary of the Navy, and found guilty of the following charges, proved by plea:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

Sentence

"The court therefore sentences him, Ensign Charles L. Andrews, Jr., U. S. Navy, to be dismissed from the United States naval service."

Returned for Revision

On November 13, 1918, the Department returned the record in the foregoing case to the court with the direction that the court reconvene for the purpose of correcting certain errors in the record which were of a clerical nature.

Action in Revision

On December 2, 1918, the court reconvened and complied with the direction of the Department.

Opinion of the Judge Advocate General

On December 14, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case expressing the opinion that the statement of the accused was clearly inconsistent with his plea and that the court erred in not following sections 310 and 312, Naval Courts and Boards, 1917. It was therefore recommended that the proceedings, findings, and sentence in the foregoing case be disapproved and that the accused be released from arrest and restored to duty.

Concurrence of the Bureau of Navigation

On December 17, 1918, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

[P. 2] Further Opinion of the Judge Advocate General

On December 23, 1918, the Judge Advocate General placed an indorsement on the record, which, after mentioning such particulars as, in the opinion of the Judge Advocate General, prevented the accused from having a fair trial, continued as follows:

> "In addition to the above it has come to the attention of this office that on October 17, 1918, this accused was nominated for promotion to the grade of lieutenant (jr. gr.) to date from September 21, 1918. The charges were made against him on September 21, 1918, and the Bureau of Navigation recommended his trial by general court martial on October 3, 1918, the charges and specifications were drawn October 5, 1918. It is thus apparent that two weeks after his trial was ordered he was nominated for promotion and has been promoted, such promotion dating from September 21, 1918.
>
> "The Department has held, following the decisions of the Attorney General (6 Op. Atty. Gen. 123; 8 Op. Atty. Gen. 237), and so published to the service, that promotion under the aforementioned conditions and circumstances is a constructive pardon and, therefore, for this reason as well as that previously set forth, it is my opinion that the proceedings, findings, and sentence in the case of Ensign (now Lieutenant j. g.) Charles L. Andrews, Jr., U. S. Navy, should be set aside and I have so to recommend."

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ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General in the case of Ensign Charles L. Andrews, Jr., U. S. Navy, are disapproved. The proceedings, findings, and sentence in this case are approved, but the sentence is mitigated to the loss of ten (10) numbers in the grade in which he is permanently serving.

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[P. 1] Lieutenant John Muir, U. S. Naval Reserve Force, was tried by general court martial on October 23, 1918, on board the U. S. S. *Finland*, by order of the Commander, Cruiser Force, U. S. Atlantic Fleet and found guilty of the following charge:

Charge.—Neglect of duty (three specifications).

SENTENCE

"The court therefore sentences him, Lieutenant John Muir, U. S. N. R. F., to lose fifty (50) dollars per month of his pay for a period of twelve (12) months."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In view of his inexperience in naval customs and procedure, and of the fact that he was at the time only acting as senior engineer officer, we recommend Lieutenant John Muir, U. S. N. R. F., to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On November 7, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant John Muir, U. S. Naval Reserve Force, and directed that he be released from arrest and restored to duty.

OPINION OF THE JUDGE ADVOCATE GENERAL

On December 11, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, in part, as follows:

> "The second specification of the charge alleges in part that the accused 'while serving on board the U. S. S. *Finland*, as acting senior engineer officer, at Hoboken, New Jersey, did, on or about September 9, 1918, neglect and fail to issue orders to properly secure an auxiliary stop valve of a steam line leading to a deck winch in the forward part of said ship from which a section of steam pipe had been removed, the open section [P. 2] of which had not been blank flanged or otherwise properly secured,' and that as a result of this failure the valve was opened by one of the engineer force with the result that one member of the crew was scalded to death and several others injured. It will be noticed that this specification does not charge the accused with failure to see the orders effected, but merely with a failure to issue same. In my opinion the proof is convincing that the accused did issue orders to wire and tag the auxiliary stop valve mentioned in the specification, which method of securing a valve is recognized as a proper guard and precaution against opening by accident or otherwise. The finding of 'proved' on the specification is, in my judgment, not in accord with the evidence, for which reason I recommend the disapproval thereof."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 26, 1918, the Bureau of Navigation recommended that in view of the unanimous recommendation to clemency, the sentence be mitigated to the loss of fifty (50) dollars per month of his pay for a period of six (6) months.

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ACTION OF THE SECRETARY OF THE NAVY

The proceedings, the findings on the first and third specifications of the charge, the charge, and the sentence of the general court martial in the foregoing case of Lieutenant John Muir, U. S. Naval Reserve Force, are approved. The finding on the second specification of the charge is disapproved. In view of the recommendation of the Bureau of Navigation, the sentence is mitigated to the loss of fifty (50) dollars per month of his pay for a period of six (6) months.

REMARKS

It was noted in the foregoing case, that the documents prefixed to the record were not marked in accordance with section 84, Naval Courts and Boards, 1917. The designation "U. S. N. R. F.," employed in the specifications, findings, and sentence, should be "U. S. Naval Reserve Force."

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[P. 1] Ensign Horatio Blakely, U. S. Naval Reserve Force, was tried by general court martial on October 17, 1918, at the U. S. Naval Air Station, Paimboeuf, France, by order of the commander Squadron Four, Patrol Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Conduct unbecoming an officer and a gentleman (one specification).

FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of the second charge.

SENTENCE

"The court therefore sentences him, Ensign Horatio Blakeley, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his previous good record, as testified to by his commanding officer and other officers, and inexperience in the naval service, we unanimously recommend Horatio Blakeley, ensign, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On October 21, 1918, the convening authority approved the proceedings, findings, and sentence in the foregoing case of Ensign Horatio Blakeley, U. S. Naval Reserve Force.

After a careful review of the testimony in the foregoing case the convening authority decided that he could not act favorably on the unanimous recommendation to clemency.

In conformity with article 53 of the Articles for the Government of the Navy the record was submitted to the Secretary of the Navy for transmission to the President.

[P. 2] RECOMMENDATION OF THE BUREAU OF NAVIGATION

On November 26, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence, and concurred in the action of the convening authority.

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ACTION OF THE SECRETARY OF THE NAVY

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record in the foregoing case was, on December 2, 1918, submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On December 30, 1918, the President of the United States confirmed the sentence of the court in the foregoing case.

REMARKS

It was noted in reviewing the record in the foregoing case that what appeared to be the original precept was prefixed thereto instead of a copy thereof as stated in the record. (See Naval Courts and Boards, 1917, secs. 230–231.)

It was further noted that the findings and sentence of the court were published in Squadron Four Court-Martial Order No. 16, of October 23, 1918. Whereas such action is prescribed in section 387, Naval Courts and Boards, 1917, exception thereto should be made in cases where the approval of the convening authority does not render the sentence effective, and said section should be amended accordingly. The sentence in this case involved the dismissal of an officer and could not be executed until confirmed by the President. Under such circumstances the penalty prescribed is not complete, but is merely the judgment of the court, and does not become an effective sentence until confirmed by the President, and therefore should not be published until so confirmed.

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[P. 14] ACCUSED AS WITNESS: CROSS-EXAMINATION OF, CONCERNING CHARACTER.

The accused in a recent case took the stand in his own behalf. Testimony had previously been introduced by the defense as to the good character of the accused. After the accused had testified on direct examination, he was asked by the judge advocate, "What is your real name?" The accused answered, "G_____ M_____." The judge advocate then asked, "What was your reason for enlisting in the Navy as D_____ S_____?" Counsel for the accused objected to this question, and his objection was overruled by the court, and the accused replied: "Because I was in trouble in the State of Florida." It was then brought out by the judge advocate on cross-examination that the accused had been convicted of a crime in the State of Florida, and while serving his sentence had stabbed a negro, another inmate of the State prison.

[P. 15] It is a generally accepted rule of law "that an accused person taking the stand as a witness may be impeached precisely like any other witness, i. e., by reputation as evidence of character, by cross-examination as to character, by conviction of crime, and the like." (Greenleaf on Evidence, 16th ed., vol. 1, pp. 568–569). It follows also that only such character as affects him testimonially may be used against him until he sets up his character as evidence of innocence, then his general character may be inquired into (Id.). In the present case the question put to the accused regarding his enlistment under an assumed name, which was objected to by his counsel, was a fair one, as it had to do with his character as to truth and veracity. The other questions asked him regarding his conviction of crime and the assault upon a negro were not objected to by his counsel, but had they been objected to the objection should have been overruled on the ground that the accused had put his general character in evidence as proof of his innocence (File 26262–5400, G. C. M. Rec. No. 40814).

ARREST—WHAT CONSTITUTES.

The accused, in a recent case, was found guilty of "Resisting arrest" and "Breaking arrest." Arrest contemplates the following three essentials: Author-

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ity, intention, and restraint. It is well settled that there must be an intention to arrest and that such intention must be understood by the person arrested. It nowhere appeared in the record of the case that the accused was notified that he was under arrest; in fact, the witnesses for the prosecution expressly stated that no such notification was given. The foregoing, coupled with the additional fact that the accused was lawfully on liberty at the time of the supposed arrest, raised at least a reasonable doubt as to his guilt. (See C. M. O. 7, 1911, 11–12, File 26262–1065.)

In view of the foregoing, the proceedings, findings, and sentence of the court were disapproved by the Department (File 26251–18096, G. C. M. Rec. No. 40752).

ATTEMPT TO ASSAULT.—THERE IS NO SUCH OFFENSE AS.

The accused in a recent case was charged with "Attempting to assault a superior officer while in the execution of the duties of his office."

Despite the fact that article 4 (3) of the Articles for the Government of the Navy purports to punish for attempting to assault a superior officer while in the execution of the duties of his office, and that members of the naval service have been tried and convicted on such a charge (C. M. O. No. 1, of Jan 6, 1893; and No. 60, of Aug. 23, 1904), the Judge Advocate General was of the opinion that there is no such offense, either at common law or created by statute, and that it is manifestly improper to bring a person in the naval service to trial on such a charge.

A simple assault is "an attempt, or offer, with force and violence, to do a corporal hurt to another" (Clark's Criminal Law, 224; *United States* v. *Hand*, 26 Fed. Cas. No. 15297).

> [P. 16] "An assault is any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, under such circumstances as denote, at the time, an intention to do it, coupled with the present ability to carry such intention into effect" (3 Cyc., 1020; C. M. O. No. 10, 1912, p. 6).

Simple assaults are crimes at common law and by statute, and punishable under the Articles for the Government of the Navy, but an attempted assault is impossible to conceive. If an assault is consummated, it becomes a battery, and according to the naval court-martial practice would be charged as "Assaulting and striking his superior officer while in the execution of the duties of his office" (art. 4, A. G. N.), or "Assaulting and striking another person in the naval service," or "Assault and battery" (art. 8, A. G. N.). A simple assault, however, is in itself nothing more than an attempt or threat to strike or otherwise with force or violence to do corporal hurt to another person. As stated by Clark and Marshall in their treatise on the Law of Crimes, section 120 (D), "there can be no such thing as an attempt to attempt a crime. Since a simple assault, as we shall see, is nothing more than an attempt to commit a battery, and aggravated assaults are nothing more than attempts to commit murder, rape, robbery, etc., there can be no such thing as an attempt to commit an assault, whether simple or aggravated" (*State* v. *Sales*, 2 Nev. 268; *Wilson* v. *State*, 53 Ga. 205; *People* v. *Thomas*, 63 Calif. 302; *White* v. *State*, 22 Tex. 608; see also Clark and Marshall, Laws of Crimes, sec. 200.)

The Department therefore disapproved the proceedings and findings of the court on the above-mentioned charge (File 26262–5546, G. C. M., Rec. No. 41261).

CHARGES AND SPECIFICATIONS: "ASSAULTING AND STRIKING HIS SUPERIOR OFFICER" IS LEGAL CHARGE.

The counsel for the accused in a recent case objected that "there is no such crime as 'striking his superior officer' known under the Articles for the Government of the Navy, the regulations, nor in the instructions," and that "section 3, article 4, Articles for the Government of the Navy, required before an offense is committed thereunder that there be two distinct facts present—first, that he strikes his superior officer; second, that his superior officer was at that time in the execution of the duties of his office. The charge as laid under which the prosecu-

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tion is proceeding is 'Assaulting his superior officer,' with no allegation that that superior officer was at the time engaged in the performance of the duties of his office."

The judge advocate replied that the charge was good under article 22, Articles for the Government of the Navy, and appeared to be sanctioned by Naval Courts and Boards, 1917, for the reason that such a charge is set forth on page 86 therein. He, however, expressed doubt as to the validity of the specimen charge in view of the provisions of section 67, Naval Courts and Boards, 1917.

[P. 17] Counsel for the accused replied that the specimen charge on page 86 is "clearly in violation or not in accord with section 67 of Naval Courts and Boards, 1917."

The court sustained the objection of the counsel for the accused.

Section 67 of Naval Courts and Boards, 1917, reads as follows:

> "When an offense is a neglect or disorder not specially provided for, it shall be charged as 'Scandalous conduct tending to the destruction of good morals,' or 'Conduct to the prejudice of good order and discipline.' But when the offense is one specifically provided for, it is properly chargeable under the specific charge, and not under a general charge. (See section 61.)"

The language of section 67 is not to be construed in the narrow sense argued by counsel for the accused in this case and adopted by the court. The words "not specially provided for" and "specifically provided for" are not to be limited to offenses specifically provided for in the Articles for the Government of the Navy but also include offenses specifically designated in the limitations of punishment and in the specimen charges contained in Naval Courts and Boards, 1917. As the charge was in conformity with the specimen charge on page 86, it was not defective on the ground urged by counsel for the accused, and its legality should have been sustained by the court. The objection should have been overruled.

The above is not to be construed as meaning that a charge not specially provided for either in the Articles for the Government of the Navy, the limitations of punishment, or the specimen forms in Naval Courts and Boards, 1917, is fatally defective. All offenses committed by persons belonging to the Navy which are not specified in the Articles for the Government of the Navy properly come within the purview of article 22. Section 67 of Naval Courts and Boards, 1917, is an instruction for convening authorities, which is directory, not mandatory, and a violation of said section does not invalidate a charge otherwise good under article 22 (File 26262–5215, G. C. M. Rec. No. 40447).

CHIEF PETTY OFFICERS' MESS TREASURER: STATUS OF, WITH RELATION TO ARTICLE 14, ARTICLES FOR THE GOVERNMENT OF THE NAVY.

The Government of the United States assumes the obligation of rationing the members of its military forces. In the case of chief petty officers of the naval service, this may be done either by supplying them with the necessary provisions in kind or by furnishing them with funds from which they may secure their subsistence. The latter method is known as "Commutation of rations." The chief petty officers' mess and its organization are provided for in part by Navy Regulations, which require, among other things, a separate mess (art. I–2513). The number of rations to be commuted for said mess and its messmen (article I–4548 (2)) as well as the question whether provisions for the mess may be secured from the ship's store, is left [P. 18] to the discretion of the commanding officer (I–4545 (1)). When supplies are obtained for said mess, it is the duty of the supply officer to keep a regular account of same (art. I–4545 (2)), and in all cases the provisions sold to said mess shall be treated as provisions sold for cash (art. I–4548 (3)). The ration is not pay (art. I–4547) and shall not be applied to liquidate indebtedness to the Government, except at the desire of the individual for whom commuted (art. R–4460). It therefore follows that the regulations applying to disbursements of pay do not apply to the disbursements of commuted rations.

The accounts of the chief petty officers' mess are audited not by those auditing pay accounts but by a board consisting of the executive officer and two other officers (art. I–2618 (1)). Nowhere in the laws and regulations creating the offices or outlining the duties of disbursing officers is the treasurer of a chief petty officers' mess enumerated or provided for in any way. Clearly if the treas-

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urer of said mess were a disbursing officer charged with the disbursement of public funds, his status as such would be provided by law, and he would be required to make returns to the Treasurer of the United States, as in the case of other disbursing officers. The treasurer of the chief petty officers' mess is elected by the mess each month from among the members of the mess for the purpose of receiving commuted rations due as well as such other sums as may be assessed by the mess upon its members, and expending said sums for provisions and such other things as the mess may direct. When funds, whether commuted rations or otherwise, are received by the treasurer of the mess in his official capacity, they become mess funds. Since provisions sold to said mess are considered as sold for cash, the stores thus purchased are the property of the mess.

From a careful consideration of the laws and customs regulating the commutation of rations in the case of a chief petty officers' mess and defining the status of the treasurer of said mess, the Department decided that—

(1) The duly elected treasurer of said mess is no wise an agent of the Government.

(2) The commuted rations of each member of such a mess, when paid to said treasurer, are no longer public funds, and may be expended by him in such manner as the mess may direct; and

(3) The function of the auditing board appointed by the commanding officer is to determine whether said treasurer has properly expended or accounted for the funds of the mess.

In view of the above, it was held that specifications which alleged that a mess treasurer of a chief petty officers' mess did, in rendering his official statement of the accounts of said mess to the members of the mess and the auditing board, etc., present as a voucher a receipted bill from a certain named firm for a certain named amount, well knowing the said bill to be false and fraudulent and to represent more than the true amount of the purchases from said firm, etc., did not support the charge of "Making false and fraudulent official reports in [P. 19] violation of article 14 of the Articles for the Government of the Navy," because the offense was not against the United States (File 26262–3363, G. C. M. Rec. No. 41585).

CONSPIRACY: WHAT CONSTITUTES, AND HOW ALLEGED.

Upon considering the charge "Conspiracy, in violation of article 14 of the Articles for the Government of the Navy," it is noted that the word "conspiracy" is not defined by said article and that recourse must be had to the act of Congress approved March 4, 1909 (35 Stat. 1088, sec. 37), which defines said crime as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

This section has been further interpreted by the Federal courts of the United States to the effect that the crime of conspiracy requires some overt act to be committed in pursuance of and as a result of said conspiring (148 U. S. 202; 67 Fed. 705; 56 Fed. 21; and 8 Cyc. 625). In the case of *Pettibone* v. *United States*, 148 U. S. 202, the court stated:

> "The confederacy to commit the offense is the gist of the criminality under this section, although to complete it some act to effect the object of the conspiracy is needed. * * * the overt act in effectuation of that purpose must appear charged in the indictment."

And in *United States* v. *Thompson*, 67 Fed. 705:

> "But, under the statute of the United States now under consideration (sec. 37), the doing of some act in pursuance of a conspiracy is an ingredient of the crime, and must be established as a necessary element to the offense, although the act need not be in itself criminal or amount to a crime" (File 26262–3363, G. C. M. Rec. No. 41585).

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CONVICTION, EXTRACT FROM SERVICE RECORD SHOWING: MUST SHOW DATES OF APPROVAL TO BE ADMISSIBLE IN EVIDENCE.

Extracts from the current service record of an accused showing previous trials and convictions are inadmissible as evidence unless the dates of approval are shown.

In two cases where the above irregularities were committed, however, they were not held to be such as to invalidate (File 26262–5489, G. C. M. Rec. No. 41072; File 26262–5503, G. C. M. Rec. No. 41086).

COURTS OF INQUIRY, PROCEEDINGS OF: WHEN, MAY BE INTRODUCED IN EVIDENCE BEFORE A COURT MARTIAL.

The prosecution in a recent case, being unable to secure the attendance of a certain witness, introduced, and the court received in evidence, over the objection of counsel for the accused, the record of the proceedings of a court of inquiry, and the judge advocate read therefrom and incorporated in the [P. 20] record of the case excerpts from the testimony given by said witness before the court of inquiry. The basis of counsel's objection was that "the accused would not have any opportunity to cross-examine the witness B_____ in connection with the charges in the trial of the accused." The testimony introduced relative to the court of inquiry proceedings disclosed the fact that at the time the aforementioned witness was testifying the accused in the case, now on trial, had not been made an interested party or defendant before the court of inquiry, and it is not shown that when he subsequently became a party to the inquiry that the particular witness was called before the court and the accused afforded opportunity to cross-examine him on the evidence given. In view of these facts, the objection made by counsel for the accused was valid and should have been sustained by the court.

Whereas article 60 of the Articles for the Government of the Navy provides for the introduction of the proceedings of courts of inquiry as evidence before courts-martial, and C. M. O. No. 46, of 1917, sets forth at length the conditions under which the provisions of this article may be made available, it is obvious that in this case the aforementioned statute did not apply. Congress cannot abridge or abrogate the constitutional rights of a person charged with crime, one of which is that he be confronted with the witnesses against him and be afforded opportunity to cross-examine them on the evidence they may give. In legislating that the proceedings of a court of inquiry shall be evidence before a court martial in certain defined cases, Congress did not undertake to curtail the rights of an accused but to enact a law which would render more effective court-martial proceedings when certain needed witnesses were not available by saying in effect that in a court of inquiry the defendant or person made a party thereto, having been present thereat, accorded counsel, and afforded opportunity to cross-examine witnesses against him, such evidence as witnesses may under those conditions have given may be used at a subsequent trial, if the witness who has so testified is not available, and in cases not capital nor extending to the dismissal of a commissioned or warrant officer.

The question next presented is, Was the admission of this incompetent evidence sufficiently prejudicial to the interests of the accused to warrant disapproval of this case?

In the case of *Swaim* v. *United States* (28 Ct. Cls. 217; 165 U. S. 553) the court in its opinion said:

> "Undoubtedly errors are committed by courts martial which a civil tribunal would regard as sufficient ground for a reversal for their judgments, if it were sitting as an appellate court. But there is always this radical difference between an appellate court sitting for the correction of errors and a civil court into which the record of a court martial is collateral—in the former there is not a failure of justice; the appellate court may reverse a judgment or prescribe another or award a new trial; in the [P. 21] latter, the court must either give full effect to the sentence or pronounce it wholly void."

Consequently if this case were taken for review before an appellate court, if there were such and this procedure allowable, the irregularity cited in

this case would undoubtedly be considered ground for awarding a new trial, but might not necessarily demand the setting aside of the proceedings. In a court-martial proceeding the error must be grave and prejudicial to the extent of being a determining factor in the conclusions reached by the court in order to warrant a setting aside thereof. In the case now under consideration it is almost impossible to conclude definitely the extent of damage done through the introduction of the aforementioned incompetent evidence; without it, it is questionable as to what the court's verdict would have been; and whether or not it was the deciding factor is problematical and being thus in doubt, such doubt should be resolved in favor of the accused.

In view of the above the Department directed that the proceedings, findings, and sentence be disapproved and that the accused be released from arrest and restored to duty (File 26251–16161, G. C. M. Rec., No. 40803).

EMBEZZLEMENT: DEFINITION OF, UNDER ARTICLE 14, ARTICLES FOR THE GOVERNMENT OF THE NAVY, AND HOW SAME SHOULD BE ALLEGED.

Embezzlement is purely a statutory offense, and as such it must be strictly construed. A survey of the Articles for the Government of the Navy shows that the crime of embezzlement is provided for only in article 14 of said articles, as follows:

> "Fine and imprisonment, or such other punishment as a court martial may adjudge, shall be inflicted upon any person in the naval service of the United States * * *.
>
> * * * * * * *
>
> "(8) Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use and benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military or naval service thereof; * * *."

And that the word "embezzles" is not defined therein except insofar as it is restricted to the embezzling of "any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military or naval service thereof; * * *." For this reason recourse must be had to sections 87–92 of the act of March 4, 1909 (35 Stat. 1088), which define embezzlement by public officers of the United States. A careful analysis of these sections discloses, among other things, that the ownership of the funds under consideration must not only be in another than the accused, they must be the public funds of the United States; that said accused must have obtained possession lawfully and retained it unlawfully against the interest of the rightful owner or the party legally authorized to receive possession [P 22] thereof. These sections provide a number of ways in which possession lawfully obtained may be unlawfully retained, but the said sections do not prescribe that the act specified must be done "intentionally," or "knowingly," or "willfully," or "fraudulently," but they merely require that the act specified must be done contrary to the provisions of the statute.

It is an axiom of pleading that the essential elements of an offense must be affirmatively pleaded, i. e., set forth specifically in the pleadings, and a court is not warranted in taking judicial notice of the existence of said essential elements; for example, the specifications under the charge of embezzlement in this case must not only show that the accused did not have a better legal title to the goods or funds in question than the party alleged to have been defrauded, bu it must show that the said goods or funds alleged to have been embezzled by the accused were the property of the United States, furnished or intended for the military or naval service thereof, and that the accused had obtained possession of them lawfully, but retained said possession unlawfully. This is fully supported by the case of *Pettibone* v. *United States*, 148 U. S. 202, as follows:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omissions cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

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Likewise, it is an error to set forth under the charge of embezzlement that the accused did fraudulently misappropriate said funds or goods, said misappropriation being a distinct and separate offense under article 14, Articles for the Government of the Navy (File 26262-3363, G. C. M. Rec. No. 41585).

FRAUD AGAINST THE UNITED STATES: WHAT CONSTITUTES, UNDER ARTICLE 14, ARTICLES FOR THE GOVERNMENT OF THE NAVY.

Article 14 of the Articles for the Government of the Navy provides, in part, as follows:

> "Fine and imprisonment, or such other punishment as a court martial may adjudge, shall be inflicted upon any person in the naval service of the United States.
>
> * * * * *
>
> "(3) Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making or use of, any writing, or other paper, knowing the same to contain any false or fraudulent statement;
>
> * * * * *
>
> "(10) Who executes, attempts, or countenances any other fraud against the United States."

Each section of this article, with the single exception of section 10 as last quoted, distinctly sets forth that the frauds therein contemplated consist only in the presentation of any [P. 23] claim against the United States, knowing such claim to be false or fraudulent, or where the intent of the frauds contemplated is to defraud the United States either directly or through its officers by presenting any claim against the United States, knowing such claim to be false or fraudulent. The nature of the frauds arising under the Articles for the Government of the Navy has been further set forth in C. M. O. No. 4, 1916, as follows:

> "There are two broad classes of fraud, viz, fraud against the United States and fraud not against the United States. The first class is punishable under article 14, A. G. N., and the other under article 8, A. G. N."

Frauds, therefore arising under article 14, Articles for the Government of the Navy, have a perfectly distinct character, the essential element of which is the defrauding of the United States, or that the act was committed with the intent to defraud the United States, whereby they have either suffered a financial or property loss or might possibly have suffered such a loss through the fraud contemplated.

In construing section 10 of article 14, Articles for the Government of the Navy, the question arises whether "or countenances any other fraud against the United States" is intended to include all frauds executed, attempted, or countenanced against the United States by any person in the naval service, or whether it is limited in its scope to frauds of like character to those described in the preceding paragraphs of this article. Referring to section 1624 of the Revised Statutes of the United States, which includes article 14, Articles for the Government of the Navy, it is noted that it refers to the act of July 17, 1862, 12 Stat. 602, article 7, paragraph 6, which is as follows:

> "Or shall knowingly make or sign, or shall aid, abet, direct, or procure the making or signing of any false muster, or shall execute, or attempt or , countenance any fraud against the United States. * * *."

Comparing the words "or countenance any other fraud against the United States," as set forth in the Revised Statutes, with the words "or countenance any fraud against the United States," as set forth in the original act, and keeping in mind that the compilers of the Revised Statutes were fully informed as to the provisions of the original act, it is apparent that the word "other" must have been inserted in this clause for a purpose. Referring to the rules for interpreting the Federal Statutes of the United States, the rule of ejusdem generis is set forth as follows:

> "While unqualified general terms are usually to be given their natural and full signification, yet when general words follow in a statute words of

particular and special meaning, if there be not a clear manifestation of different legislative intent, they are construed as applicable to persons and things, or cases of like kind, as are designated by the particular words (42 Fed. Rep. 22, 16 Op. Atty. Gen. 353). This rule, which is [P. 24] sometimes called Lord Tenterden's rule, has been stated as to 'other' thus: Where a statute enumerates several classes of persons or things and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis with, and not a quality superior to or different from, those specifically enumerated." (2 How, 208; 3 Wheat. 390; and 85 Fed. Rep. 41; Fed. Stats. Ann., vol. 1, p. LXVIII).

Applying this rule to the word "other" as inserted by the compilers of the Revised Statutes in the clause "or countenance any fraud against the United States," as found in the original statute, it is evident that said compilers intended to restrict the clause to those kinds of fraud specifically enumerated in the foregoing paragraphs of section 1624, Revised Statutes.

It is a well-known principle of statutory construction that penal statutes are to be construed strictly, are never to be extended against the interests of the defendant, and in order to determine that a case is within the terms of a penal statute the language thereof must authorize it in a clear and unmistakable manner. Chief Justice Marshall in speaking upon this point said: " * * * It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases" (5 Wheat. 96; see also upon this point 151 U. S. 451; 164 U. S. 683; 79 Fed. Rep. 64; 17 Op. Atty. Gen. 419). In speaking upon this same point Chief Justice Fuller said: "There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute" (134 U. S. 624). Justice Betts said: "Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied" (1 Blatchf. (U. S.) 156). Also Justice Brown said that a penal statute "must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial" (175 U. S. 265).

Applying the rule of ejusdem generis in this case, and the rule for interpreting penal statutes as above set forth, the only tenable conclusion is that the word "other" restricts the application of section 10, article 14, Articles for the Government of the Navy, to "other like frauds." Since Congress as well as the [P. 25] compilers of the Revised Statutes must be presumed to have been fully aware not only of the original act of July 17, 1862, but also of the rule of ejusdem generis and the rule governing the interpretation of penal statutes, it is evident that they intended to restrict this clause to "other like frauds," and, as stated by the Attorney General, "it was unnecessary to quote a judicial decision for the purpose of proving that all written laws are to be construed according to the intention of the legislature, for that is a fundamental principle which nobody denies" (9 Op. Atty. Gen. 472). Referring to section 5596 of the Revised Statutes, it will be noted that "all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be enforced in lieu thereof; all parts of such acts not retained in such revision having been repealed or superseded by subsequent acts or not being general and permanent in their nature; * * *." From this it is evident that paragraph 6 of article 7 of the act of July 17, 1862, has been repealed by section 10, article 14, of the Articles for the Government of the Navy, and that said section refers only to frauds of a nature similar to those provided for in the foregoing sections of said article (File 26262–3363, G. C. M. Rec. No. 41585).

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IRREGULARITIES: WHICH DID NOT INVALIDATE.

In reviewing a record in a recent general-court-martial case the following irregularities were discovered:

The record did not affirmatively show that the prosecution and defense offered no evidence.

The original precept was attached to the record instead of a certified copy thereof.

These defects were held not to be so serious as to invalidate (File 26262–5593, G. C. M. Rec. No. 41383).

JURISDICTION OF COURT MARTIAL: AS TO OFFENSES COMMITTED AFTER EXPIRATION OF ENLISTMENT.

It having come to the notice of the Department that the enlistment of S_____ expired September 20, 1918, and the offense for which he was brought to trial was committed October 8, 1918, on which date he was without the jurisdiction of a naval court martial, the Department directed that the proceedings, findings, and sentence be set aside as illegal. (See *U. S.* v. *Travers*, 28 Fed. Cas. No. 16537; File 26251–18353, G. C. M. Rec. No. 41706).

MURDER: JURISDICTION OF GENERAL COURTS MARTIAL OVER CRIME OF.

In a recent general court-martial case, the counsel for the accused objected to the jurisdiction of the court to try the accused for murder, on the ground that the alleged offense "was committed on board a United States ship of war on the high seas," and "that such a ship constitutes the territory of the United States within the sense that jurisdiction over such [P. 26] place and offense committed therein lies exclusively with the United States Federal courts." The court very properly overruled this objection.

Article 6 of the Articles for the Government of the Navy (sec. 1624, R. S.) provides that "if any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court martial and punished with death." Section 272 of the Criminal Code of the United States, providing for the punishment of murder and other offenses committed within the admiralty and maritime and the territorial jurisdiction of the United States, gives the district courts of the United States jurisdiction of the crime of murder "when committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or to any State, Territory, or District thereof."

It is true that article 6 of the Articles for the Government of the Navy does not place exclusive jurisdiction in naval courts martial of the crime of murder committed by a person belonging to the naval service on board a vessel of the United States outside the territorial jurisdiction thereof. The general rule is that the jurisdiction of the civil courts is concurrent as to offenses triable by courts martial not of a purely military nature (28 Op. Atty. Gen. 24; 6 Op. Atty. Gen. 413; *U. S.* v. *Clark*, 31 Fed. 710). As to the crime of murder committed on board a public vessel of the United States on the high seas, there is no doubt that naval courts martial have jurisdiction to try and punish the offender with death, and having once assumed such jurisdiction may proceed to a final judgment which, when duly approved, is legal and binding, despite the fact that the case was also cognizable and might have been taken jurisdiction of by the proper district court of the United States (6 Op. Atty. Gen. 413; 28 Op. Atty. Gen. 24; File 26262–5400, G. C. M. Rec. No. 40814).

REDUCTION IN RANK: HOW SENTENCE TO, SHOULD BE CONSTRUED IN CASE OF CORPPORAL AND PRIVATE, FIRST CLASS.

In a recent opinion of the Judge Advocate General it was held that since the rank of private, first class, in the Marine Corps had been established by

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the act of July 1, 1918, and subsequent to the issuance of section 449 of Naval Courts and Boards, 1917, which provides for uniformity in the reduction of enlisted men by sentence of summary courts martial, a reduction of a corporal to a private first class, or of a private first class to a private, would be a reduction to the next inferior rank. If, however, a corporal has been last advanced from a private, a reduction to next inferior rank in such case would mean that he would be reduced to a private (File 26806–163, J. A. G., Dec. 13, 1918).

[P. 27] SENTENCE, OCCASIONS OF: NOT THE SAME AS ACCESSORIES OF.

Part of the sentence of the general court martial in a recent case was as follows: "* * * and to suffer all the other occasions of said sentence as prescribed by section 349, Naval Courts and Boards." Section 349, Naval Courts and Boards, 1917, defines the meaning of the term "other accessories of said sentence." It is probable, therefore, that the word "accessories" was meant instead of "occasions" above used. Inasmuch, however, as the meaning of a sentence must be clear and unambiguous the above-quoted part of the sentence was set aside by the Department (File 26262–5285, G. C. M. Rec. No. 40785).

SPECIFICATIONS: SHOULD NOT CONTAIN MORE THAN ONE OFFENSE.

The specification of one of the charges in a recent case set forth the stealing of different articles on various occasions; in other words, many thefts were alleged in one specification. While the recognized legal authorities hold that it is not a fatal defect to include different offenses of the same nature under one indictment when set forth in separate counts, they do not permit their inclusion in the same count. So in court-martial procedure, it is clearly objectionable to embrace several offenses, as was done in this case, in the same specification (Naval Courts and Boards, 1917, sec. 65). As the accused was represented by counsel and was afforded opportunity to interpose objection had he so desired (and the record shows that he had none to offer), and as an offense was alleged in the specification, it was held that the accused waived any defects which appeared therein (File 26251–16161, G. C. M. Rec. No. 40803.)

STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

The accused in a recent general-court-martial case was charged with "Absence from station and duty without leave." After pleading "guilty" to the charge and specification thereunder, the accused made a statement, the pertinent part of which was as follows:

> "If I am guilty of the specification as charged against me, it is merely because I misunderstood Major L_____ when he told me that I was not to have liberty on this date."

The above statement being inconsistent with the plea of the accused and the court having failed to follow sections 310 and 312, Naval Courts and Boards, 1917, the Department disapproved the proceedings, findings, and sentence of the court (File 26251–18479, G. C. M. Rec. No. 41377).

STATEMENT INCONSISTENT WITH PLEA OF GUILTY TO CHARGE OF DESERTION: BECAUSE INTENT PERMANENTLY TO ABANDON SERVICE WAS NEGATIVED THEREBY.

The accused in a recent case pleaded "guilty" to the one and only charge against him, that of "Desertion." He then made a statement to the effect that he could not leave his wife on account of her sick and destitute condition; that he was ready to return on one or two occasions, but was prevented from so doing by his wife's condition.

[P. 28] The Judge Advocate General was of the opinion that said statement was inconsistent with the accused's plea of guilty, and that the court had

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erred in not proceeding in accordance with sections 310 and 312, Naval Courts and Boards, 1917.

The Department, thereupon, disapproved the proceedings, findings, and sentence of the court (File 26251–18325, G. C. M. Rec., No. 41070).

DISAPPROVAL OF SENTENCE OF COURT MARTIAL: STATUS OF ENLISTED MAN DISCHARGED WITH BAD-CONDUCT DISCHARGE AFTER.

It appears that an enlisted man in the Marine Corps was tried by a summary court martial for refusing to obey a lawful order; that he was found guilty and sentenced to be confined for 14 days with extra police duty; that the record was returned by the convening authority for reconsideration of the said sentence, and the court revoked its former sentence and sentenced him to be discharged from the service with a bad-conduct discharge; that the finding and sentence in the above case were disapproved by the Secretary of the Navy September 20, 1918; that the accused was discharged from the Marine Corps with a bad-conduct discharge on September 21, 1918.

In view of the above facts the question was presented whether this enlisted man may, if he so desires, be regularly reenlisted for a term of four years or for the duration of the war, his enlistment papers to be antedated to the date upon which he reported for duty and from and including which time he performed his customary military duties.

There is no authority to discharge an enlisted man in the Marine Corps with a bad-conduct discharge except by sentence of a court martial. The disapproval of the findings and sentence of the court martial in this case produced the same result as though there had never been a court martial. The bad-conduct discharge was given to this man after the sentence had been disapproved by the Secretary of the Navy, and therefore there existed no authority under which the bad-conduct discharge could have been issued. The bad-conduct discharge having been issued without authority of law, the same was illegal, and must now be considered as a nullity and without effect. Authority for a bad-conduct discharge must be shown to exist or it cannot be held legal, and in this case no authority existed at the time the bad-conduct discharge was issued.

The bad-conduct discharge should be canceled as an illegal discharge, and the record of this man should be corrected to show a status in the Marine Corps as unchanged by the issuance of said illegal discharge.

The bad-conduct discharge, being illegal, does not operate to deprive this man of any of the benefits to which he was entitled [P. 29] under his enlistment, and he is therefore entitled to pay from the date immediately following the date to which last paid at time of discharge. The period intervening between his discharge and his reporting for duty under instruction from the commandant should be considered as absence from duty with authority, and he should be credited with the pay and allowances authorized for such a status (See *Winchell* v. *U. S.*, 28 Ct. Cls., 30, and cases cited therein; File No. 26287–4981:2).

DISCHARGE, DISHONORABLE: ILLEGAL ISSUANCE OF, TO ONE SENTENCED TO BE CONFINED FOR SIX MONTHS AND TO SUFFER ALL THE OTHER ACCESSORIES, ETC.

A sentence "to be confined for six months and to suffer all the other accessories of said sentence" was adjudged by a general court martial against a private in the Marine Corps. At the expiration of his term of imprisonment under said sentence he was dishonorably discharged from the Marine Corps, and it was proposed to correct this error by the issuance in lieu thereof of a discharge as undesirable. The Judge Advocate General was of opinion that the dishonorable discharge of said private was null and void; that the man was still in the Marine Corps and entitled to pay and allowances; and that his absence from duty since the date of his illegal discharge should be considered as if by proper authority. While he may now, by proper authority, be given an undesirable discharge from the Marine Corps, such discharge cannot be dated prior to the date on which it is actually issued (File 26251–15996:1, J. A. G., Dec. 12, 1918).

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INVENTIONS: RIGHTS OF PERSONS IN THE GOVERNMENT SERVICE PATENTING.

In response to a query from an officer as to whether or not he had a right to patent his invention, the Judge Advocate was of opinion that his right depended upon which of the following rules was applicable to the facts in his case:

1. If an invention is made in pursuance to orders, in the course of duty, and with the aid of facilities furnished by the Government, the invention is the property of the United States; and the inventor acquires no personal rights therein—at least as against the United States.

2. If, on the other hand, an invention is made outside of hours, as a matter of personal enterprise, not under orders, and without the aid of facilities furnished by the Government, the device is the property of the inventor, may be patented by him, and, if so patented, may be sold or rights to its use granted upon royalties. In such case, if the Government desires to use the device, it may pay therefor, provided there is any appropriation available for the purpose (File 8247–418, J. A. G., Dec. 20, 1918).

RANK AND PRECEDENCE OF DENTAL OFFICERS: UNDER ACT OF JULY 1, 1918.

The act of July 1, 1918 (Public, No. 182) provides as follows:

> "And all dental officers now in the Dental Corps * * * or who may hereafter be appointed, shall take rank and precedence with officers of the Naval Medical Corps of the same [P. 30] rank according to the dates of their respective commissions or original appointments, and all such dental officers shall be eligible for advancement in grade and rank in the same manner and under the same conditions as officers of the Naval Medical Corps with or next after whom they take precedence, * * *."

Lieutenant D_____ was appointed a lieutenant (junior grade) in the Dental Corps with date of precedence from August 21, 1914. Upon that date Lieutenant H_____ of the Medical Corps was a lieutenant (junior grade) with date of precedence from April 10, 1914, the date of his appointment to the Medical Corps. Also on August 21, 1914, Lieut. K_____, of the line, was the junior lieutenant (junior grade) of the line with date of rank as such from June 5, 1914.

All officers entering the Navy after March 4, 1913, take precedence, when of the same rank, according to the dates of their commissions in that rank (act of March 4, 1913, 37 Stat. 892); and officers take rank in each staff corps according to the dates of commissions in the several grades, excepting in cases where they have gained or lost numbers (act of August 29, 1916, 39 Stat. 578). There is nothing in the above-quoted provisions of the act of July 1, 1918, which should be held to vary these general provisions of law relative to the rank and precedence of commissioned officers of the Navy.

The Dental Corps is a part of the Medical Corps of the Navy, and the act of July 1, 1918, is merely declaratory of the general law on the subject when it says that dental officers should take rank and precedence with officers of the Naval Medical Corps of the same rank according to the dates of their respective commissions or original appointments. They also take rank and precedence with officers of the same rank of other corps and of the line of the Navy according to the dates of their respective commissions or original appointments.

In accordance with the above, the Judge Advocate General was of the opinion that Lieut. D_____, of the Dental Corps, should not take precedence over Lieut. K_____, of the line, but that on the general precedence list the officers above mentioned should take rank as follows:

1. H_____ (M. C.), April 10, 1914.
2. K_____ (line), June 5, 1914.
3. D_____ (D. C.), August 21, 1914.

And that D_____ would be entitled to advancement in rank with K_____ (File 13707–69: 4, J. A. G., Dec. 26, 1918).

RESERVE FORCE, NAVAL: JURISDICTION OF COURTS-MARTIAL TO TRY INACTIVE MEMBERS OF, FOR OFFENSES COMMITTED ON ACTIVE DUTY.

Article 14 of the Articles for the Government of the Navy provides:

> "And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed

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from the service, he shall continue to be liable to be arrested and held for trial and sentence by a [P. 31] court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

So far as jurisdiction of naval courts martial is concerned, there is no material difference between a member of the Naval Reserve Force not on active duty and any other civilian. Members of the Naval Reserve Force who are guilty of offenses against article 14, Articles for the Government of the Navy, while on active duty, and who have been relieved from active duty or discharged or dismissed, are liable to arrest by the naval authorities and to punishment by naval courts martial at any time within the statute of limitations; and it is unnecessary that such persons be recalled to active duty in order to give the naval authorities jurisdiction to punish them for such offenses committed while in the active naval service.

With reference to other offenses than those defined by article 14 committed by members of the Naval Reserve Force while on active duty, serious doubt exists as to the jurisdiction of the naval authorities to arrest and punish the offenders by court martial, unless some action looking to their arrest and trial has been taken prior to their relief from active duty. The act of August 29, 1916 (39 Stat. 588), as amended by the act of July 1, 1918 (Public, No. 182), provides:

"Enrolled members of the Naval Reserve Force when in active service shall be subject to the laws, regulations, and orders for the government of the Regular Navy, and the Secretary of the Navy may, in his discretion, permit the members of the Naval Reserve Force to wear the uniform of their respective ranks, grades, or ratings while not in active service, and such members shall, for any act committed by them while wearing the uniform of their respective ranks, grades, or ratings, be subject to the laws, regulations, and orders for the government of the Regular Navy."

During the existence of war or national emergency, members of the Naval Reserve Force may be called or recalled into the active service at any time, in the discretion of the President. Accordingly, there is no difficulty about obtaining the necessary jurisdiction, during the present war and national emergency, over naval reservists who have been relieved from active duty, to punish them for offenses against naval discipline committed previously to their relief from active duty.

In time of peace, and when no national emergency exists, the case is different. Naval reservists may be ordered to duty with the Navy only with their consent. There is no material difference between their status and the status of regular officers and men dismissed or discharged from the service. The question whether the naval authorities have jurisdiction to arrest and punish by court martial persons discharged from the naval service for offenses committed while in the service is an old one, long contraverted among authorities on military and naval law in this country.

"In England the jurisdiction of a court martial under such circumstances was unanimously sustained by the twelve judges in [P. 32] the case of Lord George Sackville, and their decision is recognized as the law by Tytler, page 113, in Griffith's notes, page 32, and in other respectable works on military law and courts martial. The subject has also been ably discussed in this country by De Hart (pp. 27, 30), who cites a decision of Justice Wilde of the supreme court of Massachusetts, in a case of habeas corpus, where a seaman in the Navy, who had been arrested for an offense committed a few days before his term of service expired, applied for his discharge. The writ was returned after the end of the relator's term of enlistment; but it was held that he was, nevertheless, liable to be tried by a court martial, and he was accordingly remanded. The chief justice and Justice Putnam concurred in the opinion. The reasoning of the court favors the doctrine of Sackville's case, although the precise point was not decided" (9 Op. Atty. Gen., 182).

The case of William Walker, decided by the Supreme Court of Massachusetts and reported and commented on by De Hart, at pages 30 to 36 of his work on courts martial, is not directly in point, because Walker was arrested and brought to trial prior to the expiration of his enlistment; but the significance of it is that the court cited with approval the English case of Lord George Sack-

ville. Also in the case of *In re Bird*, 3 Fed. Cas. 1428, District Judge Deady, though not having the specific question before him, cited with approval the Sackville case, saying:

> "As at present advised, I do not see what provision of the constitution or any statute or principle of the common law can be invoked to prevent the arrest and trial of a person by court martial for a military offense committed while such person was a soldier or officer of the Army of the United States, after the expiration of his term of service, so that the order for the trial is issued within the time limited by the article of war. And so, in principle, it seems to have been held in the case of Lord George Sackville, as reported by Tytler in his treatise on courts martial. In that case it appeared that, as the defendant had been dismissed from His Majesty's service previously to the commencement of the prosecution against him, it was doubted, under the Mutiny Act, whether he was subject to the jurisdiction of the court; upon which, that question being referred to the twelve judges, they certified that under the circumstances of the case they saw no reason to doubt the jurisdiction of the court martial."

Commenting on the Walker case, Judge Deady said:

> "It is proper to note that there was an arrest and that charges were preferred in that case during the term of service, and that the conclusion reached was, therefore, irrespective of the question, whether the seaman was liable to arrest and prosecution after his discharge from the service for an offense committed prior thereto; but the above citation from the opinion, as also the case of Sackville, goes to sustain the jurisdiction of [P. 33] the naval authorities to arrest and try the offender, as well after the discharge from service as before."

In neither of the above-mentioned American cases was it necessary for the court to decide the question of whether the military or naval authorities have jurisdiction to arrest and punish persons discharged from the service for offenses committed while in the service, nor did they attempt to decide such question. Their opinions, therefore, although interesting and persuasive, have not the weight of judicial decisions, but are merely dicta. Also in the above-mentioned opinion of Mr. Attorney General Black (9 Op. Atty. Gen. 182), the question was discussed but not decided.

Opinions of the Attorney General, published in 5 Op. Atty. Gen., 55, and 24 Op. Atty. Gen., 470, deny the jurisdiction of military courts to punish officers who have left the service, for offenses committed while in the service, and the only action by this Department on the question is unfavorable to the exercise of the jurisdiction by naval courts martial to punish an ex-paymaster's clerk for offenses committed previously to the acceptance of his resignation. In the case to which I refer, that of R. D. Bogart (G. O. No. 143, Oct. 28, 1869), the proceedings were instituted more than six months after the acceptance of Bogart's resignation. The Secretary of the Navy, in disapproving and setting aside the proceedings, findings, and sentence in the Bogart case, said:

> "Unless, therefore, there be some act of Congress applicable to his case which prolonged his liability to military courts for military offenses after he had been allowed to leave the service, he was not subject to trial by naval court martial on charges preferred after that date." (The date of acceptance of his resignation.)

In view of the action of the Department in the Bogart case, and the opinions of the Attorney General cited in the paragraph above, the Judge Advocate General was constrained to advise against any attempt to exercise jurisdiction to punish members of the Naval Reserve Force not on active duty with the Navy for offenses committed by them while on such active duty, other than offenses under article 14, Articles for the Government of the Navy. Until the end of the war and the national emergency, however, such persons can be recalled to active duty for the purpose of obtaining the necessary jurisdiction. Should a specific case arise after the termination of the war and national emergency it was suggested that the question be referred to the office of the Judge Advocate General for reference to the Attorney General (File 28550–611, J. A. G., Dec. 19, 1918).

[C. M. O. 2—1919]

RETIREMENT OR TRANSFER TO FLEET NAVAL RESERVE OF ENLISTED MEN: HOW SERVICE FOR, IS AFFECTED BY ACCEPTANCE OF TEMPORARY WARRANT.

Information was requested as to whether time served as a temporary warrant officer will be counted for retirement. The request did not make it clear whether retirement of enlisted men of the Regular Navy under act of March 3, 1899, after 30 [P. 34] years' service, or the transfer of such men to the Fleet Naval Reserve after 20 years' service under the act of August 29, 1916 (39 Stat. 589), was meant.

It was the opinion of the Judge Advocate General that the answer to both the above propositions is the same.

The act of May 22, 1917, provides:

> "That the rights, benefits, privileges, and gratuities of all enlisted men in the Navy and Marine Corps now authorized by law shall not be lost or abridged in any respect whatever by their acceptance of temporary commissions or warrants hereunder."

This provision fully protects enlisted men who accept temporary warrants under the act of May 22, 1917, from any loss or abridgment of their right to retirement after 30 years' service and to transfer to the Fleet Naval Reserve after 20 years' service (File 7657–445, Aug. 7, 1918; File 7657–448, June 18, 1917).

In accordance with the above, a chief boatswain's mate having three years to serve before retirement with 30 years' service, who is appointed a temporary boatswain and serves as such for a period of two years, will have only one year to serve before retirement on reverting to his enlisted status after the termination of his temporary appointment (Files 17789–74, J. A. G., Dec. 19, 1918).

C. M. O. 2—1919

[P. 1] Ensign Horace R. Whittaker, U. S. Navy, was tried by general court martial on October 30, 1918, at the U. S. Submarine Base, New London, Conn., by order of the Secretary of the Navy, and found guilty of the following charges, proved by plea:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

Sentence

"The court therefore sentences him, Ensign Horace R. Whittaker, U. S. Navy, to be dismissed from the United States naval service."

Returned for Revision

On November 13, 1918, the Department returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of correcting such of certain omissions in the record as were not errors of procedure.

It was noted by the Department that the copy of the precept attached to the record mentioned only four members, and the record did not show that the prosecution offered no evidence or that provisions of section 326, Naval Courts and Boards, 1917, had been complied with.

Action in Revision

On December 2, 1918, the court reconvened and complied with the directions of the Department.

Opinion and Recommendation of the Judge Advocate General

On December 14, 1918, the Judge Advocate General placed an indorsement on the record, in part, as follows:

> "The accused was charged with 'Absence from station and duty without leave,' and 'Conduct to the prejudice of good order and discipline.' He

pleaded guilty to both of the charges. The court accepted these pleas and the prosecution offered no [P. 2] evidence. The accused made a statement, the matter of which is clearly inconsistent with his plea of guilty to both charges. It is evident that the court made a material error by not proceeding in accordance with sections 310 and 312, Naval Courts and Boards.

"In view of the above, it is, therefore, recommended that the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Horace R. Whittaker, U. S. Navy, be disapproved, and that he be released from arrest and restored to duty."

CONCURRENCE OF THE BUREAU OF NAVIGATION

On December 23, 1918, the Bureau of Navigation concurred in the indorsement of the Judge Advocate General.

FURTHER OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On January 3, 1919, the Judge Advocate General placed a second indorsement on the record in the foregoing case as follows:

"As set forth in my comment of December 14, 1918, relative to this case, the record of proceedings shows that the accused was not, according to the regulations promulgated by the Department, accorded the fair trial to which he was entitled, in that:

"(*a*) The accused pleaded guilty to both charges laid against him and submitted a statement clearly inconsistent with his plea.

"(*b*) The court failed to follow the procedure set forth in Naval Courts and Boards, sections 310 and 312.

"(*c*) If the facts set forth by the accused in his statement were sustained by competent evidence he would doubtless have been acquitted of the charges.

"In addition to the above it has come to the attention of this office that on October 17, 1918, this accused was nominated for promotion to the grade of lieutenant (junior grade) to date from September 21, 1918. The charges were made against him on September 21, 1918, and the Bureau of Navigation recommended his trial by general court martial on October 3, 1918, the charges and specifications were drawn on October 4, 1918. It is thus apparent that two weeks after his trial was ordered he was nominated for promotion and has been promoted, such promotion dating from September 21, 1918.

"The Department has held following the decisions of the Attorney General (6 Op. Atty. Gen. 123; 8 Op. Atty. Gen. 237), and so published to the service, that promotion under the afore-mentioned conditions and circumstances is a constructive pardon and, therefore, for this reason as well as that previously [P. 3] set forth, it is my opinion that the proceedings, findings and sentence in the case of Ensign Horace R. Whittaker, U. S. Navy, should be set aside, and I have so to recommend."

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General in the case of Ensign Horace R Whittaker, U. S. Navy, are disapproved. The proceedings, findings, and sentence in this case are approved but the sentence is mitigated to the loss of ten (10) numbers in the grade in which he is permanently serving.

C. M. O. 6—1919

[P. 1] Lieutenant Harry S. Manson, U. S. Naval Reserve Force, was tried by general court martial on November 13, 1918, at the U. S. Naval Station, New Orleans, La., by order of the Secretary of the Navy, and found guilty of the following charges, proved by plea:

Charge I.—Disobeying the lawful order of his superior officer (one specification).

Charge II.—Drunkenness (one specification).

[C. M. O. 8—1919]

SENTENCE

"The court therefore sentences him, Lieutenant Harry S. Manson, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On November 27, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case as follows:

"The accused was charged with 'Disobeying the lawful order of his superior officer,' and 'Drunkenness.' He pleaded guilty to both charges and the specifications thereunder. The court accepted these pleas and the prosecution offered no evidence.

"The accused submitted a statement to the effect that he was unable to carry out his orders on account of sickness, and also that he was sick in bed on the date on which he was charged with drunkenness. This statement is clearly inconsistent with his plea of guilty to both charges. It is, therefore, evident that the court made a material error by not proceeding in accordance with sections 310 and 312, Naval Courts and Boards.

"In view of the above it is recommended that the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Harry S. Manson, U. S. Naval Reserve Force, be disapproved."

[P. 2] RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 4, 1918, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

"In considering his record I am of the opinion that the statement of the accused in this case is not necessarily inconsistent with his pleas of guilty. Further, the accused being an officer in the service, is presumed to have sufficient intelligence to be fully cognizant of the nature of his pleas and the statement made in connection therewith, and, furthermore, as he was represented by counsel, it must be assumed he was properly advised. I cannot, therefore, concur in the remarks and recommendations made by the Judge Advocate General and the Chief of the Bureau of Navigation; accordingly the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Harry S. Manson, U. S. Naval Reserve Force, are approved, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings in the foregoing case is respectfully submitted to the President of the United States, with the recommendation that the sentence be confirmed."

ACTION OF THE PRESIDENT

On January 7, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 8—1919

[P. 1] Gunner (T) Ernest Sirbeck, U. S. Navy, was tried by general court martial on October 30, 1918, on board the U. S. S. *Maine*, by order of the Commander, Battleship Force One, U. S. Atlantic Fleet, on the following charge:

Charge.—Conduct unbecoming an officer and a gentleman (three specifications).

FINDINGS

The court found the first and second specifications of the charged proved, except as to certain words; the third specification of the charged "proved," and the accused "guilty" of the charge.

[C. M. O. 10—1919]

SENTENCE

"The court therefore sentences him, Gunner (T) Ernest Sirbeck, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by four of the nine members of the court, was spread upon the record:

> "In consideration of his previous excellent record and length of service, we recommend Gunner (T) Ernest Sirbeck, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On November 15, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Gunner (T) Ernest Sirbeck, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On December 3, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, expressing the [P. 2] opinion that the second specification of the charge did not allege an offense. It was recommended that the findings of the court on said specification be disapproved, but that the proceedings and findings of the court on specifications one and three of the charge and the sentence be approved.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On December 6, 1918, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

On December 10, 1918, the Secretary of the Navy approved the remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Gunner (T) Ernest Sirbeck, U. S. Navy, was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On January 7, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 10—1919

[P. 1] Ensign Edwin D. Baker, Jr., U. S. Naval Reserve Force, was tried by general court martial on December 16, 1918, at Hoboken, N. J., by order of the Commander, Cruiser Force, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Culpable inefficiency in the performance of duty (one specification).

Charge II.—Neglect of duty (two specifications).

Charge III.—Leaving station before being regularly relieved (one specification).

SENTENCE

"The court therefore sentences him, Ensign Edwin D. Baker, Jr., U. S. Naval Reserve Force, to be dismissed from the United States naval service."

[C. M. O. 12—1919]

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In view of the fact that the accused had been a commissioned officer for only three months prior to committing these offenses, and as it is believed that the extreme youth and short experience of the accused, rather than a willful disregard of regulations, were the cause of the offenses, we urgently recommend Ensign Edwin D. Baker, Jr., U. S. Naval Reserve Force, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On December 17, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Edwin D. Baker, Jr., U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

[P. 2] In view of the unanimous recommendation to clemency it was recommended that the sentence be commuted to a lesser punishment.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 6, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence of the general court martial in the foregoing case, but, in view of the unanimous recommendation to clemency, it was further recommended that the sentence be mitigated to the loss of fifty dollars (50) per month for twelve (12) months.

ACTION OF THE SECRETARY OF THE NAVY

In view of the recommendation of the Bureau of Navigation the sentence of the general court martial in the foregoing case of Ensign Edwin D. Baker, Jr., U. S. Naval Reserve Force, is mitigated to the loss of fifty dollars ($50) per month of his pay for a period of twelve (12) months. He will be released from arrest and restored to duty.

C. M. O. 12—1919

[P. 1] Lieutenant (Junior Grade) Harold S. Simmons, U. S. Naval Reserve Force, was tried by general court martial on November 7, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

Charge III.—Conduct unbecoming an officer and a gentleman (one specification).

Additional charge.—Conduct to the prejudice of good order and discipline (two specifications).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) (T) Harold S. Simmons, (RF) United States Navy to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On November 20, 1918, the convening authority, subject to remarks concerning motions in bar of trial made by the accused, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) Harold S. Simmons, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, the

[C. M. O. 16—1919]

record was referred to the Secretary of the Navy for transmission to the President.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 17, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence of the court in the foregoing case.

ACTION OF THE SECRETARY OF THE NAVY

On December 20, 1918, the Secretary of Navy approved the proceedings, findings, and sentence of the court in the foregoing [P. 2] case, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On January 11, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

REMARKS

The counsel for the accused made a motion to strike out a charge and specification for the reason that the Navy Regulations (R–1409) had not been complied with. The court did not pass on the motion, but, instead, referred the record back to the convening authority. The convening authority rightly refused to pass on the motion, as the decision of the matter was solely within the province of the court.

The accused was designated in the specifications, proceedings, sentence, and certain of the subsequent actions as a lieutenant (junior grade) (T), (RF) U. S. Navy, and the accused also signed himself as such in his statement. He was, however, in fact a lieutenant (junior grade), U. S. Naval Reserve Force. This last-mentioned irregularity, however, was not such as to invalidate, as the accused was in the naval service and the court had jurisdiction of the person (the accused) before it.

C. M. O. 16—1919

[P. 1] Lieutenant Douglas W. Fuller, U. S. Navy, was tried by general court martial on October 26, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charge, proved by plea:

Charge.—Absence from station and duty after leave had expired (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Commander Douglas W. Fuller, U. S. Navy, to lose three hundred (300) numbers in his permanent grade of lieutenant."

RETURNED FOR REVISION

On October 26, 1918, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was not adequate for the offense to which the accused plead guilty.

ACTION IN REVISION

The court decided to revoke its former sentence and substitute therefor the following:

> "The court therefore sentences him, Lieutenant Commander Douglas W. Fuller, United States Navy, to be dismissed from the United States naval service."

[C. M. O. 17—1919]

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his excellent record as commanding officer of a destroyer in war, as attested by commendatory letters attached to the record, we recommend Lieutenant Commander [P. 2] Douglas W. Fuller, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On October 31, 1918, the convening authority placed an endorsement on the record in the foregoing case, which, after commenting on the seriousness of the offense found proved and the fact that the accused had rendered signal service to the nation by the destruction of an enemy submarine, continued as follows:

"As a matter of law, however, the convening authority can remit but cannot commute. As the sentence is that of dismissal, such sentence cannot be remitted without allowing the accused to escape all consequences of his offense. This the convening authority is unwilling to do.

"But before this case is disposed of finally, it will come for review before higher authority possessed of the power to adapt the sentence to all the merits of the case. And in that view of the matter, the convening authority adds * * * his own recommendation for clemency.

"In view of the foregoing, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Douglas W. Fuller, U. S. Navy, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

OPINION OF THE JUDGE ADVOCATE GENERAL

On January 6, 1919, the Judge Advocate General expressed the opinion that inasmuch as the rank is merely descriptive and, further, because no objection was taken thereto by the accused, the designation of the accused as lieutenant commander instead of lieutenant (his true rank, although due for promotion) did not invalidate the proceedings.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 11, 1919, the Bureau of Navigation recommended that the proceedings, findings, and sentence be approved, but, in view of the recommendations to clemency by the court (unanimously) [P. 3] and the convening authority, that the sentence be mitigated to the loss of one hundred (100) numbers in his grade, and of fifty dollars ($50) per month of his pay for a period of six (6) months.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Douglas W. Fuller, U. S. Navy (who it appears was erroneously designated in the charge, specification, and subsequent proceedings as a lieutenant commander), are approved; but in view of the excellent service of Lieutenant Fuller, and the recommendation of the Bureau of Navigation, the sentence is mitigated to the loss of one hundred (100) numbers in his permanent grade of lieutenant and to the loss of fifty dollars ($50) per month of his pay for a period of six (6) months. He will be released from arrest and restored to duty.

C. M. O. 17—1919

[P. 1] Lieutenant Commander Stewart Allan Manahan, U. S. Navy, was tried by general court martial on November 22, 1918, at Base Seven by order of the Commander, Patrol Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Drunkenness (one specification).

[C. M. O. 17—1919]

Charge II.—Conduct unbecoming an officer and a gentleman (two specifications).

FINDINGS

The court found the specification of the first charge proved except as to certain words, and the accused "guilty" of the first charge; the specifications of the second charge proved except as to certain words, and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Commander Stewart Allan Manahan, United States Navy, to lose one hundred (100) numbers in his permanent grade of lieutenant."

RETURNED FOR REVISION

On November 26, 1918, the convening authority returned the record in the foregoing case to the court with the direction that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was not adequate for the offenses found proved.

SENTENCE IN REVISION

"The court therefore sentences him, Lieutenant Commander Stewart Allan Manahan, United States Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by five of the six members of the court, was spread upon the record:

> "In consideration of his clear record and efficient service for thirteen years, and because there exists in our minds a possibility [P. 2] of his having been drugged, we recommend Lieutenant Commander Stewart Allan Manahan, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On November 30, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Stewart Allan Manahan, U. S. Navy.

It was noted by the convening authority that the word "possibility" in the recommendation to clemency had evidently been used advisedly as distinguished from that "reasonable doubt" to which the accused was entitled at the trial in the determination of his guilt or innocence.

In view of the accused's honorable record and the extenuating evidence introduced at the trial, the convening authority added his own recommendation for clemency to that quoted above.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 14, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

It was further recommended that in view of the above recommendations to clemency, the sentence of the accused to dismissal be mitigated to the loss of one hundred (100) numbers in his temporary grade of lieutenant commander and loss of one hundred (100) numbers in his permanent grade of lieutenant.

ACTION OF THE SECRETARY OF THE NAVY

In view of the recommendation of the Bureau of Navigation, the sentence of the general court martial in the foregoing case of Lieutenant Commander Stewart Allan Manahan, U. S. Navy, is mitigated to the loss of one hundred (100) numbers in his temporary grade of lieutenant commander and loss of one hundred (100) numbers in his permanent grade of lieutenant.

C. M. O. 19—1919

[P. 1] Lieutenant Eugene Ames, U. S. Naval Reserve Force, was tried by general court martial on November 20, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, on the following charges:

Charge I.—Absence from station and duty after leave had expired (one specification).

Charge II.—Disobeying the lawful order of his superior officer (one specification).

Findings

The court found the specification of the first charge "proved" and the accused "guilty" of the first charge; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of the second charge.

Sentence

"The court therefore sentences him, Eugene Ames, lieutenant, United States Naval Reserve Force, to be restricted to his ship or station for a period of thirty (30) days and to lose twenty-five dollars ($25) of his pay per month for a period of three (3) months."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the accused's high character as an officer and a gentleman; his efficiency both on deck and in the engine room, as testified to by his former commanding officers, covering a period of several years after his graduation from the Naval Academy; his service in the present war, for which he promptly reentered the service shortly after its outbreak; and, finally, on account of the very favorable impression produced by the accused upon us, we recommend Eugene Ames, lieutenant, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

[P. 2] Returend for Revision

On December 2, 1918, the Department returned the record in the foregoing case to the court with the direction that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the Department, was not adequate for the offense found proved.

Action in Revision

The court decided to revoke its former sentence and substituted therefor the following:

> "The court therefore sentences him, Eugene Ames, lieutenant, United States Naval Reserve Force, to be restricted to his ship or station for a period of three (3) months, to lose fifty dollars ($50) per month of his pay for a period of three (3) months, and to be reprimanded by the convening authority."

Returned for Revision

On December 14, 1918, the Department again returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its sentence in revision, which, in the opinion of the Department, was not adequate for the offense found proved.

The attention of the court was directed to Naval Digest, 1916, Public Reprimand 12, 19, and 21.

Action in Revision

The court decided to revoke its former sentence in revision and substituted therefor the following:

> "The court therefore sentences him, Eugene Ames, lieutenant, United States Naval Reserve Force, to be dismissed from the United States naval service."

[C. M. O. 21—1919]

RECOMMENDATION TO CLEMENCY IN REVISION

"The members signing the original recommendation to clemency, revoke said clemency recommendation, and substitute therefor the following:

"In consideration of the accused's high character as an officer and a gentleman; his efficiency both on deck and in the [P. 3] engine room, as testified to by his former commanding officer, covering a period of several years after his graduation from the Naval Academy; his service in the present war, for which he promptly reentered the service shortly after its outbreak; the belief that great mental stress was produced in the accused by the futility of his efforts to obtain his detachment from his very unharmonious relationship with his commanding officer, which aforesaid stress seemed to have exercised a compelling influence upon the accused in this case; in fact, the circumstances in connection with the fitness report of the accused seem to indicate a situation that is believed to be unusual in the general practice of the service; and, finally, on account of the very favorable impression produced by the accused upon us, we recommend Eugene Ames, lieutenant, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 10, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

The Bureau further recommended that, in view of the unanimous recommendation to clemency, the sentence of dismissal be mitigated to the loss of fifty dollars ($50) per month for a period of six (6) months.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Eugene Ames, U. S. Naval Reserve Force, are approved, but the sentence is mitigated to restriction to the ship or station to which he may be attached for a period of three (3) months, and to the loss of fifty dollars ($50) per month of his pay for a period of three (3) months. He will be released from arrest and restored to duty.

C. M. O. 21—1919

[P. 1] Ensign Arthur W. Davis, U. S. Naval Reserve Force, was tried by general court martial on January 2, 1919, at the U. S. Naval Academy, Annapolis, Md., by order of the Secretary of the Navy and found guilty of the following charge, proved by plea:

Charge.—Conduct to the prejudice of good order and discipline (one specification).

SENTENCE

"The court therefore sentences him, Ensign Arthur W. Davis, United States Naval Reserve Force, to be publicly reprimanded by the Secretary of the Navy, to be restricted to his ship or station for a period of four (4) months, and to lose fifteen dollars ($15) per month of his pay for a period of four (4) months."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 10, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Arthur W. Davis, U. S. Naval Reserve Force, are approved, but the sentence is remitted with the exception of that portion involving public reprimand. He will be released from arrest and restored to duty.

A review of the record in this case discloses that the accused conducted himself in an angry, insolent, disrespectful, and unmilitary manner toward another officer

[C. M. O. 27—1919]

of the naval service who had been placed on duty by competent authority, and who was then and there in the exercise of the duties of his office. Such conduct cannot be too severely condemned, as it strikes at the very foundations of discipline. Ensign Davis is, therefore, hereby reprimanded for his thoroughly reprehensible conduct.

C. M. O. 27—1919

[P. 1] Ensign George L. Cassidy, U. S. Naval Reserve Force, was tried by general court martial on September 3, 1918, at the U. S. Naval Port Office, Saint Nazaire, France, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (one specification).

Charge II.—Disobeying the lawful order of his superior officer (one specification).

Charge III.—Resisting arrest (one specification).

Charge IV.—Disrespectful in language and deportment to his superior officer while in the execution of his office (one specification).

Charge V.—Using abusive, obscene, and profane language toward his superior officer (one specification).

Sentence

"The court therefore sentences him, Ensign George L. Cassidy, U. S. N. R. F., to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of three (3) years."

Action of the Convening Authority

On October 25, 1918, the convening authority, subject to remarks concerning the fact that the abbreviation "U. S. N. R. F.," had been employed in the findings and sentence of the court instead of the authorized form, "U. S. Naval Reserve Force," approved the proceedings, findings, and sentence in the foregoing case of Ensign George L. Cassidy, U. S. Naval Reserve Force; designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement; and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion and Recommendation of the Judge Advocate General

In the opinion of the Judge Advocate General, the evidence before the court did not support its finding that the accused was [P. 2] guilty of "resisting arrest," in view of the following excerpt from Naval Digest, 1916, Arrest, 10:

> "The question of what constitutes an arrest has been considered by the civil courts in numerous decisions and may now be regarded as finally settled.
>
> * * * * * * *
>
> "'Except in the case of a submission, there must be either a physical touching or restraint, mere words addressed to the person said to be arrested not being sufficient. Such words are enough, however, if there is also submission to one who has the apparent power of carrying his design into effect' (2 A. & E. Enc. L. 838)."

It was therefore recommended that the findings of the court on the third charge and the specification thereunder be disapproved.

The remarks of the convening authority on the use of the abbreviation "U. S. N. R. F." were concurred in.

Concurrence and Recommendation of the Bureau of Navigation

On December 23, 1918, the Bureau of Navigation concurred in the action taken by the convening authority as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

[C. M. O. 28—1919]

ACTION OF THE SECRETARY OF THE NAVY

On December 28, 1918, the Secretary of the Navy approved the recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings in the foregoing case was submitted to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On January 25, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 28—1919

[P. 1] Lieutenant Commander Gus J. Lehnhardt, U. S. Naval Reserve Force, was tried by general court martial on December 12, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness on duty (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (two specifications).

FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specifications of the second charge proved excepting as to certain words, and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Gus J. Lehnhardt, lieutenant commander, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by three of the six members of the court, was spread upon the record:

> "In view of the accused's previous efficient record, we recommend Gus J. Lehnhardt, lieutenant commander, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On December 28, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case expressing the opinion that the words excepted by the court in its findings on the first specification of the second charge formed the gist of the offense; and recommending that the finding of the court on said specification be disapproved, and that the proceedings, findings of the court on the first charge and specification thereunder, the second charge and second specification thereunder, and the sentence, be approved.

[P. 2] CONCURRENCE OF THE BUREAU OF NAVIGATION

On December 31, 1918, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, were approved on January 3, 1919, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of proceedings of the general court martial in the foregoing case of Lieutenant Commander Gus J. Lehnhardt, U. S.

[C. M. O. 31—1919]

Naval Reserve Force, was submitted to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On January 25, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 31—1919

[P. 1] Machinist Fred C. Schmidt, U. S. Naval Reserve Force, was tried by general court martial on September 27, 1918, at the U. S. Naval Port Office, La Pallice, France, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Assault (one specification).

Charge III.—Scandalous conduct tending to the destruction of good morals (one specification).

SENTENCE

"The court therefore sentences him, Machinist Fred C. Schmidt, U. S. Naval Reserve Force, to be reduced to the rating of fireman, third class, U. S. Naval Reserve Force, to be confined for a period of one year, then to be dishonorably discharged from the U. S. naval service and to suffer all the other accessories of said sentence as prescribed by section 349, Naval Courts and Boards."

RETURNED FOR REVISION

On October 5, 1918, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of correcting the record of proceedings and of reconsidering its sentence.

It was noted by the convening authority that the original precept was prefixed to the record instead of a copy thereof (see Naval Courts and Boards, 1917, sections 230 and 231), and sections 84, 366, 367, and 368, Naval Courts and Boards, 1917, appeared not to have been complied with.

The convening authority was further of the opinion that so much of the sentence as provides that the accused be reduced to the rating of fireman, third class, is illegal, inasmuch as the punishment of officers by reduction to enlisted ratings is not authorized by law for the offenses of which the accused was found guilty.

[P. 2] SENTENCE IN REVISION

"The court therefore sentences him, Machinist Fred C. Schmidt, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On November 21, 1918, the convening authority, subject to remarks concerning the inconsistency on the part of the court in entirely omitting the confinement in the sentence in revision, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Machinist Fred C. Schmidt, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 28, 1918, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

ACTION OF THE SECRETARY OF THE NAVY

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the Secretary of the Navy, on

[C. M. O. 35—1919]

January 4, 1919, submitted the record in the foregoing case to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On January 25, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 35—1919

[P. 1] Lieutenant (Junior Grade) Ford L. Wilkinson, Jr., U. S. Navy, was tried by general court martial on September 12, 1918, at the Navy Yard, New York, by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Culpable negligence and inefficiency in the performance of duty (one specification).

Charge II.—Culpable inefficiency in the performance of duty (one specification).

SENTENCE

"The court therefore sentences him, Ford L. Wilkinson, lieutenant (junior grade), U. S. Navy, to lose one hundred (100) numbers in his temporary grade of lieutenant (junior grade), and to lose one hundred (100) numbers in his permanent grade of ensign."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "We recommend the accused to the clemency of the reviewing authority in view of his excellent character as testified to, his youth, and inexperience. It appears that he had only a three years' course at the Naval Academy and was only about six months and sixteen days out of the academy at the time of the collision. It would seem, therefore, that he had not had sufficient experience to meet the situation, which was urgent and needed to be handled with the promptitude that can only be gained from experience. Attention is invited to the report of fitness on this officer signed by his commanding officer, Captain Amon Bronson, Jr., U. S. Navy, commanding the U. S. S. *Denver*, covering this collision, which states as follows: 'Due allowance should, however, be made for the inexperience of this officer, and it is confidently believed that he will profit by this experience and improve.'"

RETURNED FOR REVISION

On December 27, 1918, the Department returned the record in the foregoing case to the court and directed that the court [P. 2] reconvene for the purpose of reconsidering the findings and sentence.

It was noted by the convening authority that the accused was improperly designated in the findings and sentence as Ford L. Wilkinson instead of Ford L. Wilkinson, Junior.

ACTION IN REVISION

The court decided to revoke its former findings and sentence the substituted therefor findings and sentence identical with its former findings and sentence except that the accused was properly designated therein as Ford L. Wilkinson, Junior, instead of Ford L. Wilkinson.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 29, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case of Lieutenant (Junior Grade) Ford L. Wilkinson, Jr., U. S. Navy. It was further recommended that in view of the unanimous recommendation to clemency the

[C. M. O. 39—1919]

sentence be mitigated to the loss of fifty (50) numbers in his temporary grade of lieutenant (junior grade), and of fifty (50) numbers in his permanent grade of ensign.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) Ford L. Wilkinson, Jr., U. S. Navy, are approved, but, in view of the recommendation of the Bureau of Navigation, the sentence is mitigated to the loss of fifty (50) numbers in his temporary grade of lieutenant (junior grade) and of fifty (50) numbers in his permanent grade of ensign.

C. M. O. 39—1919

[P. 14] ARRAIGNMENT: FAILURE TO ARRAIGN ON CHARGE DOES NOT CONSTITUTE FATAL ERROR.

It was noted in a recent case that the accused was arraigned on the specification of the single charge against him, and pleaded "not guilty," but he was not arraigned on the charge. The record, however, shows that the accused was furnished a copy of the charge and specification preferred against him, and that the charge and specification were read to him prior to his arraignment on the specification.

The department has heretofore held that failure to arraign an accused on the charge is a fatal error, necessitating disapproval [P. 15] of the proceedings, findings, and sentence (G. C. M. Rec. Nos. 39124 and 40016; C. M. O. 28, 1902; C. M. O. 57, 1905; and C. M. O. 27, 1913, 10–11). These rulings, however, were based upon naval court-martial precedents and the decision of the Supreme Court of the United States in *Crain* v. *United States*, 162 U. S. 625, which decision was overruled by the Supreme Court in *Garland* v. *State of Washington*, 232 U. S. 642.

Following said later case, it was held that failure to arraign the accused on the charge was not a fatal error, although irregular and contrary to the practice of naval courts martial, established by regulations and long-continued usage (Naval Courts and Boards, 1917, p. 197; File 26262–5602, G. C. M. Rec. No. 41419; see also G. C. M. Rec. Nos. 34302, 34303, 34304, and 35169).

CHARGES AND SPECIFICATIONS: DEFECTIVE SPECIFICATION UNDER CHARGE OF MANSLAUGHTER.

A specification under the charge of manslaughter read as follows:

> "In that O_____ A. H_____, private, U. S. Marine Corps, serving with the Twenty-fifth Company, Fourth Provisional Regiment, on detached duty at Seibo, Dominican Republic, did, on or about October 16, 1918, at Seibo, Dominican Republic, negligently and carelessly so handle a revolver that it was discharged, and by such discharge he, the said H_____, did, then and there, inflict a mortal wound in and upon the leg of one J_____ A_____, of which said mortal wound so inflicted, as aforesaid, the said A_____ died at or about 2:40 p. m., on October 16, 1918; the United States being then in a state of war."

The Judge Advocate General was of the opinion that the above specification did not support the charge. The negligence might have been slight and therefore insufficient to hold the accused criminally responsible for the resulting homicide. "Homicide may result from carelessness of such a low degree or of such a trivial character in the performance of a lawful act, however, as not to involve criminality in the person so carelessly performing the act. To constitute criminality the carelessness must be aggravated and gross, implying indifference to consequences" (3 L. R. A. (N. S.) 1159; *Fitzgerald* v. *State*, 112 Ala. 34; 20 So. 966; *Robertson* v. *State*, 2 Lea, 239, 31 Am. Rep. 602).

The specification of a charge of manslaughter should allege with sufficient definiteness facts which, if true, would show that the homicide was felonious. The sample specification set forth in Naval Courts and Boards, 1917, page 112, will furnish a proper guide in most cases, and in appropriate cases manslaughter may

be alleged by following the words of the Criminal Code, section 274, as was done in General Court-Martial case No. 28796, in which the specification alleges, in part, that the accused "did, at or about ten o'clock antemeridian on the said date, at the said disciplinary barracks, feloniously neglect and fail to handle said rifle with due care and circumspection, [P. 16] through which neglect and failure he, the said R_____, did then and there, with the rifle aforesaid, shoot in the head, and did then and there mortally wound the said W_____, of which mortal wound he, the said W_____, at or about ten-thirty o'clock antemeridian on said date, at the disciplinary barracks aforesaid, did die; and he, the said R_____, did, through the neglect and failure aforesaid and by the means aforesaid, kill and slay the said W_____" (File 26262-5602, G. C. M. Rec. No. 41419).

CHARGES AND SPECIFICATIONS: IF UNOBJECTED TO, AN ERROR IN FIRST NAME OF ACCUSED IN SPECIFICATION IS NOT FATAL DEFECT.

The accused in a recent case was designated in the specification of the charge against him as William B. B_____. The judge advocate changed the name William to Willis. An investigation of the record showed his first name to be Willas, whereas in acknowledging the receipt of a copy of the record of proceedings the accused signed himself as Willis B. B_____. It was therefore established that his first name was either "Willis" or "Willas" and that he was properly the defendant in the case. Since he made no objection, no miscarriage of justice resulted from the failure of the court to return the charge and specification to the convening authority to correct the error in the name of the accused. See Naval Courts and Boards, 1917, sec. 56 (2) (File 26251-18697, G. C. M. Rec. No. 41566).

CHARGES AND SPECIFICATIONS: DEFECTIVE SPECIFICATION, UNOBJECTED TO, CURED BY FINDING OF COURT.

The accused in a recent case was found guilty of "Conduct to the prejudice of good order and discipline." The single specification under the charge alleged that the accused did, "while a member of said guard, by standing outside of a house near the corner of 20th and K Streets in the said city, aid and abet one A_____ S. F. _____, private, U. S. Marine Corps, of the said company, while he, the said A_____ S. F. _____, entered the said house and threatened the occupants thereof, two native women, demanding that they sell him a bottle of rum on pain of being arrested, the United States then being in a state of war." This specification is vague and indefinite in that it fails properly to specify by what manner and means the accused, by standing outside of a certain house near a certain corner, thereby aided and abetted another in the commission of an offense. Inasmuch, however, as the accused, who was represented by counsel, made no objection to the specification and submitted to trial, impliedly waiving the defect in the specification, he could be legally convicted thereunder, provided the evidence was such as to supply the deficiency and to show that he was in fact an aider and abettor of the person engaged in the commission of an offense in the said house.

[P. 17] The testimony of one of the native women, apparently believed by the court, is to the effect that he actually aided and abetted in the commission of the offense, although not merely by standing on the corner, as alleged in the specification. The allegation that he aided and abetted by standing on the corner in front of the house may be, therefore, regarded as surplusage and rejected as such; and the defect in the specification may be regarded as cured by the failure of the accused to object and by the finding of the court (File 26262-5604, G. C. M. Rec. No. 41903).

ENLISTMENT: EFFECT OF EXPIRATION OF.

An accused whose enlistment expires during the time that he is being held for trial by court martial, but who has not been given a discharge, is subject to the jurisdiction of a naval court martial upon the charges for which he is being so held. But he is no longer in the Navy, and the statement to the con-

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trary at the top of page 22 of C. M. O. 129, 1918, is an error, and was not necessary to the decision of the case in which made (File 26251–16178: 3, J. A. G., Jan. 31, 1919; see also File No. 26251–18353, G. C. M. Rec. No. 41706).

FINDINGS ON "ABSENCE FROM STATION AND DUTY WITHOUT LEAVE": NOT SUPPORTED BY EVIDENCE ADDUCED.

The accused in a recent case was found guilty of "Absence from station and duty without leave." The testimony for the defense, which was straightforward and unimpeached, showed that the accused was ill; that he had received medical attention; that he attempted to communicate these facts to his superior officers; that he intended to return to his station and duty as soon as he was physically able; that he actually started to return before he fully recovered; that his physical condition was such when he reached said station he was immediately taken to the hospital for treatment; and that his physical condition was not due to any fault of his own.

The Judge Advocate General was of the opinion that the findings of the court were not supported by the evidence adduced, and the department thereupon disapproved said findings and the sentence (File 26251–18535, G. C. M. Rec. No. 41374).

FORMER JEOPARDY: TRIAL ON DEFECTIVE SPECIFICATION AS AFFECTING.

It was held in a recent case that, where the accused made no objection to being tried on a fatally defective specification, and the court acquitted him on the charge, he could not lawfully be brought to trial again for the same offense (File 26262–5602, G. C. M. Rec. No. 41419; see C. M. O. 141, 1918, 17).

[P. 18] LIBEL: NOT CONSTITUTED BY MERE WRITING AND ADDRESSING OF LIBELOUS COMMUNICATION.

The accused in a recent case was charged, inter alia, with "Conduct to the prejudice of good order and discipline," and to support said charge the single specification thereunder alleged that the accused addressed a communication to two persons in Massachusetts, which said communication contained matter tending to bring individuals of the naval service into disrepute, and written with the intent and purpose, on the part of the accused, of treating the commanding officer and executive officer of his ship with contempt.

The acts of writing and addressing a communication containing libelous matter do not constitute any crime or misdemeanor at common law; the gravamen of the offense is the publishing of such communication. It was not alleged or proved that the communication was published. The accused's plea of guilty (by advice of counsel) admits no more than was charged, viz, the writing and addressing. The communication must, then, so far as the accused is concerned, be regarded as unpublished, and, being so regarded, it could not, in contemplation of law, bring individuals of the naval service into disrepute, nor could the officers in question have been treated with contempt. The department therefore disapproved the aforementioned charge, the specification thereunder, and the findings of the court thereon (File 26262–5663, G. C. M. Rec. No. 41552).

RATING OF ACCUSED: FAILURE TO ARRAIGN AND FIND UNDER CORRECT RATING DOES NOT INVALIDATE PROCEEDINGS, ETC.

An accused with the rating of mess attendant, third class, was improperly arraigned by the judge advocate as mess attendant, second class; his true rating was not established by any of the witnesses called, and in the findings of the court he was designated as simply mess attendant. It was held, however, that the proceedings, findings, and sentence of the court were not invalidated by the above-mentioned irregularities (File 26262–5780, G. C. M. Rec. No. 41782).

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RECORD: IRREGULARITIES IN.

The following irregularities noted in the review of a recent case were held not to be sufficient to invalidate:

(*a*) The record failed to show that the prosecution offered no evidence.

(*b*) The record did not show that the provisions of section 253 (a), Naval Courts and Boards, 1917, had been complied with.

(*c*) The action of the court upon completion of the case was not shown (File 26262-5682, G. C. M. Rec. No. 41598).

REVISION, PROCEEDINGS IN: RENDERED ILLEGAL BY FAILURE OF CONVENING AUTHORITY TO SIGN LETTER RETURNING CASE.

In reviewing a recent general-court-martial case it was noted that the letter returning the case to the court for revision was [P. 19] not signed by the convening authority. The Judge Advocate General being of the opinion that said proceedings in revision were illegal, the said proceedings were set aside by the department (File 26251–18572, G. C. M. Rec. No. 41398).

COMMANDING OFFICERS OF NAVAL HOSPITALS: GRANTING OF FURLOUGHS BY, TO CONVALESCENT PATINTS.

Commanding officers of naval hospitals are authorized to grant furloughs to convalescent patients where such furlough is considered of benefit in restoring the patient's health and does not extend beyond the time when he would be fit for duty. Such furlough may be regarded as a part of the course of treatment prescribed by the medical officer in command and does not require the recommendation of a board of medical survey (File 26806–162).

COMMISSIONS IN GUARDIA NACIONAL DOMINICANA: ISSUANCE OF, TO OFFICERS AND MEN OF THE NAVY AND MARINE CORPS.

The issuance of commissions in the Guardia Nacional Dominicana "to such officers and enlisted men of the Navy and Marine Corps who are already serving in the Dominican Republic as may be necessary for the proper organization of that force," is authorized by the act of February 11, 1918, and men so commissioned may, under the authority of said act, accept such offices "with compensation and emoluments from the said Dominican Republic, subject to the approval of the President of the United States."

The commissions in such cases would properly be issued by the military governor of Santo Domingo as representative of that Government (File 16870–306, J. A. G., Jan. 3, 1919).

ENLISTMENT, EXPIRATION OF: RETENTION OF ENLISTED MAN AFTER, IN ORDER TO INVESTIGATE CHARGES AGAINST HIM.

The question having arisen as to whether a chief commissary steward in the Navy implicated in certain irregularities in connection with the furnishing of supplies by a commercial firm which had been indicted by the Federal civil authorities, could be held in the naval service beyond the date of expiration of his enlistment, it was advised that either he may be held for trial by court-martial after his enlistment expires, provided the necessary steps are promptly taken with a view to such trial, or, if it is decided to discharge him from the service, the local United States district attorney should be notified in advance of [P. 20] the discharge in order that he may take the proper steps to retain the said chief commissary steward within the jurisdiction of the court before which the trial of the commercial firm implicated will be held. (File No. 7657–771).

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INTOXICATING LIQUOR: SALE OF, TO MEN RELIEVED FROM NAVAL SERVICE BUT STILL WEARING UNIFORM.

Section 12 of the Selective Service Act, approved May 18, 1917 (Public, No. 12), provides that "it shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform." By the act of October 6, 1917 (Public, No. 77), the word "military" was defined by Congress to include "naval" (Navy Department General Order No. 412, dated August 16, 1918).

The act of July 1, 1918 (Public, No. 182, p. 10), provides:

> "* * * the Secretary of the Navy may, in his discretion, permit the members of the Naval Reserve Force to wear the uniform of their respective ranks, grades, or ratings while not in active service, and such members shall, for any act committed by them while wearing the uniform of their respective ranks, grades, or ratings, be subject to the laws, regulations, and orders for the government of the Regular Navy."

Navy Department General Order No. 410, dated August 2, 1918, provides:

> "During the present emergency, it is prohibited for any person in the naval service to purchase or accept intoxicating liquor from bootleggers within the prescribed zones, or to have intoxicating liquor in his possession on board any naval vessel or at any naval station or at any other place under the exclusive jurisdiction of the Navy Department, except as authorized for medical and religious purposes."

Under the foregoing the sale of intoxicating liquor to officers or members of the naval forces while in uniform is prohibited. In the opinion of the Judge Advocate General, officers or members of the Naval Reserve Force released to inactive duty are officers or members of the naval forces within the meaning of said prohibition, the sale of intoxicating liquors to them while in uniform is a violation of the above acts of Congress, and the persons so selling said liquor may be prosecuted by the Federal civil authorities.

On the other hand, the sale of intoxicating liquor to persons "discharged" from the naval service, and while still wearing the uniform, does not, except in prohibited zones, appear to be unlawful, as such persons upon discharge cease to be members of the naval forces as the term is used in the above acts of Congress.

It would also appear that the naval authorities have jurisdiction over all offenses defined in Navy Department General Order No. 410, dated August 2, 1918, committed by persons in the naval service while on active duty, or, if on inactive duty, while [P. 21] wearing the uniform of their respective ranks, grades, or ratings. Persons discharged from the naval service are, of course, not amenable to naval jurisdiction for alleged offenses under the above general order (File 7657–800, J. A. G., Jan. 10, 1919).

LINE OF DUTY: CHANGE OF RECORDS AFTER DISCHARGE.

A man was discharged from the Navy with an ordinary discharge by reason of a medical survey in which origin of disability was stated as occurring "not in line of duty." The Bureau of Navigation was of opinion that the finding should have been "line of duty," and that the man in question "is entitled to have the record changed" accordingly and to receive an honorable discharge and the benefits of compensation under the War-Risk Insurance Act.

Held, That as the man in question has already been discharged pursuant to the report of medical survey to which exception is taken, his case should now, in accordance with precedent, be considered closed. The discharge which has been issued to him cannot be revoked and a different form of discharge substituted, even should the Secretary decide that the facts in his case might have been sufficient to support a finding of line of duty. His rights under the War-Risk Insurance Act may be determined by the Bureau of War Risk Insurance upon the facts as found by that bureau to exist, without regard to the decision of this department. It has been the policy of the Bureau of Medicine and Surgery to furnish the Bureau of War Risk Insurance with all the facts in any case,

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without an expression of opinion. Any additional evidence should, in accordance with precedent, be attached to and made a part of the man's record, but in accordance with repeated decisions of the Secretary no changes should be made in the entries of record in his case (File 7657–686, J. A. G., Jan. 7, 1919).

LINE OF DUTY QUESTIONS: JURISDICTION OF JUDGE ADVOCATE GENERAL, AS TO.

At the present time, although the Judge Advocate General has jurisdiction of line of duty questions arising upon the reports of boards of inquest, boards of investigation, and courts of inquiry, he is without jurisdiction of such questions growing out of entries upon health records and reports of medical survey. Should the Secretary of the Navy or the Surgeon General submit to the Judge Advocate General for his opinion any question of doubt as to the line of duty status of a person who protests against an adverse entry in his health record or in a report of medical survey, such opinion would be rendered; but it is not believed that under any other circumstances an opinion in such case could, with propriety, be rendered by the Judge Advocate General, unless the question should incidentally arise in some connection not now anticipated (File 7657–686, J. A. G., Jan. 7, 1919).

[P. 22] MARINE CORPS: STATUS OF APPLICANTS FOR ENLISTMENT IN.

W_____ T. B_____ applied for enlistment in the Marine Corps on July 1, 1918, at the recruiting station, Albany, N. Y., was accepted and transferred to marine barracks, Parris Island, S. C., for further examination and final enlistment. On arrival at Parris Island he was taken sick and before further steps could be taken toward the completion of his enlistment died at the naval hospital, Parris Island, on July 10, 1918.

S_____ G_____ applied for enlistment in the Marine Corps on April 30, 1918, at the recruiting station, New York City, was accepted and transferred, via the S. S. *City of Athens*, to marine barracks, Parris Island, S. C., for further examination and completion of enlistment. On May 1, 1918, the aforenamed vessel collided with another, and G_____ is assumed to have been lost, as nothing further has ever been learned regarding him.

Held, that under the rulings of the department the status of the above-named applicants for enlistment was that of civilians at the time of their death, and not that of persons in the naval service of the United States, as fully appears from the opinion of the Judge Advocate General in a similar connection, of February 28, 1917, File 10060–85. (See also 18 Comp. Dec. 103 as modified by 19 Comp. Dec. 367, 371; File 28909–191, J. A. G., Jan. 21, 1919.)

PROBATIONERS: LEGALITY OF DISCHARGE AND TRANSFER OF, TO INACTIVE DUTY.

The discharge of an enlisted man of the Marine Corps in the status of a court-martial probationer effected upon competent orders, would, in the opinion of the Judge Advocate General, be legal.

Similarly an enrolled member of the Marine Corps Reserve, while in the status of a court-martial probationer, may legally, upon competent orders, be transferred from the active to the inactive list of the Naval Reserve Force (File 28553–15, J. A. G., Jan. 23, 1919).

PROMOTION: CIRCUMSTANCES UNDER WHICH PHYSICAL EXAMINATION FOR, MAY BE CONDUCTED BY SINGLE MEDICAL OFFICER.

Should an officer after qualifying physically be suspended from promotion because of professional deficiencies, he might thereafter be promoted when found mentally, morally, and professionally qualified without any further physical examination; or he might under such circumstances be examined and promoted upon the informal report of a single medical officer or a nonstatutory board (File 26266–627:1; Sec. Nav., Jan. 30, 1919).

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PROMOTION: DURATION OF ELIGIBILITY FOR, OF OFFICERS SELECTED BY SELECTION BOARD.

Officers selected for promotion by the selection board, whether the board be convened pursuant to the act of August 29, 1916, or that of May 22, 1917, remain eligible for promotion until the [P. 23] end of the calendar year following their recommendation for promotion, and where the number of officers selected has been in excess of the number of vacanies in the grade to which they were to be promoted during such time, their names must be again presented to the selection board which makes selection for the next succeeding calendar year.

For example, where a board meets in December to select for promotion for the following calendar year, officers selected for promotion need not have their names submitted to a board meeting in July (for instance) of the next following calendar year in order to remain eligible for promotion, when vacancies occur, until December 31 of said following calendar year (File 28687–22: 1, J. A. G.).

REMOVAL OF MARK OF DESERTION FROM RECORD: CANNOT BE DONE EXCEPT IN CASE OF ERROR.

The question whether the mark of desertion may be removed from the record of an enlisted man in the Marine Corps recently arose.

From the facts of the case submitted it appeared that the man in question deserted. He was apprehended and delivered at marine barracks, Navy Yard, New York. It was recommended that he be brought to trial by general court martial for desertion, but while awaiting trial he died, whereupon the department withdrew the case against him. Application was then made to have the mark of desertion removed from his record.

It is well established that in the absence of evidence showing that the mark of desertion appearing upon the records in any case was erroneously entered or retained it is not within the power of the department to remove such mark. The official record of a fact of this nature, where no error has been made therein, cannot be changed by executive authority.

In the present case it was not made to appear as a matter of fact that such mark was erroneously entered, and therefore it should not be removed from the record. The record should, however, disclose the facts as they transpired subsequent to the desertion, namely, the apprehension, recommendation for trial by general court martial, and the subsequent withdrawal of the case on account of this man's death (File 26251–18119: 1).

RETIREMENT OF OFFICER: DOES NOT CHANGE HIS OFFICE BUT EFFECTS A CHANGE OF STATUS.

An officer when transferred to the retired list is not divested of one office and appointed to another. He continues as a retired officer under the appointment which he held on the active list; and even when he acquires a higher rank on retirement, this does not call for an exercise of the appointing power. The situation, accurately stated, is that when an officer is transferred from the active to the retired list there is no change in the office which he holds, but merely a change in his status and [P. 24] functions under his existing appointment. The fact of his retirement creates a new office in the military service, the number of officers of his grade thereby being increased by one and a new office coming into existence on the moment that his retirement becomes legally effective. The number of officers in any given grade in the Navy is not limited by law, but only the number of such officers who may be on the active list is so limited, the remainder being on the retired list (File 28687–22: 3, J. A. G., Jan. 9, 1919).

RETIREMENT OF OFFICER: WHEN EFFECTIVE.

Officer A, in the grade of rear admiral, applied for retirement under section 1443, Revised Statutes. His application was approved by the President on December 30, 1918. Notification of the President's action was sent to the

officer in question by telegram dated December 31, 1918, but the date of receipt of said notice is not known.

Officer B was recommended for promotion to the permanent grade of rear admiral by the selection board convened in July 1918. Another selection board was convened on December 31, 1918. If the vacancy created by A's retirement existed prior to the convening of the selection board on December 31, 1918, B is eligible, by reason of his previous selection, to be promoted to said vacancy and to take precedence in accordance with the terms of the act of August 29, 1916. If, however, the vacancy caused by A's retirement did not exist until after the convening of the selection board of December 31, 1918, B is not eligible for promotion to said vacancy unless again selected upon recommendation of the board of selection convened on December 31, 1918.

Held, that the vacancy in the grade of rear admiral of the active list resulting from the retirement of A did not occur until he legally ceased to be an officer of the active list, and this did not take place until he received official notification of the President's approval of his application for retirement. As the notification was not sent to A until the day on which the selection board of December 1918, convened, A must be held to have been an officer on the active list of the Navy when said board convened, and accordingly B is not now eligible for promotion to the permanent grade of rear admiral of the active list in the place of A, and to become so eligible must be selected upon the recommendation of the board now in session. In this connection, see 16 Comptroller's Decision, 682, holding that—

> "As the law does not recognize fractional parts of a day in the matter of retirements, promotions, and appointments in the Army, a vacancy caused by an officer's retirement from active service does not begin to run until the day following his retirement" (File 28687–22:3, J. A. G., Jan. 9, 1919).

C. M. O. 40—1919

[P. 1] Ensign Harold J. Grant, U. S. Naval Reserve Force, was tried by general court martial on January 15, 1919, at the Navy Yard, New York, by order of the Secretary of the Navy, and found guilty of the following charge, proved by plea:

Charge.—Absence from station and duty after leave had expired (one specification).

Sentence

"The court therefore sentences him, Harold J. Grant, ensign, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Recommendation to Clemency

The following recommendation to clemency, signed by three of the five members of the court, was spread upon the record:

> "In consideration of the extenuating circumstances attending the absence of the accused, we recommend Harold J. Grant, ensign, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

Recommendation of the Bureau of Navigation

On January 31, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

It was further recommended that in view of the extenuating circumstances, the sentence be mitigated to the loss of fifty dollars ($50) per month of his pay for a period of six (6) months.

Action of the Secretary of the Navy

The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Harold J. Grant, U. S. Naval Reserve Force, are approved, but, in view of the recommendation of the Bureau of Navigation, the sentence is mitigated [P. 2] to the loss of fifty dollars ($50) per month of his

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pay for a period of six (6) months. He will be released from arrest and restored to duty.

REMARKS

The accused in this case, after pleading guilty to the charge, took the stand in extenuation, such fact being recorded as follows: "The accused was at his own request duly sworn as a witness in his own behalf." When the accused takes the stand at his own request as a witness in extenuation of his acts, the record should contain proper notation that he was a witness in extenuation. (See C. M. O. 127, 1918, and Naval Digest, 1916, Witnesses, 63.)

C. M. O. 51—1919

[P. 1] Lieutenant William C. Bartlett, U. S. Naval Reserve Force, was tried by general court martial on October 5, 1918, at Base Nineteen, by order of the Commander, Squadron Four, Patrol Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Drunkenness (one specification).

Charge III.—Using profane and threatening language toward another person in the service (three specifications).

Charge IV.—Conduct unbecoming an officer and a gentleman (one specification).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the specification of the second charge "proved by plea," and the accused "guilty" of the second charge; the specifications of the third charge proved excepting as to certain words, and the accused "guilty" of the third charge; the specification of the fourth charge proved excepting as to certain words, and the accused "guilty" of the fourth charge.

SENTENCE

"The court therefore sentences him, Lieutenant William C. Bartlett, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On October 10, 1918, the convening authority approved the proceedings, findings on the second, third, and fourth charges and specifications thereunder, and the sentence of the general court martial in the foregoing case of Lieutenant William C. [P. 2] Bartlett, U. S. Naval Reserve Force; disapproved the findings on the specification of the first charge and on the first charge, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On October 29, 1918, the Judge Advocate General placed an endorsement on the record in the foregoing case, in part, as follows:

> "Charge III, containing three specifications, is as follows: 'Using profane and threatening language toward another person in the service.' The accused might properly have been charged with 'Conduct unbecoming an officer and a gentleman,' but there is no warrant in the Articles for the Government of the Navy for the charge as framed.
>
> "It is noted that specifications two and three under charge III do not support the charge as laid. In each of the specifications mentioned the language, while profane, is not threatening and thus does not support the charge.

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"It is further noted that the subject matter of specification one, charge III, is set out in the specification under charge IV, the same language being used in both. The offense set out is properly laid under charge IV.

"In view of the foregoing it is recommended that the finding on charge III be disapproved."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On November 4, 1918, the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

On November 6, 1918, the Secretary of the Navy approved the foregoing remarks and recommendations of the Judge Advocate [P. 3] General, concurred in by the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On February 7, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 58—1919

[P. 1] Lieutenant Hugh Markey, U. S. Naval Reserve Force, was tried by general court martial on January 22, 1919, at Base Twenty-nine, by order of the Commander, Base Twenty-nine, on the following charges:

Charge I.—Absence from station and duty after leave had expired (one specification).

Charge II.—Drunkenness (one specification).

FINDINGS

The court found the specification of the first charge "proved by plea," and the accused "guilty" of the first charge; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Hugh Markey, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On January 27, 1919, the convening authority placed the following endorsement on the record in the foregoing case:

"The proceedings and findings of the general court martial in the foregoing case of Lieutenant Hugh Markey, U. S. Naval Reserve Force, are approved.

"In review the convening authority notes that the accused was acquitted of the charge of 'Drunkenness,' and that he plead guilty to the charge of 'Absence from station and duty after leave had expired.' The evidence adduced shows such extenuating circumstances that punishment for the technical absence over leave is shown to be unnecessary. The acquittal of the accused of the main charge of 'Drunkenness' removes the seriousness from the charge of absence over leave.

"In view of the foregoing the sentence is disapproved, and he will be released from arrest and restored to duty."

C. M. O. 59—1919

[P. 1] Captain Tracy G. Hunter, Jr., U. S. Marine Corps, was tried by general court martial on December 18, 1918, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Conduct unbecoming an officer and a gentleman (two specifications).

Sentence

"The court therefore sentences him, Captain Tracy G. Hunter, Junior, United States Marine Corps, to be dismissed from the United States Marine Corps and from the United States naval service."

Recommendation to Clemency

The following recommendation to clemency, signed by six of the seven members of the court, was spread upon the record:

> "In view of his highly meritorious service with the American Expeditionary Force, we recommend Captain Tracy G. Hunter, Jr., U. S. Marine Corps, to the clemency of the reviewing authority."

Opinion of the Judge Advocate General

On February 4, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case as follows:

> "Objection is made by counsel for the accused to the admission in evidence of a copy of a letter sent by the Major General Commandant, U. S. Marine Corps, to the accused on the grounds, 'first, that it was a copy and not an original; and second, that the contents of the letter constitute a reprimand of the accused and would tend to prejudice the minds of the court against the accused.'
>
> "It is obvious that the first objection above taken is without merit, since the original letter was admitted to have been received by the accused and consequently was under his control [P. 2] and could have been produced by him had he any question as to the verity of the copy tendered in evidence; moreover, the document in question was a copy of an official public record and as such, when properly authenticated, is admissible under the same conditions which would render admissible the original. No objection to the manner of authentication of said copy is recorded, and it is to be presumed that none was made thereto.
>
> "The second objection to the admission of the copy of letter above referred to is upon the merits. It is quite true that the letter in question contains a reflection upon the conduct of the accused concerning the subject matter at issue, but it would appear that its pertinency is in no way affected thereby. Accused is charged with conduct unbecoming an officer and a gentleman in that he exhibited a dishonorable indifference to his just indebtedness, etc. It is sometimes difficult to predicate the exact time when the nonpayment of debts justly due and owing becomes, by reason of the manifest indifference of the debtor, a military impropriety. This case is vexed with no such difficulty for, however long prior to the receipt by accused of the letter of the Major General Commandant of December 18, 1917, his nonpayment may be regarded as rendering him liable to discipline, there can be no question remaining that upon receipt by him of that letter he was amply advised that his conduct from thence forward was regarded by competent authority as constituting a delictum. Up to that point it is conceivable that the accused had not given sufficiently serious consideration to his indebtedness and the effect of its nonpayment upon his status; from thence forward his failure to pay or to explain nonpayment could not be chargeable to thoughtlessness, but may in the absence of adequate explanation be fairly presumed to emanate from the dishonorable indifference laid in the specification. For the purposes and by reason of the matters above outlined the competency and relevancy to the issue of the letter in question is manifest.

[C. M. O. 61—1919]

"I am of opinion that there was no error in the admission of the evidence objected to and that the proceedings, findings, and sentence in the case of Tracy G. Hunter, Junior, captain U. S. Marine Corps, are legal but that the sentence is excessive under the circumstances. It is recommended that it be reduced to the loss of one hundred (100) numbers in his temporary and in his permanent rank in the Marine Corps."

[P. 3] On February 11, 1919, the Major General Commandant U. S. Marine Corps recommended that, in view of all of the circumstances in the case, the sentence be commuted to the loss of fifty (50) numbers in the accused's permanent rank of captain in the Marine Corps.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Captain Tracy G. Hunter, U. S. Marine Corps, are approved, but, in view of the recommendation of the Major General Commandant U. S. Marine Corps, the sentence is commuted to the loss of fifty (50) numbers in his permanent grade of captain in the Marine Corps.

C. M. O. 61—1919

[P. 1] Ensign Benjamin F. Close, U. S. Naval Reserve Force, was tried by general court martial on December 12, 1918, at the Submarine Base, Coco Solo, C. Z., by order of the Commandant, Fifteenth Naval District, on the following charges:

Charge I.—Violation of a lawful order issued by the Commandant, Fifteenth Naval District (one specification).

Charge II.—Violation of a lawful general order issued by the Secretary of the Navy (one specification).

Charge III.—Conduct to the prejudice of good order and discipline (one specification).

Charge IV.—Absence from command without leave (one specification).

FINDINGS

The court found the specification of the first charge "proved by plea," and the accused "guilty" of the first charge; the specification of the second charge "proved by plea," and the accused "guilty" of the second charge; the specification of the third charge "not proved," and the accused "not guilty" of the third charge; the specification of the fourth charge "not proved," and the accused "not guilty" of the fourth charge.

SENTENCE

"The court therefore sentences him, Ensign Benjamin F. Close, U. S. Naval Force, to be privately reprimanded by the Commandant of the Fifteenth Naval District, and to lose fifty dollars ($50) per month of his pay for a period of six (6) months."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"On account of the previous good conduct of the accused, his efficient and zealous performance of his duty, the momentous circumstances surrounding the day on which his indiscretions occurred, he is unanimously recommended to the clemency of the reviewing authority."

[P. 2] ACTION OF THE CONVENING AUTHORITY

On January 7, 1919, the convening authority placed an endorsement on the record as follows:

"In the opinion of the reviewing authority, the sentence of the general court martial in the foregoing case of Ensign Benjamin F. Close, U. S.

[C. M. O. 63—1919]

Naval Reserve Force, is inadequate for the offenses found proved. However, in view of the fact that the exigencies of the service at this time are such that reconvening the general court martial in this case would divert officers from other more vital duty, the proceedings, findings, and sentence are approved.

"That part of the sentence involving reprimand is disapproved as not being in accordance with the policy of the Department. (See C. M. O. 8, 1915, 3, and C. M. O. 25, 1915.) Ensign Close will be released from arrest and restored to duty."

REMARKS

Charge I, "Violation of a lawful order issued by the Commandant, Fifteenth Naval District," is not one of those authorized by Naval Courts and Boards, 1917.

The court after finding the accused "not guilty" of charges III and IV should have acquitted the accused of said charges.

C. M. O. 63—1919

[P. 1] Lieutenant (Junior Grade) John Davis, U. S. Naval Reserve Force, was tried by general court martial on January 13, 1919, on board the U. S. S. *Antigone* by order of the Commander, Newport News Division, Transport Force, and found guilty of the following charges, proved by plea:

Charge I.—Conduct to the prejudice of good order and discipline (two specifications).

Charge II.—Falsehood (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) John Davis, U. S. Naval Reserve Force, to be dismissed from the United States Naval service."

ACTION OF THE CONVENING AUTHORITY

On January 14, 1919, the convening authority approved the proceedings, findings, and sentence of the general court matrial in the foregoing case of Lieutenant (Junior Grade) John Davis, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General was of the opinion that the following irregularity in laying charge I was not sufficiently serious to require disapproval thereof.

The accused was charged under said charge I with "Conduct to the prejudice of good order and discipline" (two specifications). The first specification alleged that the accused "was on or about December 21, 1918, on board said ship * * * under the influence of intoxicating liquor and thereby incapacitated for the proper performance of duty." The second specification was the same except that the date was about three weeks later and with the additional allegation "while confined to [p. 2] said ship." Each of these specifications would support a charge of "Drunkenness" and could have been so charged under article 8 of the Articles for the Government of the Navy. Inasmuch as there was an aggravated circumstance connected with the second specification in that the accused was drunk while confined to his ship, this offense might properly be charged, as it was, under "Conduct to the prejudice of good order and discipline."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 25, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

[C. M. O. 73—1919]

ACTION OF THE SECRETARY OF THE NAVY

In conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the Secretary of the Navy, on January 29, 1919, submitted the record in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On February 26, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 73—1919

[P. 1] Captain William H. Haggerty, U. S. Marine Corps, was tried by general court martial on December 18, 1918, on board the U. S. S. *Tonopah*, by order of the Commander, Azores Detachment, U. S. Atlantic Fleet, on the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (one specification).

Charge II.—Drunkenness (two specifications).

Charge III.—Attempting to suborn testimony to be given before a court of inquiry (one specification).

Charge IV.—Threatening to assault and kill with a deadly weapon another person in the Marine Corps (three specifications).

FINDINGS

The court found the specification of the first charge "proved by plea," and the accused "guilty" of the first charge; the specifications of the second charge "proved by plea," and the accused "guilty" of the second charge; the specification of the third charge "proved," and the accused "guilty" of the third charge; the specifications of the fourth charge "proved," and the accused "guilty" of the fourth charge.

SENTENCE

"The court therefore sentences him, Captain William H. Haggerty, U. S. Marine Corps, to be dismissed from the United States Marine Corps and from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of two (2) years."

ACTION OF THE CONVENING AUTHORITY

On December 19, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial [P. 2] in the foregoing case of Captain William H. Haggerty, U. S. Marine Corps, designated the naval prison, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On January 11, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case in substance as follows:

> "Although the offense of 'attempting to suborn testimony to be given before a court martial' is specified in the limitations of punishments under article 22 (Naval Courts and Boards, 1917, p. 223), no specific provision is made in the Articles for the Government of the Navy, or the regulations thereunder, for 'attempting to suborn testimony to be given before a court of inquiry,' which is set forth in charge III of this case. Under such circumstances the convening authority in preparing charges should be gov-

[C. M. O. 77—1919]

erned by section 67, Naval Courts and Boards, 1917, which provides that 'when an offense is a neglect or disorder not specially provided for it shall be charged as "Scandalous conduct tending to the destruction of good morals" or "Conduct to the prejudice of good order and discipline.' "

The specification under Charge III alleges that the accused, by threatening with a deadly weapon, etc., endeavored to persuade another "not to disclose information concerning the said Captain Haggerty, before a court of inquiry convened to inquire into the said officer's conduct." The accused might have been entirely successful in this endeavor without perjury being committed—as, for example, if the other party had been coerced by him into failing to attend or refusing to testify as a witness before a court of inquiry.

The specification under Charge III would not, therefore, support the charge under which laid, even if said charge were one [P. 3] recognized by the laws, regulations, or instructions for the government of the Navy.

It was accordingly recommended that Charge III and the specification thereunder be set aside, together with the proceedings and findings of the court thereon.

Charge IV in this case was not, in the opinion of the Judge Advocate General, authorized by any regulation, form, instruction, or precedent, nor did the specifications thereunder support so much of the charge as relates to "Threatening to assault * * * with a deadly weapon another person in the Marine Corps"—the first two specifications alleging assault, and the third a threat to kill. The words "assault and" appearing in Charge IV were thereupon treated as surplusage and rejected as such.

Although not sanctioned by the department, the use of charges such as Charge IV does not involve the same fatal consequences in time of war, when the limitations of punishment prescribed by the President are suspended, as would be the case in time of peace, and accordingly the findings of the court upon Charge IV and the specifications thereunder may be sustained and will support a sentence.

RECOMMENDATION OF THE MAJOR GENERAL COMMANDANT, U. S. MARINE CORPS

On January 18, 1919, the Major General Commandant, U. S. Marine Corps, after careful consideration of the record of proceedings in the foregoing case, recommended that the sentence of the court be confirmed.

ACTION OF THE SECRETARY OF THE NAVY

On January 20, 1919, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the Secretary of the Navy submitted the record in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

[P. 4] ACTION OF THE PRESIDENT

On February 26, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 77—1919

[P. 14] BOARDS, EXAMINING, RETIRING, ETC.: AUTHORITY TO APPOINT.

No authority is vested in any commander in chief, senior officer present afloat, or commanding officer, to appoint naval examining boards, boards of medical examiners, naval retiring boards, or marine examining and retiring boards, except on foreign station as provided by the act of March 4, 1917, upon authority granted by the Secretary of the Navy.

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE: GRAVAMEN OF OFFENSE OF, NOT PROVED BY CERTAIN EVIDENCE.

The accused in a recent case was charged with "Absence from station and duty after leave had expired," and "Conduct to the prejudice of good order and

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discipline." He pleaded guilty to the first charge, and to the second charge guilty except to the words, "well knowing that the said ship *Michigan* was to sail on important service, on or about September 30, 1918." The court accepted these pleas.

In the opinion of the Judge Advocate General the accused, in pleading to the second charge, excepted the words which constituted the gravamen of the offense—namely, "well knowing that the said ship *Michigan* was to sail on important service." This amounted practically to a plea of not guilty and the court erred in not instructing the accused to that effect.

The court, however, proceeded to take evidence in reference to the second charge and found the specification proved. The only witness called testified that to the best of his knowledge the crew and officers had no official knowledge of the sailing date of the ship, but that all hands knew of the preparations made and must have known or concluded that the ship would sail soon. The Judge Advocate General was of the opinion that this evidence was insufficient to sustain the findings of the court on the second charge. The department thereupon disapproved said findings (File 26262–5680, G. C. M. Rec. No. 41596; File 26262–5678, G. C. M. Rec. No. 41594).

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE: ONE ABSENT AFTER LEAVE EXPIRED MAY BE GUILTY OF, ALTHOUGH NOT "DELIBERATELY AND WILFULLY" ABSENT.

In a recent court martial case the accused was charged with "Absence from station and duty after leave had expired" and "Conduct to the prejudice of good order and discipline," the second charge being supported by a specification which alleged that, having knowledge of orders to join a detail for special duty, the accused did fail to return upon the expiration of leave, and "did deliberately and wilfully remain absent," etc. The Judge Advocate General was of opinion that "after denuding [P. 15] the specification of the averment imputing to the accused a positive intention to avoid the detached service for which he had been detailed," the court's findings on the specification of the second charge, excepting therefrom the words "deliberately and willfully," which words it found not proved, "can be explained upon the theory only that, whereas the action of the accused had not been willful and deliberate in absenting himself, yet his conduct had been characterized by the absence of that degree of care, attention, prudence, and forethought which was required of him under the circumstances under which he found himself." This finding amounted to something more than simply one of guilty of "Absence from station and duty after leave had expired" in this case, for it was alleged and proved that the accused had notice and knowledge of the fact that he was detailed for and was to depart upon detached service * * * and that notwithstanding this fact he failed to return to his station in time to depart with his detail. The finding arrived at by the court was therefore, in the circumstances, a proper one (File 26262–5730, G. C. M. Rec. No. 41694).

DESERTION: CERTAIN DOCUMENTS INSUFFICIENT TO PROVE.

In an endeavor to prove desertion the prosecution in a recent case introduced no evidence other than two documents purporting to relate to the accused, a member of the U. S. Coast Guard—one a report, presumably from the commanding officer of the ship on which the accused served, addressed to the Captain Commandant, U. S. Coast Guard, advising him that the accused was declared a deserter, as he had been on unauthorized leave since May 3, 1918, had failed to communicate with his vessel, and that every endeavor had been made to apprehend him without result; the other was the usual report of deserter received on board, addressed to the Bureau of Navigation.

The above-mentioned evidence was held to be incompetent to prove the beginning of the accused's absence, and therefore necessarily there was no competent evidence before the court as to the duration of the accused's absence, from which it might infer the intent of the accused to permanently abandon the naval service, which intent is an essential element of "desertion" (File 28762–11: 174, G. C. M. Rec. No. 160).

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DRUNKENNESS: EVIDENCE DID NOT SUPPORT FINDINGS OF COURT ON CHARGE OF.

The accused in a recent case was charged with "Drunkenness." The prosecution offered the testimony of the examining medical officer and the officer of the deck. The medical officer testified, in part, as follows: "He may have been able to perform his duties all right, and then again he may not." The officer of the deck, who was present during the examination, [P. 16] testified, in part, as follows: "From the indications which I have seen I cannot say that I could consider him unfit for duty." The accused lay in his bunk during the examination and was subjected to none of the well-recognized tests for drunkenness. The department held that the above evidence was insufficient to prove the charge, and therefore disapproved the court's finding of guilty thereon (File 26262–95482, G. C. M. Rec. No. 41041).

FRAUDULENT ENLISTMENT: ONE WHO CONCEALS NOTHING UPON ENTRY INTO THE NAVAL SERVICE CANNOT BE GUILTY OF.

The accused in a recent case, in defense to the charge of "Fraudulent enlistment," swore that at the time of his enrollment in the Naval Reserve Force he had concealed nothing, but, on the contrary, had made out a paper on which he stated that he had been in the naval service and had been discharged therefrom with a bad-conduct discharge. The testimony of the accused was later verified by communicating with the recruiting office where the accused had enrolled. In view of the above it was held that the accused was innocent of the offense of "Fraudulent enlistment," of which he had been convicted, and the findings of the court on said charge were set aside by the department (File 26251–18552, G. C. M. Rec. No. 41608).

INTOXICATING LIQUOR: NOT AN OFFENSE TO HAVE IN POSSESSION, EXCEPT IN PROHIBITED PLACES.

It was noted in a recent case that the specification in support of the charge of "Unlawfully having intoxicating liquor in his possession," did not set forth the place where the accused had intoxicating liquor in his possession, the recital "attached to and serving with the First Regiment, U. S. Marine Corps, at the U. S. naval station, Guantanamo Bay, Cuba," not being an allegation of the place where the offense was committed, but only describing the station and duty of the accused at such time (G. C. M. Rec. No. 23743; Naval Dig., 1916, p. 67, sec. 82). The above omission to allege the place of the offense was held to be a fatal defect, requiring disapproval of the above-mentioned charge (which was one of two against the accused), because it is not an offense for a member of the naval service to have intoxicating liquor in his possession except at certain specified places. (See G. O. 410 and R–1539, Naval Regulations, 1913; File 26262–5658, G. C. M. Rec. No. 41547).

JUDGE ADVOCATE: EFFECT OF APPOINTMENT OF, BY OTHER THAN CONVENING AUTHORITY.

It was noted in a recent case that the judge advocate, who acted when the case was considered by the court in revision, was appointed by order of the Secretary of the Navy, while the court was organized and convened by the commandant, Sixth [P. 17] Naval District. Although the authority of the judge advocate to act as such did not affirmatively appear from the record, it was held that the irregularity did not invalidate the proceedings, as the interests of the accused were not prejudiced thereby (File 26262–5869, G. C. M. Rec. No. 42057).

JURISDICTION: OF ARMY COURTS MARTIAL TO TRY PERSONS IN THE NAVY.

A fireman, second class, of the U. S. Navy, attached to the U. S. S. *Dochra*, was, on October 25, 1918, tried by an Army court martial convened by a lieutenant colonel, Medical Corps, U. S. Army, commanding a U. S. Army base hospital, American Expeditionary Forces, for absence without leave from said hos-

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pital, found guilty, and sentenced to forfeiture of pay, which sentence was approved on October 26, 1918, by the aforesaid Army officer.

It was held that the aforesaid sentence was null and void by reason of the fact that the accused was not subject to the jurisdiction of an Army court martial (File 26287–5459, J. A. G., Feb. 28, 1919).

MEMBERS OF COURTS-MARTIAL: IT IS INADVISABLE TO HAVE AS, OFFICERS WHO INVESTIGATE CASE AND APPEAR AS WITNESSES FOR THE PROSECUTION.

It was noted in a recent case that the president of the court testified that he had made an investigation which implicated the accused. It is inadvisable to have as members of courts martial officers who have investigated the case and who appear as witnesses for the prosecution (File 26262–5125, G. C. M. Rec. No. 40189).

RECORD OF GENERAL COURT MARTIAL: EFFECT OF LOSS OF, UPON RETURN TO CORRECT ERROR.

The accused, John F. Barton, in a recent case, was mistakenly arraigned as Carl A. Butler. When the record arrived in the office of the Judge Advocate General for review it was returned to the court for revision, at which time the record was lost, and due and diligent search failed to disclose the whereabouts of same. The foregoing error in arraignment, unexplained, was held to be a fatal defect in the proceedings and the department disapproved the proceedings, findings, and sentence of the court (File 26251–17834, G. C. M. Rec. No. 39987).

SPECIFICATION, DEFECTS IN: WAIVED BY PLEA.

The accused in a recent case was charged with "Disobeying the lawful order of his superior officer." The order disobeyed, as set forth in the specification, was "to perform extra duty in accordance with the sentence of a summary court martial." The Judge Advocate General was of the opinion that the said specification was vague, indefinite, and too general in scope, in that [P. 18] it did not fully inform the accused of the order alleged to have been disobeyed. Since the accused not only made no objection to said specification, but also pleaded guilty thereto, he was held to have waived the defects therein (File 26262–5716, G. C. M. Rec. No. 41660).

STATEMENT OF ACCUSED: FAILURE TO ACCORD RIGHT TO MAKE, NOT FATAL.

In reviewing a recent case it was noted that the record failed to state that the accused was accorded the opportunity to make a statement. Since it is the right of the accused to make a statement, either orally or in writing, if he waives the right the fact that it was accorded him and not taken advantage of should be affirmatively indicated upon the record of proceedings. (See Naval Dig., 1916, Statement of Accused, 34.) However, it has heretofore been held that this error, though material, is not sufficient to invalidate the proceedings. (See G. C. M. Rec. No. 21279 and C. M. O. 49, 1919, 5: File 26262–5577, G. C. M. Rec. No. 41342.)

TRAIL IN JOINDER: WHEN JOINT TRIAL SHOULD NOT BE HAD.

The mere fact that several persons happen to have committed the same offense at the same time does not authorize their being joined in the charge. Thus where two or more persons in the naval service take occasion to desert or absent themselves without leave, in company but not in pursuance of a common unlawful design and concert, the case is not one of a single joint offense, but of several separate offenses of the same character, which are no less several in law though committed at the same moment (File 26262–5714, G. C. M. Rec. No. 41658).

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CREDITABLE RECORD: WHAT CONSTITUTES WITHIN MEANING OF ACT OF AUGUST 29, 1916—INDIVISIBLE.

The Act of August 29, 1916, provides:

> "Hereafter chief boatswains, chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after six years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant (junior grade), United States Navy: *Provided*, That chief boatswains, [P. 19] chief gunners, chief machinists, chief carpenters, chief sailmakers, chief pharmacists, and chief pay clerks, on the active list with creditable records, shall, after twelve years from date of commission, receive the pay and allowances that are now or may hereafter be allowed a lieutenant, United States Navy."

In a case before a naval examining board the question arose whether the candidate's record was "creditable" within the meaning of the above provision. The candidate, a warrant officer, was commissioned in 1905 and had served more than 12 years under said commission. On account of numerous unfavorable entries in his reports of fitness in 1910 to 1912, the board concluded that he did not have a "creditable record," the favorable reports during his whole period of commissioned service not being deemed sufficient to offset the unfavorable ones. Yet reports on fitness for six years subsequent to April 1, 1912, were deemed sufficiently favorable by the board to warrant a report of "creditable record" for that length of time. The board requested information as to whether the last six years only could be counted so as to give the candidate the pay and allowances of a lieutenant (junior grade).

The Judge Advocate General was of the opinion that the period of "twelve years from date of commission" is indivisible and, if the candidate's record is not creditable, he is not entitled, on a finding that his record was creditable for six years, to the pay and allowances of a lieutenant (junior grade).

The Judge Advocate General went on to add, however, that it was not, in his opinion, essential that a chief warrant officer with 12 years' service should at all times for the whole period of such service have a creditable record in order to entitle him to the pay and allowances of a lieutenant, but that the question of whether or not a record is "creditable" is a question of fact to be determined by the board upon considering the record as a whole (File 17789–27:15, J. A. G.).

DISCHARGE: MISTAKE IN DATE OF, NOT SUFFICIENT TO VITIATE.

In a case where a member of the Navy Nurse Corps serving in the Philippines requested the department to accept her resignation, to take effect at the termination of the cumulative leave due her, and where the commandant mistook authority from the department to grant her request for authority he had later requested to summarily discharge her, and issued to her the following: "In accordance with instructions from the bureau * * * you are hereby discharged * * * from this date," * * * the Judge Advocate General was of opinion that the words "from this date" were contrary to the authorization from the Bureau of Medicine and Surgery for said nurse's discharge, and to this extent the discharge issued by the commanding officer was illegal and could not operate to vary the intention of the parties as plainly expressed in the papers leading up to the said discharge; that these words, accordingly, [P. 20] must be disregarded as unauthorized and ineffective; that they did not, however, affect the remaining terms of the discharge or the legality of the discharge itself, which should be read as though such unauthorized words were not contained therein, in accordance with the legal maxim, "Utile per inutile non vitiatur" (What is useful is not vitiated by the useless). The question whether the granting of cumulative leave of absence with pay to female nurses prior to discharge is mandatory, discussed but not decided, "as should such a case occur the question would be one for determination by the Comptroller of the Treasury" (File 26477–87, J. A. G., Feb. 6, 1919).

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LINE OF DUTY: DEATH IN.

A board of inquest in a recent case found that the deceased, late yeoman second class, U. S. Navy, died at 5:50 a. m. on May 6, 1918, in King George's Hospital, London, England, by reason of cerebral hemorrhage, caused by being struck by a motorbus while on authorized liberty; and expressed the opinion that the death was not occasioned by an act of duty in which the deceased was engaged, and was not the result of his own misconduct.

The evidence before the board was to the effect that the accident which caused the death occurred "soon after 9 o'clock on Saturday night, May 5, at the corner of Ebury Street." There was no evidence that he was on leave at the time. There was testimony to the effect that "he was not on duty, as his duty consisted of clerical work, which required him to be on duty during daily office hours." The daily office hours of the deceased were 10 a. m. to 6 p. m., during which hours he was required to be on duty at the naval headquarters. He was on duty at said headquarters from 10 a. m. to 6 p. m. on Saturday, May 5. It could not be definitely ascertained whether or not the deceased was proceeding either to or from naval headquarters at the time of the accident, which happened in front of said headquarters, but it was known that he finished his duty at headquarters at 6 p. m. on that date.

The Secretary of the Navy sustained the finding of the board—i. e., that death had occurred not in line of duty (File 26250–1372, J. A. G. and Sec. Nav. Feb. 20, 1919; see also as to deaths while absent from duty on liberty, File 26250–1491:1, Oct. 29, 1918, and cases there cited).

LINE OF DUTY: PRECEDENTS OF NAVY DEPARTMENT SUSTAINED.

The Navy Department's precedents upon the question of what constitutes "line of duty" are based upon the construction of these words in an exhaustive opinion rendered by Attorney General Cushing in 1855 (7 Op. Atty. Gen. 149). With reference to this opinion it was stated in 1897 by the U. S. Circuit [P. 2] Court of Appeals for the Eighth Circuit: "The fact that after this construction Congress has retained this expression (line of duty) for more than 40 years, although it has repeatedly revised and amended the pension laws, amounts to a demonstration that Mr. Cushing * * * properly interpreted its meaning" (*Rhodes* v. *U. S.*, 79 Fed. Rep. 740). In 1881 it was remarked by Attorney General MacVeagh: "The phrase, 'in the line of duty,' has been uniformly used in the statutes from 1799 to the present time in defining the right to pensions. It received elaborate discussion from Mr. Attorney General Cushing in 1855 (7 Opin. 149), and as Congress, since the publication of that opinion, has not seen proper to substitute any other expression, we are justified in concluding that it stands in the statutes invested with the meaning expressed by Mr. Cushing" (17 Op. Atty. Gen. 172). Referring to the pension law, Mr. Cushing stated: "It does not say 'any disease not the consequence of misconduct,' and if that had been the category contemplated by the legislator, he would have propounded it in simple and apt phraseology" (7 Op. Atty. Gen. 153, 156, 160).

The rulings of the War Department, based upon Mr. Cushing's opinion, having been brought to the attention of the Senate, and having been concurred in by eminent members of that body as legally correct and "compelled" by the language, "line of duty," used in the law then under consideration (act May 11, 1908, 35 Stat. 108, providing for payment of death gratuities), there was promptly passed, upon motion of Senator Bacon, an amendment substituting the words "not the result of his own misconduct" for the words "contracted in the line of duty," as used in said act. (See 43 Cong. Rec. 2688, 2689.) This amendment became law as part of an act approved Mar. 3, 1909 (35 Stat. 735). Several years later the act of May 13, 1908 (35 Stat. 128), relating to the Navy, was similarly amended. (See act Aug. 22, 1912, 37 Stat. 329.)

The particular case under consideration by the Senate was that of one Capt. John K. Moore, whose death was held by the War Department to be not in line of duty, although clearly not the result of his own misconduct; and it was to extend the provisions of the law to cover similar cases occurring in the future that the amendment was proposed. Nevertheless on February 3, 1913, the Court of Claims rendered a decision with reference to the case of the same Captain Moore, in which it remarked that the amendment did not broaden the applica-

[C. M. O. 77—1919]

tion of the original statute "in the least," and that said original statute applied "whenever the soldier dies while in the service generally, and submitting to its rules and regulations, from wounds or disease not the result of his own misconduct." In this decision the court did not cite the opinion of Attorney General Cushing, the decision of the U. S. Circuit Court of Appeals in which said opinion was expressly adopted, the long-established precedents of the War and Navy Departments and [P. 22] Pension Bureau, or the history of the legislative enactments relating to line of duty. It should also be said that the death of Captain Moore, upon the facts as found by the Court of Claims, was clearly in line of duty under the principles enumerated by Attorney General Cushing, and no reversal of precedents was necessary to the allowance of the claim in that case.

The Navy Department has never adopted the remarks of the Court of Claims above quoted, but has continued to follow the opinions of the Attorney General, the decision of the Circuit Court of Appeals, and the established precedents of the Government which received legislative sanction in the amendments made to the death gratuity statutes, as above cited, and which had been previously brought to the attention of Congress in connection with the rulings of the Interior Department in pension cases. (See, for example, H. Doc. No. 5, vol. 3, 54th Cong., 2d sess., p. 74.)

It having now been recommended that the department's rulings be changed to conform to the remarks of the Court of Claims in the Moore case, *Held*, That such remarks of said court are not sufficient to override the established precedents and prior decisions on the subject; but advised that the question be submitted to the Attorney General for a ruling by him as to whether the opinion of his department requires modification or should be regarded as overruled by said decision of the Court of Claims; and that the action to be taken by this department be determined in accordance with the advice of the Attorney General (File 26250–1491 : 1, J. A. G., Oct. 29, 1918).

The Secretary of the Navy does not concur in the foregoing recommendation of the Judge Advocate General that this question be submitted to the Attorney General. That Mr. Cushing's opinion of May 17, 1855, and the long line of precedents, both executive and judicial, in which said opinion was sustained, have been accepted by Congress is evidenced by its amending the former death gratuity laws in both the Army and the Navy, so as to provide that payment of the benefits thereunder could be made in the case of any person described therein whose death was "not the result of his own misconduct" instead of, as originally provided, whose death resulted "from wounds or disease contracted in line of duty." In other words, the phrase "line of duty" had by practice and decision acquired such a settled meaning that when Congress desired to extend the benefits of a particular statute to include all deaths not the result of misconduct, it deemed it necessary to enact a specific legislative provision to that effect. Under these circumstances the Secretary of the Navy cannot at this late date assent to the proposition that the phrase "line of duty" can by executive construction be given the meaning now advocated—viz, "that all deaths of officers or men should be considered as being incurred in the line of duty unless the proof is clear that they were [P. 23] caused through misconduct or inexcusable negligence." It is informally stated that the War Department has departed from its former precedents in line of duty cases, which precedents were based upon the Attorney General's opinion, and that the Bureau of War Risk Insurance of the Treasury Department has adopted a more liberal construction of this phrase than that put forward by the Attorney General and which has been followed in pension cases. It has not been considered necessary to verify this information, because, in any event, the Secretary of the Navy would not authorize such a change in the precedents of this department without legislative sanction. Reference has also been made to a decision of the Court of Claims which is contrary to the Attorney General's opinion, as well as being opposed to judicial decision sustaining same, and it is in view of this decision of the Court of Claims that the Judge Advocate General, while entirely satisfied that the precedents of this department are in accordance with law, has recommended that the Attorney General be asked for a further opinion upon the question, particularly with reference to the effect which should be given the Court of Claims decision in view of the other authorities with which it conflicts. However, the Secretary of the Navy is entirely satisfied as to the correctness of the existing precedents, and does not

entertain any doubt in the matter, which the Attorney General has repeatedly stated is essential before the head of a department is authorized to require his opinion (File 26250–1372, Sec. Nav., Mar. 3, 1919).

MARK OF DESERTION: NOT REMOVED IN CASE OF DESERTER'S DEATH IN ACTION IN FRANCE, BUT FACT OF SUCH DEATH WAS ENTERED ON RECORD

Where a deserter from the Navy joined the Army and was killed in action in France, it was held that the department's records could not be changed so as to remove the mark of desertion, which was shown by the application to have been correctly entered, but the Bureau of Navigation was instructed to make appropriate notation upon the deceased's record showing his subsequent enlistment in the Army and death in action (File 26529–772:1, J. A. G., Mar. 6, 1919).

NAVAL RESERVE FORCE: ACCEPTANCE OF CERTAIN EMPLOYMENT BY MEMBERS OF.

It is the opinion of the Judge Advocate General that the act of June 10, 1896 (29 Stat. 361; see C. M. O. 88, 1917, 16), does not apply to members of the Naval Reserve Force while on inactive duty; and also that section 113 of the Criminal Code (see C. M. O. 114, 1918, 39–40) is inapplicable under such circumstances. However, until there has been a judicial determination of these matters they cannot be regarded as settled, and such officers must determine for themselves whether or not they may accept civil employment of the character specified in the [P. 24] statutes cited. (See C. M. O. 114, 1918, 44.) The department is not empowered to "grant permission" to Naval Reserve officers on the inactive list to accept such employment, because if not prohibited by statute the department's permission is not required in such cases, and if prohibited by statute the department's permission would be nugatory (File 28559–788, J. A. G., Feb. 3, 1919).

NAVAL RESERVE FORCE: RETURN OF AMOUNTS CHECKED AGAINST ACCOUNTS UNDER I–4893 UPON BEING PLACED ON INACTIVE DUTY.

This office is of the opinion that members of the Naval Reserve Force who are relieved from active duty prior to the termination of their four-year enrollment are not entitled to refund of amounts checked against their accounts pursuant to sentences of courts martial, which were remitted subject to I–4893, Naval Instructions, 1913. Such refund can only be made upon disenrollment or discharge from the Naval Reserve Force or at the expiration of the terms of enrollment (File 26806–131:62, J. A. G., Feb. 11, 1919).

NAVY MEDALS: AWARD OF, TO MEMBERS OF MILITARY FORCES OF ALLIED POWERS, AND TO CIVILIANS.

The Judge Advocate General, in a recent opinion, held that, under the provisions of the Army appropriation act of July 9, 1918, the President is authorized to award any of the medals or decorations provided for in the Navy medal act of February 4, 1919 (Public, No. 253), to officers and enlisted men of the naval establishments of the countries concurrently engaged with the United States in the present war; that the President may, by regulations duly prescribed by him, provide for the conferring of such medals and decorations upon civilians who, while serving as officers or enlisted men in the naval establishments of the countries concurrently engaged with the United States in the present war, rendered services of such character as in his opinion may warrant such award; and that as to citizens of this country who rendered distinguished services "while in the naval service of the United States" of such character and at such times as to fulfill the requirements of the Navy medal act, the awarding to them of the medals and decorations provided for in said act after their resumption of a civilian status is clearly authorized by said Navy medal act (Public, No. 253; File 9644–48, J. A. G., Feb. 26, 1919).

[C. M. O. 88—1919]

OFFICER'S RECORDS: WHEN CERTIFICATE OF CREDITABILITY MAY BE CANCELED.

While it has been held that when the record of a commissioned warrant officer with the required length of service has once been determined to be creditable within the meaning of the act of [P. 25] August 29, 1916 (39 Stat. 578), his right to the pay and allowances provided in the statute is thereby definitely fixed, "and, in the event of his record ceasing to be creditable, the same cannot be affected except by means of disciplinary action, as in the case of all officers" (see C. M. O. 33, 1916, 6; Naval Digest, 454), this opinion does not apply to a case where it is subsequently established by additional evidence, unknown to the department at the time the certificate of creditability was issued, that said certificate was clearly erroneous, and that in fact the officer's record was not creditable on the date thereof, because of serious offenses previously committed by him, but not reported and proved by general court-martial proceedings until after the issuance of the certificate. In the case noted in the Naval Digest it was stated that when a certificate of creditability had been issued "anything of a discreditable nature thereafter occurring should be disposed of by means of the disciplinary instrumentalities." In this case the offenses cannot be regarded as matters "thereafter occurring" within the meaning of the former opinion, and cancellation of the certificate was accordingly authorized (File 17789–27:21, J. A. G., Feb. 28, 1919).

PROMOTION: IN U. S. COAST GUARD.

A third lieutenant of engineers, U. S. Coast Guard, became eligible for promotion to a vacancy in the grade of second lieutenant of engineers on March 27, 1917, but he was found physically incapacitated for promotion by the board of medical officers who examined him. He was subsequently, on October 19, 1918, again examined and found physically qualified for promotion. In the meantime the original vacancy had been filled by the promotion of another officer, and thereafter, on September 26, 1918, another vacancy occurred which is to be filled by his promotion.

Opinion was requested as to the date of precedence of the officer in question after his contemplated promotion.

Held, that since the vacancy of March 27, 1917, was not held open, the officer in question would take precedence from September 26, 1918. The question of pay, although discussed, was not passed upon (File 28762–402:2, J. A. G. Feb. 8, 1919).

SERVICE OF PROCESS AND ADMINISTERING OATH OF SAME: BY AND ON PERSONS IN NAVY.

Under paragraph 18 of General Order No. 121 of September 17, 1914, commanding officers are authorized to permit service of process upon persons in the naval service and to grant leave of absence to persons upon whom such process has been served in order to permit them to appear at the trial, unless the public interests would be seriously prejudiced by their absence.

[P. 26] But for a commanding officer personally to make service or to select someone else to make such service, or to administed an oath that such service was made, would be contrary to the department's practice, and the administering of the oath of doubtful legality under the act of March 4, 1917 (39 Stat. 1171), which authorizes commanding officers to administer oaths only for naval purposes (File 26524–716, Sec. Nav., Feb. 12, 1919).

C. M. O. 88—1919

[P. 1] Gunner Helge C. Hermann, U. S. Coast Guard, was tried by general court martial on February 14, 1919, at the Navy Yard, New York, by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Culpable inefficiency in the performance of duty (one specification).

[C. M. O. 89—1919]

SENTENCE

"The court therefore sentences him, Helge C. Hermann, gunner, U. S. Coast Guard, operating as a part of the United States Navy, in accordance with law during time of war, to be dismissed from the U. S. Coast Guard and from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"The circumstances in this case are of an extenuating nature, in that the accused, due to rain on deck, where Lewis-gun drills were ordinarily held in good weather, was at first giving instructions in the armory without the use of live ammunition, and was, at the close of such instruction, requested by one of the listeners to explain more fully the operation of the magazine. As proper explanation really required the use of ammunition, the accused, in an unguarded moment, in his desire to illustrate, there being no dummy cartridges on board, used live ammunition, in the way stated, and with the unfortunate results that followed.

"In view of the manifest good faith in which he was acting at the time, his previous excellent record of 11 years' service, his recent excellent and zealous service for 16 months in the war zone, as testified to by Lieutenant Commander (sic) J. H. Cornell, U. S. Coast Guard, and the favorable impression produced upon us, we recommend Helge C. Hermann, gunner, U. S. Coast Guard, to the clemency of the reviewing authority."

[P. 2] RECOMMENDATION OF THE COMMODORE COMMANDANT, U. S. COAST GUARD

On March 8, 1919, the Commodore Commandant, U. S. Coast Guard, recommended that, in view of all the circumstances of the case, and the unanimous recommendation to clemency, all action be withheld in the foregoing case for a period of one year with a view to indefinitely withholding action should the conduct of the accused so warrant.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 8, 1919, the Judge Advocate General recommended that action on the foregoing case of Helge C. Hermann, gunner, U. S. Coast Guard, be withheld for a period of one year, with a view to withholding action indefinitely should the conduct of the accused warrant such clemency, and that if at any time during said period the conduct of the accused, in the opinion of his commanding officer, is such as not to warrant further probation, a report be made to the department and final action then be taken upon the findings and sentence of the court. It was further recommended that the accused be released from arrest and restored to duty subject to the foregoing probation.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendations of the Judge Advocate General are approved.

C. M. O. 89—1919

[P. 1] Boatswain Francis Joseph, U. S. Naval Reserve Force, was tried by general court martial on February 6, 1919, at the Navy Yard, New York, by order of the Commander, Cruiser Force, Atlantic Fleet, and found guilty of the following charge:

Charge.—Drunkenness (one specification).

SENTENCE

"The court therefore sentences him, Boatswain Francis Joseph, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

[C. M. O. 89—1919]

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his previous good record and the short length of time he has been in the naval service, and therefore the reasonable doubt that he has not become thoroughly imbued with the ideals and traditions of the discipline of the service, we recommend Francis Joseph, boatswain, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

Action of the Convening Authority

On February 12, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Boatswain Francis Joseph, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion and Recommendation of the Judge Advocate General

On February 25, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case expressing the [P. 2] opinion that the finding and sentence of the court should be set aside, and so recommending, in view of the grave irregularities disclosed by the record, and especially in view of the insufficient testimony offered by the prosecution and the very positive evidence produced by the defense. The record disclosed that the court, on motion of the accused, ruled that it was without jurisdiction to try him upon the charge and specification preferred, although later, without revoking this ruling, it proceeded with the trial, found the accused guilty, and sentenced him.

The confusion appears to have been caused by the action of the convening authority in preferring two sets of charges against the accused on the same day, one set being addressed to the judge advocate of a general court martial on board the U. S. S. *Siboney*, and the other to the judge advocate of the general court martial on board the U. S. S. *Great Northern*. The record shows that the accused was served with a copy of the first set, but that same was withdrawn by the convening authority in compliance with a letter addressed by him to the commanding officer of the U. S. S. *Mongolia*, who was directed at the same time to deliver a copy of the second set of charges for trial on board the U. S. S. *Great Northern*. It was upon this second set that the accused was tried, the record indicating that the accused was not served with a copy of the second set, although the law provides otherwise. (See art. 43, A. G. N.) The trial of the accused on the said second set of charges against him was had with his conditional consent, after the court had ruled against its jurisdiction in the case, the consent being "to proceed until these papers appeared at the trial," referring to the papers sent to the commanding officer of the U. S. S. *Mongolia*. The record did not disclose that the said papers ever appeared at the trial, although with the consent of the accused there was received, at the time of his said conditional consent to be tried, a copy of the letter of February 3, 1919, addressed by the convening authority to the commanding officer of the U. S. S. *Mongolia*.

The convening authority approved the proceedings, findings, and sentence of the court, thereby approving its action in sustaining the aforesaid motion of the accused and at the same time approving the remainder of the proceedings which were contrary to the aforesaid ruling.

Because of the fact, however, that the guilt of the accused was not legally established by the testimony in the case, it was [P. 3] not considered necessary to decide whether or not the proceedings of the court were entirely invalidated by the aforementioned irregularities.

Concurrence of the Bureau of Navigation

On March 3, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

[C. M. O. 94—1919]

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved. The accused will be released from arrest and restored to duty.

C. M. O. 91—1919

[P. 1] Ensign (T) John S. Bessent, U. S. Navy, was tried by general court martial on December 28, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Using abusive language toward another person in the service (one specification).

Charge III.—Striking another person in the Navy (one specification).

SENTENCE

"The court therefore sentences him, Ensign (T) John S. Bessent, U. S. Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On January 10, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign (T) John S. Bessent, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

In view of the thoroughly efficient services of the accused and of his exemplary character both as an enlisted man and an officer, the convening authority was of the opinion that should the accused be dismissed from the service, the Navy would lose a very valuable officer, and it was therefore recommended, that the accused be placed on probation for such period as the department might direct, the sentence of the court to be carried into effect at any time the accused again committed himself in a similar unofficerlike manner during such probationary period.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On March 3, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, and recommended [P. 2] that the accused be placed on probation for a period of one year.

ACTION OF THE SECRETARY OF THE NAVY

In view of the recommendation of the commander, Patrol Force, U. S. Atlantic Fleet, concurred in by the Bureau of Navigation, the sentence in the foregoing case of Ensign (T) John S. Bessent, U. S. Navy, is remitted on condition that Bessent during a period of one year from this date conducts himself in such a manner as in the opinion of the department warrants his further retention in the service. Reports on his conduct will be submitted quarterly by his commanding officer. In the event of its being unsatisfactory the sentence will be carried into effect. He will be released from arrest and restored to duty on probation subject to the above.

C. M. O. 94—1919

[P. 1] Ensign Fred B. Williams, U. S. Naval Reserve Force, was tried by general court martial on January 16, 1919, at the Naval Academy, Annapolis, Md., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Drunkenness on duty (one specification).

[C. M. O. 97—1919]

SENTENCE

"The court therefore sentences him, Ensign Fred B. Williams, U. S. Naval Reserve Force, to be publicly reprimanded by the Secretary of the Navy, to be restricted to his ship or station for a period of six (6) months, and to lose fifty dollars ($50) per month of his pay for a period of six (6) months."

RETURNED FOR REVISION

On January 24, 1919, the department returned the record in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering the sentence (which, in the opinion of the department, was entirely inadequate for the offense found proved) and for the purpose of correcting the record by attaching thereto a copy of the precept under which the court was authorized to act.

The attention of the court was directed to Naval Digest, 1916, Public Reprimand, section 5.

SENTENCE IN REVISION

"The court therefore sentences him, Ensign Fred B. Williams, U. S. Naval Reserve Force, to be restricted to his ship or station for a period of one (1) year, and to lose fifty dollars ($50) per month of his pay for a period of one (1) year."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On February 5, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Fred B. Williams, U. S. Naval Reserve Force, are approved. He will be released from arrest and restored to duty.

C. M. O. 97—1919

[P. 1] Ensign Mark E. Smith, Pay Corps, U. S. Naval Reserve Force, was tried by general court martial on December 12, 1918, at the U. S. Naval Air Station and Submarine Base, Coco Solo, C. Z., by order of the Commandant, Fifteenth Naval District, on the following charges:

Charge I.—Violation of a lawful order issued by the Commandant, Fifteenth Naval District (one specification).

Charge II.—Violation of a lawful order issued by the Secretary of the Navy (one specification).

Charge III.—Conduct to the prejudice of good order and discipline (one specification).

Charge IV.—Absence from station and duty without leave (one specification).

FINDINGS

The court found the specification of the first charge "proved by plea," and the accused "guilty" of the first charge; the specification of the second charge "proved by plea," and the accused "guilty" of the second charge; the specification of the third charge proved excepting as to certain words, and the accused "guilty" of the third charge; the specification of the fourth charge "not proved," the accused "not guilty of the fourth charge, and acquitted the accused of the fourth charge.

SENTENCE

"The court therefore sentences him, Ensign Mark E. Smith, U. S. Naval Reserve Force, to be privately reprimanded by the Commandant of the Fifteenth Naval District, and to lose fifty dollars ($50) per month of his pay for a period of nine (9) months."

[C. M. O. 97–1919]

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"On account of the previous good record of the accused, his officerlike qualities, his efficient and zealous performance of his duties, the momentous circumstances surrounding the day on which his indiscretion occurred, he is unanimously recommended to the clemency of the reviewing authority."

[P. 2] ACTION OF THE CONVENING AUTHORITY

On January 7, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Mark E. Smith, Pay Corps, U. S. Naval Reserve Force. The convening authority was of the opinion that the sentence in the foregoing case was inadequate for the offenses found proved, but that in view of the exigencies of the service at this time the officers composing the court should not be diverted from more vital duties for the purpose of revising the sentence.

That part of the sentence involving reprimand was disapproved as not being in accord with the policy of the Department. (See C. M. O. No. 8, 1915, and No. 25, 1915.) It was directed that the accused be released from arrest and restored to duty.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On February 12, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case, in part, as follows:

"A review of the proceedings in this case discloses that the accused is charged as follows: 'Violation of a lawful order issued by the Commandant, Fifteenth Naval District.' This charge is not one of those specifically authorized by Naval Courts and Boards, 1917. However, the allegations contained in the specification thereunder bring the offense within article 22, Articles for the Government of the Navy, and inasmuch as the charge above quoted describes and sustains the offense committed, I am of the opinion that the same is sufficient, and that a failure to charge this offense under any of the prescribed forms does not invalidate the proceedings.

"It is further noted that the accused pleaded not guilty to the specification under the second charge and not guilty to the second charge, but that the court made the following finding on said specification of the charge: 'The specification of the second charge "proved by plea" and that the accused, Ensign Mark E. Smith, U. S. Naval Reserve Force, is of the second charge "guilty."' I am of the opinion that this error does not invalidate the proceedings for the reason that proof was offered on the second charge and the specification thereunder and the allegations thereof clearly sustained

[P. 3] "It is also noted that the court found the specification of the third charge proved except the words 'knowingly false and.' I am of opinion that the specification, after removal of the words above quoted, is meaningless and does not charge an offense.

"In view of the above, it is recommended that the proceedings, and findings on Charges I, II, and IV and the sentence of the general court martial in the foregoing case of Ensign Mark E. Smith, U. S. Naval Reserve Force, be approved, and that Charge III and the specification thereunder be disapproved."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On February 15, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved.

C. M. O. 102—1919

[P. 1] Lieutenant Commander Alfred T. Hunter, U. S. Naval Reserve Force, was tried by general court martial on February 10, 1919, at Hoboken, N. J., by order of the Commander, Cruiser Force, Atlantic Fleet, and found guilty of the following charges:

Charge I.—Culpable inefficiency in the performance of duty (one specification).

Charge II.—Through inattention and negligence, suffering a vessel of the Navy to be stranded and hazarded (one specification).

Sentence

"The court therefore sentences him, Lieutenant Commander Alfred T. Hunter, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his previous excellent record and the favorable impression created by him in his appearance before the court, we recommend Lieutenant Commander Alfred T. Hunter, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

Action of the Convening Authority

On February 20, 1919, the convening authority approved the proceedings, findings, and sentence in the foregoing case, and, in accordance with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion of the Judge Advocate General

On March 17, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case, expressing the [P. 2] opinion that the evidence did not support the finding of the court on part of the specification under Charge I.

The accused was found guilty of Charge I, "Culpable inefficiency in the performance of duty," and the specification thereunder alleging that the accused, "as navigator of the U. S. S. *Northern Pacific*, making passage from Brest, France, to New York, N. Y., having obtained the necessary astronomical and navigational data, did, at about 3:16 p. m., December 31, 1918, fail to establish the correct position of the said ship, and was therein and thereby culpably inefficient in the performance of his duty as navigator, in consequence of which the said ship was, at about 2:14 a. m., January 1, 1919, stranded at a point about twenty-six hundred yards one hundred degrees true from Fire Island Lighthouse, the United States then being in a state of war."

It was the opinion of the Judge Advocate General that the evidence adduced supported the finding of "guilty" upon the part of the specification alleging in effect that the accused did "fail to establish the correct position of said ship and was thereby culpably inefficient in the performance of his duty as navigator," but that the evidence did not support the finding, "in consequence of which the said ship was, at about 2:14 a. m., January 1, 1919, stranded at a point about twenty-six hundred yards one hundred degrees true from Fire Island Lighthouse." The Judge Advocate General was further of the opinion that the clause last quoted above (i. e., "in consequence," etc.) might be regarded as surplusage, not being an essential part of the specification.

Concurrence and Recommendation of the Bureau of Navigation

On November 19, 1919, the Bureau of Navigation placed the following endorsement on the record:

> "In view of the unanimous recommendation of clemency by the members of the court, the excellent war-service record of the accused, the fact

that the error in working out his navigational data the day previous to the grounding was due to employing methods unusual in the merchant service but in accordance with latest naval practice, the theory of this method which, unknown to the accused, was not fully understood by him—which fact, it seems, should have been detected by his [P. 3] superior officer—and further, this error was not directly responsible for the grounding but contributed to throwing the ship closer to the coast line, and the fact that the care and precautions in approaching land observed in the regular naval service are not observed in the merchant service to nearly the same extent, of which fact Lieutenant Commander Hunter was not informed, as he evidently was not required while acting as navigator to observe these precautions, it is recommended that his sentence of dismissal be remitted.

"As an entirely separate procedure, it is recommended that a letter of reprimand be addressed this officer and no further disciplinary action be had."

ACTION OF THE ACTING SECRETARY OF THE NAVY

On November 24, 1919, the Acting Secretary of the Navy approved the foregoing recommendation of the Bureau of Navigation, remitted the sentence of dismissal adjudged by the general court martial in the foregoing case of Lieutenant Commander Alfred T. Hunter, U. S. Naval Reserve Force, and directed that as an entirely separate and independent proceeding a letter of reprimand be addressed this officer.

C. M. O. 103—1919

[P. 1] Lieutenant Charles E. Morgan, U. S. Naval Reserve Force, was tried by general court martial on February 27, 1919, at Hoboken, N. J., by order of Commander, Cruiser Force, Atlantic Fleet, and found guilty of the following charges:

Charge I.—Culpable inefficiency in the performance of duty (one specification).

Charge II.—Neglect of duty (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Charles E. Morgan, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his previous record while serving on board the *Northern Pacific*, as testified to by Captain Louis J. Connelly, U. S. Navy, and Lieutenant Commander Alfred T. Hunter, U. S. Naval Reserve Force, we recommend Lieutenant Charles E. Morgan to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On March 4, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Charles E. Morgan, U. S. Naval Reserve Force, disapproved the recommendation to clemency, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 19, 1919, the Judge Advocate General placed the following endorsement on the record in the foregoing case:

"The specification of Charge II, which the court has found proved, alleges in effect that the accused being the officer of [P. 2] the deck of the U. S. S.

[C. M. O. 104—1919]

Northern Pacific from midnight until about 2: 14 a. m., January 1, 1919, and the weather having become thick and at times rainy, did neglect and fail to report to his commanding officer the said change in the weather conditions, as it was his duty to do; in consequence of which said ship was, at about 2: 14 a. m., January 1, 1919, stranded at a point 2,600 yards 100 degrees true from Fire Island Lighthouse.

"I am of opinion that the concluding clause above is not sustained by the evidence adduced, and furthermore, that as a matter of logic, to hold that the ship stranded in consequence of the failure to report to the commanding officer the change in weather conditions is an erroneous conclusion, as it is entirely problematical what the effect would have been to avert the disaster had the required report been made, and it is even possible that the ship would have stranded although the change in the weather had been reported.

"It has been held that the concluding clause in the specification to the effect that 'in consequence' of which (neglect and failure) said ship was stranded, is surplusage, and is not an essential part of the specification, that it might have been omitted in framing the charges or have been affirmatively omitted in the findings of the court, the question as to whether the negligence involved directly resulted in the stranding of the vessel being important only so far as the quantum of punishment is involved; and that the culpability, in so far as the specification is concerned, is fully established entirely without the concluding clause (Naval Digest, p. 415).

"It is therefore recommended that, subject to the above, the proceedings and findings of the general court martial in the foregoing case of Lieutenant Charles E. Morgan, U. S. Naval Reserve Force, be approved."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On March 21, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

The Bureau further recommended that in view of the previous good record of the accused, the sentence of dismissal be mitigated to change of his provisional enrollment as lieutenant to that of lieutenant (junior grade).

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

In view of the recommendation of the Bureau of Navigation, the sentence of dismissal in the foregoing case of Lieutenant Charles E. Morgan, U. S. Naval Reserve Force, is mitigated to change of his provisional enrollment as lieutenant to that of lieutenant (junior grade). He will be released from arrest and restored to duty.

C. M. O. 104—1919

[P. 1] Ensign John A. Johnsen, U. S. Naval Reserve Force, was tried by general court martial on December 11, 1918, at Base Twenty-nine, by order of the Commander, Base Twenty-nine, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

SENTENCE

"The court therefore sentences him, Ensign John A. Johnsen, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of one (1) year."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by two of the five members of the court, was spread upon the record:

"In consideration of his youth and inexperience and the testimony given by his commanding officer, we recommend Ensign John A. Johnsen, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

[C. M. O. 105—1919]

ACTION OF THE CONVENING AUTHORITY

On December 16, 1918, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President. Base Twenty-nine was designated as the place for the execution of so much of the sentence as relates to confinement until an opportunity offers for transfer to such prison as may be designated for the unexpired portion of said confinement.

[P. 2] RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On January 10, 1919, the Judge Advocate General recommended that that part of the sentence involving confinement be remitted.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 14, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the indorsement of the Judge Advocate General, and recommended approval of said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

On February 28, 1919, the Secretary of the Navy approved the foregoing recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record in the foregoing case to the President of the United States with the recommendation that the sentence, as reduced, be confirmed.

ACTION OF THE PRESIDENT

On March 25, 1919, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

C. M. O. 105—1919

[P. 1] Lieutenant Commander Whitley Perkins, U. S. Navy, was tried by general court martial on November 13, 1918, on board the U. S. S. *Agamemnon* by order of the Commander, Cruiser Force, Atlantic Fleet, and found guilty of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Commander Whitley Perkins, U. S. Navy, to lose twenty (20) numbers in his permanent grade."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by four of the five members of the court, was spread upon the record:

> "In consideration of his previous good record, we recommend Lieutenant Commander Whitley Perkins, U. S. Navy, to the clemency of the reviewing authority."

RETURNED FOR REVISION

On November 27, 1918, the convening authority returned the record of proceedings of the general court martial in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was grossly inadequate to the offense found proved.

[C. M. O. 109—1919]

ACTION IN REVISION

The court decided to revoke its former sentence, and substituted therefor the following:

"The court therefore sentences him, Lieutenant Commander Whitley Perkins, U. S. Navy, to lose fifty (50) numbers in his permanent grade."

[P. 2] RECOMMENDATION TO CLEMENCY IN REVISION

The same recommendation to clemency as that set forth above was spread upon the record in revision.

ACTION OF THE CONVENING AUTHORITY

Subject to remarks concerning the inadequacy of the sentence in revision and the impracticability of reconvening the court, the convening authority, on December 3, 1918, approved the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Lieutenant Commander Whitley Perkins, U. S. Navy, and directed that he be released from arrest and restored to duty.

C. M. O. 109—1919

[P. 1] Lieutenant Thomas D. Baxter, Medical Corps, U. S. Navy, was tried by general court martial on January 10, 1919, at the U. S. Naval Training Barracks, Glenbrook, Ireland, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Thomas D. Baxter, Medical Corps, U. S. Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On January 16, 1919, the convening authority approved the proceedings, findings, and sentence in the foregoing case of Lieutenant Thomas D. Baxter, Medical Corps, U. S. Navy, and, in conformity with article 53 or the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 12, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case, in substance, as follows:

The accused was charged with "Conduct to the prejudice of good order and discipline," found guilty thereof, and sentenced to be dismissed from the United States naval service.

It is noted that a member of the court which tried the accused was called as a witness for the prosecution and testified that he examined the accused and made entry in his service [P 2] record to the effect that his condition was due to his own misconduct resulting from overindulgence in alcohol. While this member was not challenged by the accused, and the proceedings are therefore legal (Naval Digest, 1916, p. 379, secs. 54–56), it was clearly the duty of this member to have stated at the opening of the trial that he had formed an opinion as to the guilt of the accused, and that he could not accord the accused a fair and impartial trial. His action in remaining on the court and sitting in judgment on the accused, having prior to the trial formed an opinion as to the guilt of the accused, was highly improper. If the exigencies of the service will not permit offering the accused a new trial on account of the witnesses not being available, it is recommended that the proceedings, findings, and sentence be disapproved.

[C. M. O. 110—1919]

CONCURRENCE OF THE BUREAU OF NAVIGATION

On March 24, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

In view of the fact that the accused and witnesses in this case are now at widely separated stations and that to assemble them for the purpose of a new trial would be a matter of considerable delay and expense to the Government, it is not considered practical to offer the accused a new trial; and the proceedings, findings, and sentence in this case are disapproved, in accordance with the endorsement of the Judge Advocate General, concurred in by the Bureau of Navigation.

It is ordered that the accused be released from arrest and restored to duty.

C. M. O. 110—1919

[P. 1] Commander Henry G. S. Wallace, U. S. Navy, was tried by general court martial on January 10, 1919, at Newport News, Va., by order of the Commander, Newport News Division, Transport Force, on the following charges:

Charge I.—Neglect of duty (one specification).

Charge II.—Through negligence suffering a vessel of the Navy to be run upon a reef and stranded (one specification).

FINDINGS

The court found the specification of the first charge proved excepting as to certain words, the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the specification of the second charge proved excepting as to certain words, the accused "not guilty" of the second charge, and acquitted the accused of the second charge.

ACTION OF THE CONVENING AUTHORITY

On January 14, 1919, the convening authority approved the proceedings, findings, and acquittal of the general court martial in the foregoing case of Commander Henry G. S. Wallace, U. S. Navy, and directed that he be released from arrest and restored to duty.

REMARKS

The accused in this case was tried and acquitted on charges of "Neglect of duty" and "Through negligence suffering a vessel of the Navy to be run upon a reef and stranded," the specifications thereunder alleging, in substance, that the accused neglected and failed to cause certain things to be done in connection with the navigation of the ship, as a result of which the ship was run upon a reef and stranded. The court, although acquitting the accused on each of the charges, nevertheless, [P. 2] found so much of the respective specifications proved as alleged that the accused failed to do the things charged therein. The parts of the specifications found "not proved" were the words directly imputing negligence on the part of the accused, and the conclusion therefrom that the accused was thereby negligent, and that the stranding was the result of such negligence.

From the foregoing it is evident that the court applied the word "fail" in the sense of "undone," rather than in its legal sense as employed in the framing of specifications under naval practice, wherein the word implies delinquency. In other words, in naval practice "fail" and "neglect" mean substantially the same thing (File 26262–1626, J. A. G.). Accordingly, a finding that the accused failed to do the acts specified but is not guilty of the charge is improper.

As it is clear that the court in this case did not consider the accused delinquent in the performance of his duties, it should have found the specification under each charge "not proved," and such finding would have been in accord with the evidence.

C. M. O. 111—1919

[P. 1] Lieutenant Commander D. H. Smith, U. S. Naval Reserve Force, was tried by general court martial on February 3, 1919, at Base Twenty-nine, by order of the Commander, Base Twenty-nine, on the following charge:

Charge.—Culpable inefficiency in the performance of duty (three specifications).

Findings

The court found the first and third specifications of the charge "not proved," the second specification of the charge "proved," and the accused "guilty" of the charge.

Sentence

"The court therefore sentences him, Lieutenant Commander D. H. Smith, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the favorable appearance of the accused and of the heavy weather encountered, we recommend Lieutenant Commander D. H. Smith, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

Action of the Convening Authority

On February 15, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander D. H. Smith, U. S. Naval Reserve Force, but, because of certain circumstances set forth more fully below under "Remarks," and in view of the unanimous recommendation to clemency by the court, remitted the sentence of dismissal, and directed that Lieutenant Commander Smith be released from arrest and restored to duty.

[P. 2] Remarks

The accused in this case was tried on the charge of "Culpable inefficiency in the performance of duty" embraced in three specifications, each alleging a distinct dereliction of duty as a cause for the grounding of the ship. The court found the second specification, only, proved, said specification alleging a failure on the part of the accused to set a safe course, and sentenced him to be dismissed.

The convening authority in acting on the case commented, in part as follows:

> "The evidence shows attention and care in navigating on the part of the accused. It also shows a fairly heavy sea, in which the Lake type of vessel does not steer well. It shows that trouble was experienced with the U. S. S. *Lake Bloomington's* steering gear on the trip down just prior to her loss, and that similar trouble has from time to time occurred with the steering gear of other Lake vessels. The evidence also shows that the U. S. S. *Lake Bloomington* was about one-half mile from danger on the port hand and approximately on the prescribed course for entering the channel.
>
> "The accused and the officer of the deck believe that the steering gear failed when the helm was put over to turn to starboard, and the actions at that time of the U. S. S. *Lake Bloomington* afford reasonable presumption that it did fail, a presumption of which the accused should be given the benefit of the doubt. It is probable that the U. S. S. *Lake Bloomington* was to the north'ard of the set course line but the ship was in the white sector of Terre Negre Light and safe, but the rough water made absolutely accurate bearings impossible."

It would seem from the foregoing that the convening authority was of the opinion that under the evidence a reasonable doubt existed as to the guilt of the accused. Under such circumstances it would have been more proper for the convening authority to have disapproved the finding on the second specification of the charge and the sentence, than to have remitted the sentence, after having approved the proceedings, findings, and sentence.

[C. M. O. 113—1919]

C. M. O. 112—1919

[P. 1] Lieutenant Eugene W. Torrey, Medical Corps, U. S. Navy, was tried by general court martial on March 3, 1919, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Absence from station and duty without leave (one specification).

Sentence

"The court therefore sentences him, Lieutenant Eugene W. Torrey, Medical Corps, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

"The accused, at the time of his absence without leave, was suffering from a physical malady, for which he sought and obtained expert medical treatment.

"Prior to his absence he endeavored to report to his commanding officer that he was sick and, at his request, it was subsequently done by a messenger. * * *

"The court believes, from statements made by his counsel, an officer of rank in the service, that, while suffering himself, he did fine work during the recent influenza epidemic and, on another occasion having sustained a broken kneecap, he performed travel, in order to give medical treatment to a man with fractured ribs.

"For these reasons we strongly recommend him to the clemency of the reviewing authority."

Recommendation of the Judge Advocate General

On March 17, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case, recommending [P. 2] that the sentence of the accused be mitigated to the loss of five (5) numbers in his grade.

Recommendation of the Bureau of Navigation

On March 25, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case and concurred in the endorsement of the Judge Advocate General.

Action of the Secretary of the Navy

The foregoing recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, in the foregoing case of Lieutenant Eugene W. Torrey, Medical Corps, U. S. Navy, is approved. He will be released from arrest and restored to duty.

C. M. O. 113—1919

[P. 1] Lieutenant Commander A. Erickson, U. S. Naval Reserve Force, was tried by general court martial on February 5, 1919, at Base Twenty-nine, by order of the Commander, Base Twenty-nine, on the following charge:

Charge.—Culpable inefficiency in the performance of duty (two specifications).

Findings

The court found the first specification of the charge proved excepting as to certain words, the second specification of the charge "not proved," and the accused "guilty" of the charge.

[C. M. O. 114—1919]

SENTENCE

"The court therefore sentences him, Lieutenant Commander A. Erickson U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On February 12, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander A. Erickson, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 22, 1919, the Judge Advocate General recommended that the sentence in the foregoing case be mitigated to the loss of fifty dollars ($50) per month of the accused's pay for a period of six (6) months.

[P. 2] RECOMMENDATION OF THE BUREAU OF NAVIGATION

On March 27, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, is approved. Lieutenant Commander Erickson will be released from arrest and restored to duty.

C. M. O. 114—1919

[P. 14] ABSENCE WITHOUT LEAVE WHILE A PRISONER AT LARGE: NOT AN AUTHORIZED CHARGE.

The charge "Absence without leave while a prisoner at large" is not one of those authorized by Naval Courts and Boards, 1917. Where such a charge was used, however, the department held that it was not of an invalidating nature (File 26262–6079, G. C. M. Rec. No. 42637).

CHARGES AND SPECIFICATIONS: INCONSISTENCY, GROUNDS FOR DISAPPROVAL.

The accused in a recent case was tried and found guilty of certain charges. One of the charges related to the use of intoxicating liquor by the accused while with a visiting party in a certain foreign port. Another charge was "Absence from station and duty without leave." The accused plead guilty to all charges, but made a statement in which he said that he could not understand why under the first of the above-mentioned charges he was charged with being under the influence of intoxicating liquor while on duty with a visiting party at said foreign port, while the other alleged that he was absent from station and duty, when, as a matter of fact, he was with the visiting party during the whole time in question.

The offenses laid in the charges purported to have occurred during the time the visiting party in question was in the aforementioned foreign port. In view of the inconsistency between the charges in question, the department disapproved the findings of the court on the charge of "Absence from station and duty without leave" (File 26262–5715, G. C. M. Rec. No. 41659).

[C. M. O. 114—1919]

CONVENING AUTHORITY: CANNOT PLACE ACCUSED ON PROBATION AFTER REMITTING SENTENCE.

The action of the convening authority (not the Secretary of the Navy) in a recent case was, in part, as follows:

> "But in view of the unanimous recommendation to clemency, the sentence is remitted, and the accused is placed on six months' probation."

The department held that as the convening authority had remitted the sentence, he had exhausted his power and that the part of his action placing the accused on probation was a nullity (File 26262–6106, G. C. M. Rec. No. 42726).

[P. 15] FINDING: "PROVED WITHOUT CULPABILITY" SHOULD BE SIMPLY NOT PROVED."

The accused in a recent case was charged, inter alia, with "Using abusive, obscene, and threatening language toward his superior officer." The court found the specification of the charge "proved without culpability" and the accused of the charge "not guilty."

The court gave as a reason for its finding on the specification that, in its opinion, the accused at the time of committing the offense was suffering from an epileptic attack and that he was therefore morally and legally irresponsible.

A finding of "proved without culpability" is virtually a form of acquittal, being a determination that the accused is not guilty in law. It is more legally accurate as well as more just to the accused in such cases to express such a finding on the specification simply as "not proved." (See Naval Digest, 1916, Finding, 69, 70; File 26251–18879, G. C. M. Rec. No. 42409.)

HEARSAY EVIDENCE: ALTHOUGH UNOBJECTED TO, HELD GROUNDS FOR DISAPPROVAL OF FINDINGS.

The accused was being tried for refusal to obey the lawful order of officer A. In order to show that a lawful order was given the accused, officer B, called as a witness, testified that he had ordered officer A to order the accused to turn to, and that officer A had reported to him (officer B) that the accused had refused to do so.

The above was hearsay evidence and should have been objected to. This being the only evidence on the point, the finding of the court thereon was disapproved by the department (File 26251–18146 M, G. C. M. Rec. No. 42734).

REDUCTION IN RANK: IN CASE OF CORPORAL ADVANCED FROM PRIVATE.

A corporal of the Marine Corps was advanced to that rank from private. He was sentenced by summary court martial " * * * to be reduced to the next inferior rank, that of private, first class, U. S. Marine Corps * * *."

The department held that the sentence was legal, and thereby overruled so much of the matter in C. M. O. 190, 1918, 26, as is in conflict with the above (File 26287–5529; J. A. G., Mar. 17, 1919, S. C. M. Rec. No. 10291, 1919).

[P. 16] COAST GUARD: RIGHTS OF DISCHARGED ENLISTED MEN OF, TO MILEAGE.

Section 3 of the Act of February 28, 1919, provides as follows:

> "SEC. 3. That section one hundred and twenty-six of the act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June third, nineteen hundred and sixteen, be amended to read as follows:
>
> "'SEC. 126. That an enlisted man honorably discharged from the Army, Navy, or Marine Corps since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably discharged, shall receive five cents per mile from the place of his discharge to his actual bona fide home or residence, or original muster into the service, at his option,'" etc.

[C. M. O. 114—1919]

In the opinion of the Judge Advocate General, an enlisted man honorably discharged from the Coast Guard since November 11, 1918, is an enlisted man honorably discharged from the Navy since November 11, 1918, within the above-quoted provision, the word "Navy" as therein used being broad enough to include the personnel of the Coast Guard at any time when said Coast Guard by law operates as a part of the Navy (File 28762–329, J. A. G., Mar. 10, 1919).

CITIZENSHIP: A JAPANESE BORN IN JAPAN OF JAPANESE PARENTS INELIGIBLE FOR.

A Japanese born in Japan of Japanese parents is not eligible for naturalization as a citizen of the United States, and a certificate of naturalization issued him by any court of the United States is null and void and does not entitle him to the benefits of citizenship, even though he has served in the Navy of the United States for 19 years (File 26252–140, J. A. G., Mar. 14, 1919).

FLEET NAVAL RESERVE: CONFIRMATION OF OFFICERS OF.

This office is of opinion that, by the terms of the act of August 29 1916 (39 Stat. 587), members of the Fleet Naval Reserve are exempt from the requirement "that members of the Naval Reserve Force, when first enrolled, * * * shall be given a provisional grade, rank, or rating in accordance with their qualifications, determined by examination"; that the provision "they may thereafter, upon application, be assigned to active service in the Navy for such [P. 17] periods of instruction and training as may enable them to qualify for and be confirmed in such grade, rank, or rating" obviously does not apply to members of the Fleet Naval Reserve; that "all former officers of the United States naval service, including midshipmen, who have left the service under honorable conditions * * * and who have enrolled in the Naval Reserve Force shall be eligible for membership in the Fleet Naval Reserve" was intended to provide a particular class into which "former officers and midshipment of the Navy * * * may be appointed in the grade and rank last held by them without examination other than the physical examination above described," viz, when "found physically qualified to perform the duties required in time of war"; that as the "retainer pay of all members of the Naval Reserve Force, except the Volunteer Naval Reserve (Fleet Naval Reserve previously excepted) while enrolled in a provisional rank or rating, and until such time as they shall have been confirmed in such rank or rating, shall be $12 per annum," while "the annual retainer pay of officers of the Fleet Naval Reserve shall be two months' base pay of the corresponding rank in the Navy," it follows that entrance into this particular class of the Naval Reserve Force, for the purposes herein considered, should be only by appointment in confirmed rank.

On the assumption that the above premises are correct, and taking into consideration that no affirmative authority appears to have been conferred upon the department to give to members of the Fleet Naval Reserve, on first enrollment, other than confirmed rank, this office is unable to concur in the view that whether members of the Naval Reserve Force, when first enrolled, should be given provisional or confirmed rank in the Fleet Naval Reserve, is within the discretion of the department.

Not denying the right of the department to make suitable regulations as to how the medical examination should be conducted, this office is of opinion that a personal physical examination of the officers in question by a "board of medical officers" is not a prerequisite to their being commissioned in the grade and rank last held by them in the Navy as of date of their acceptance of office in the Fleet Naval Reserve, for the reason that the language of the act of August 29, 1916, is broad enough to permit a physical examination by a properly authorized medical officer on whose report a "board of medical officers" may base a finding as to the physical qualifications of these officers. As the officers in question have already been examined physically by a duly qualified medical officer, an inspection of such reports by a "board of medical officers" may be used by such a board to base findings that such officers were "physically qualified to perform the duties required in time of war," thus satisfying the terms of the act of August 29, 1916, in this regard. In other words, as the law presumes that done which ought to have been done, this office is of the opinion that those officers who "upon

[C. M. O. 114—1919]

original enrollment subsequent" to a certain date were "given a provisional assignment" in the Fleet Naval Reserve "simply upon a physical examination by one medical officer" should now be considered by the department as having been properly appointed in the Fleet Naval Reserve in the rank last held by them as of date of their original enrollment, and upon the required finding "by a board of medical officers" their so far delayed commissions should issue (File 28550–123: 5, 28550–123: 6, J. A. G., Mar. 27, 1919; and see File 28550–123: 7, J. A. G., Mar. 24, 1919).

LINE OF DUTY: DEATH IN.

About a week before his death, the deceased complained of indigestion and colicky pain in his abdomen, and at times of discomfort in the region of the heart. An examination of the heart disclosed that it was perfectly normal. The deceased was treated for indigestion and a few days later said he was feeling better.

While engaged in a game of golf the deceased complained of "terrible indigestion," and, upon returning to the clubhouse, fell dead.

The board of inquest held in the case found that the deceased died by reason of heart failure while on authorized liberty, and that his death was occasioned by a disease which was contracted in the line of duty.

The department held that the death occurred in line of duty and was not the result of misconduct (File 26250–1841, J. A. G., Mar. 19, 1919).

MILEAGE UPON DISCHARGE: WHEN PAYABLE.

Section 126 of the National Defense Act of June 3, 1916, as amended by section 3 of the act of February 28, 1919 (Public, No. 300), provides as follows:

> "SEC. 126. That an enlisted man honorably discharged from the Army, Navy, or Marine Corps since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably discharged, shall receive five cents per mile from the place of his discharge to his actual bona fide home or residence, or original muster into the service, at his option: *Provided*, That for sea travel on discharge, transportation and subsistence only shall be furnished to enlisted men: *Provided*, That naval reservists duly enrolled who have been honorably released from active service since November eleventh, nineteen hundred and eighteen, or who may hereafter be honorably released from active service, shall be entitled likewise to receive mileage as aforesaid."

As this statute applies to the Army, as well as to the Navy and Marine Corps, the expression "honorably discharged" as used therein does not, as applied to the Navy, intend to refer only to the [P. 19] technical "honorable discharge" which is issued, with few exceptions, only to those who have completed a full term of enlistment, but is used in the same broad sense with reference to the Navy that it has with reference to the Army, thus including all discharges under which the holder may be regarded as leaving the service in an honorable manner, just as by the last proviso in the amended section 126, naval reservists are given the benefits thereof when "honorably released" from active service.

This enactment is permanent legislation superseding prior laws for payment of travel allowance on discharge from the Army and Navy (File 9209–114, J. A. G., Mar. 11, 1919).

OFFICERS, TEMPORARY: PRECEDENCE OF.

The order in which line officers selected for temporary promotion shall be promoted, or whether they shall be promoted at all, is entirely discretionary. When in fact promoted, their precedence is governed by the dates of their respective temporary commissions and not by their order of precedence in the grade from which promoted, whether their appointments in such lower grade were temporary or permanent (File 11130–62, J. A. G., Mar. 12, 1919).

[C. M. O. 114—1919]

PRISONERS, DECEASED: FURNISHING NATIONAL FLAG TO NEXT OF KIN OF.

The naval appropriation act of June 30, 1914 (38 Stat. 392, 406), provides, in part, as follows:

> "* * * *Provided*, That the Secretary of the Navy be authorized at his discretion to issue free of cost the national flag (United States national ensign No. 7) used for draping the coffin of any officer or enlisted man of the Navy or Marine Corps whose death occurs while in the service of the United States Navy or Marine Corps, upon request, to the relatives of the deceased officer or enlisted man or upon request, to a school, patriotic order, or society to which the deceased officer or man belonged: * * *."

Under the above provision the Secretary of the Navy is authorized, at his discretion, to issue free of cost to the relatives of deceased officers and enlisted men the particular national flags used for draping their coffins, the only limitation being that the death of such officers or enlisted men must occur while in the service of the U. S. Navy or Marine Corps. In consonance with the above, the Judge Advocate General was of the opinion that if a national flag of the kind specified were used to drape the coffin of a deceased enlisted man who was a prisoner at the time of his death, the next of kin of such deceased may, in the discretion of the Secretary of the Navy, be furnished such flag free of cost, provided such prisoner's death occurs while he is in the service of the U. S. Navy or Marine Corps (File 3768–673:1, J. A. G., Mar. 24, 1919).

[P. 20] SEA SERVICE IN GRADE: COMPUTATION OF, UNDER ACT OF 29 AUGUST, 1916.

The act of August 29, 1916 (39 Stat. 579), provides:

> "On and after June thirtieth, nineteen hundred and twenty, no captain, commander, or lieutenant commander shall be promoted unless he has had not less than two years' actual sea service on seagoing ships in the grade in which serving * * * ."

It is the opinion of the Judge Advocate General that sea service rendered in the grade of captain under a temporary commission should be credited to the officer concerned for purposes of promotion the same as service subsequently rendered by him under a permanent commission in that grade.

Should an officer holding a temporary commission as captain revert to his permanent grade of commander, the sea service rendered by him under his temporary commission as captain may be credited to him as sea service in the grade of commander by virtue of the following clause contained in the act of May 22, 1917 (40 Stat. 86):

> "SEC. 7. That the permanent and probationary commissions, appointments, and warrants of officers shall not be vacated by reason of their temporary advancement or appointment, nor shall said officers be prejudiced in their relative lineal rank in regard to promotion in accordance with the act of August twenty-ninth, nineteen hundred and sixteen * * * ."

Should the officer afterward be permanently promoted to the grade of captain, the fact that he was credited with such sea service as having been rendered in the grade of commander would not deprive him of the right to credit for the same service as rendered in the grade of captain (File 2652–1321, J. A. G., Mar. 15, 1919).

U. S. S. "CYCLOPS": DATE OF LOSS OF, AS AFFECTING POLICY OF INSURANCE.

The date of June 14, 1918, was arbitrarily fixed by the department for administrative purposes as the date of death of all officers and men of the U. S. S. *Cyclops*. A date might as well have been selected between Mar. 4, 1918, when the *Cyclops* was last heard from, and May 31, 1918, on which latter date a policy of insurance held by one of the officers on the *Cyclops*, by its terms expired. This department is not authorized to make a decision concerning the claim of the widow against the insurance company, but it would seem that the

[C. M. O. 116—1919]

company is not justified in withholding payment merely because of the date which was fixed upon by this department for purposes of record (File 28080–232, J. A. G., Mar. 5, 1919).

C. M. O. 116—1919

[P. 1] Captain Harry Halladay, assistant quartermaster, U. S. Marine Corps, was tried by general court martial on December 20, 1918, at Port au Prince, Haiti, by order of the Commander, First Provisional Brigade, U. S. Marine Corps, on the following charges:

Charge I.—Embezzlement (fifteen specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (two specifications).

Charge III.—Disobedience of a lawful order of the Secretary of the Navy (one specification).

Findings

The court found the first specification of the first charge "not proved," the second, third, fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, and fourteenth specifications of the first charge proved excepting as to certain words, the ninth and fifteenth specifications of the first charge "proved," and the accused "guilty" of the first charge; the specifications of the second charge proved excepting as to certain words, and the accused "guilty" of the second charge; the specification of the third charge "proved," and the accused "guilty" of the third charge.

Sentence

"The court therefore sentences him, Captain Harry Halladay, assistant quartermaster, U. S. Marine Corps, to be dismissed from the United States Marine Corps and from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of two (2) years."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his previous good record and his honorable service of fifteen years, we recommend Captain Harry [P. 2] Halladay, assistant quartermaster, U. S. Marine Corps, to the clemency of the reviewing authority."

Action of the Convening Authority

On February 10, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Captain Harry Halladay, assistant quartermaster, U. S. Marine Corps, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion and Recommendation of the Judge Advocate General

On March 19, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case, expressing the opinion that the evidence adduced was not sufficient to support the findings of the court on the first charge and second to fifteenth specifications, inclusive, thereunder, that in view thereof the sentence adjudged was too severe; and recommending that the findings of the court on the first charge and specifications thereunder be disapproved.

Recommendation of the Major General Commandant, U. S. Marine Corps

On March 31, 1919, the Major General Commandant, U. S. Marine Corps, placed an endorsement on the record in the foregoing case, in part, as follows:

> "The province of this office is to comment on the disciplinary features of the case, and I am fully in accord with the opinion of the Judge Advocate

[C. M. O. 122—1919]

General that the sentence of the court is excessive. This sentence was adjudged by the court upon its finding of 'guilty' for all three charges, and the most serious one, that of 'embezzlement,' has been recommended for disapproval by the Judge Advocate General.

* * * * *

"This officer has rendered long and faithful service to the Government, and there is nothing in the record in this case that would lead me to believe that he is not still capable of rendering efficient service.

[P. 3] "To dismiss him from the Marine Corps would, I believe, be a loss to the service and a punishment much more severe than warranted, while to sentence him to the penitentiary would seem a travesty upon justice, and I can find nothing in the record of this case to warrant either of these sentences. I do not think that for disciplinary reasons he should go unpunished, in view of the fact that he has been legally found guilty of two of the charges, and I believe that the best interests of the Marine Corps would be subserved if the sentence adjudged by the court in his case is mitigated to the loss of ten numbers in his temporary grade of captain and to a reprimand by the department, and I accordingly recommend such mitigation."

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Major General Commandent, U. S. Marine Corps, in the foregoing case of Captain Harry Halladay, assistant quartermaster, U. S. Marine Corps, are approved, but in view of the recommendation of the Major General Commandant, U. S. Marine Corps, the sentence is mitigated to the loss of ten (10) numbers in his temporary grade of captain and to be reprimanded by the Secretary of the Navy. He will be released from arrest and restored to duty.

C. M. O. 122—1919

[P. 1] Captain Louis J. Connelly, U. S. Navy, was tried by general court martial on January 30, 1919, at Hoboken, N. J., by order of the Commander, Cruiser Force, Atlantic Fleet, on the following charges:

Charge I.—Through inattention and negligence suffering a vessel of the Navy to be stranded and hazarded (one specification).

Charge II.—Culpable inefficiency in the performance of duty (two specifications).

Charge III.—Disobedience of orders (one specification).

FINDINGS

The court found the specification of the first charge proved, excepting as to certain words, and the accused "guilty" of the first charge; the specifications of the second charge "proved," and the accused "guilty" of the second charge; the specification of the third charge "not proved," the accused "not guilty" of the third charge, and fully acquitted the accused of the third charge.

SENTENCE

"The court therefore sentences him, Captain Louis J. Connelly, U. S. Navy, to be placed at the foot of the list of temporary captains of present date and there to remain until he shall have lost forty (40) numbers in his temporary grade of captain, and to be placed at the foot of the list of permanent commanders of present date and there to remain until he shall have lost forty (40) numbers in his permanent grade of commander."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his previous excellent record, we recommend Captain Louis J. Connelly, U. S. Navy, to the clemency of the reviewing authority."

[C. M. O. 124—1919]

[P. 2] ACTION OF THE CONVENING AUTHORITY

The convening authority on February 7, 1919, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Captain Louis J. Connelly, U. S. Navy, disapproved the recommendation to clemency, and directed that he be released from arrest and restored to duty.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On March 21, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case, and further recommended that, in view of the accused's previous excellent record, the loss of numbers be reduced from forty (40) to fifteen (15).

ACTION OF THE SECRETARY OF THE NAVY

In consideration of the recommendation of the Bureau of Navigation and of the final action heretofore taken by the department in cases similar in general character to the one at bar, the sentence of the general court martial in the foregoing case of Captain Louis J. Connelly, U. S. Navy, is mitigated to the loss of ten (10) numbers in his temporary grade of captain and to the loss of ten (10) numbers in his permanent grade of commander. From a personal knowledge of these cases, I am of the opinion that the sentences ultimately given were too light, and I am constrained to the view that a stricter policy must hereafter be adopted by the department in the disciplining of officers who strand or otherwise improperly hazard vessels of the Navy under their command.

C. M. O. 124—1919

[P. 1] Lieutenant (Junior Grade) Frederick R. Neindorff, U. S. Naval Reserve Force, was tried by general court martial on January 16, 1919, at Base Twenty-nine, by order of the Commander, Base Twenty-nine, and found guilty of the following charges:

Charge I.—Uttering seditious words (two specifications).

Charge II.—Conduct to the prejudice of good order and discipline (two specifications).

SENTENCE

"The court therefore sentences him Lieutenant (Junior Grade) Frederick R. Neindorff, U. S. Naval Reserve Force, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of fifteen (15) years."

ACTION OF THE CONVENING AUTHORITY

On January 27, 1919, the convening authority approved the proceedings of the general court martial in the foregoing case of Lieutenant (Junior Grade) Frederick R. Neindorff, U. S. Naval Reserve Force; disapproved the findings on the first and second specifications of the first charge and on the first charge; and approved the findings on the second charge, the specifications thereunder, and the sentence.

It was the opinion of the convening authority that the evidence before the court failed to show intent on the first charge, that of seditious utterances, and that the evidence clearly substantiated the second charge of "Conduct to the prejudice of good order and discipline." In view of the foregoing, that portion of the sentence which involves confinement was reduced to five (5) years, and, in conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On February 14, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case recommending that the period of confinement be reduced to one year.

[C. M. O. 126—1919]

[P. 2] CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On February 18, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

On February 27, 1919, the Secretary of the Navy approved the foregoing recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, designated the naval prison, Portsmouth, N. H., as the place of confinement, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record in the foregoing case to the President of the United States with the recommendation that the sentence, as reduced, be confirmed.

ACTION OF THE PRESIDENT

On April 8, 1919, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

C. M. O. 126—1919

[P. 1] Ensign John Elsman, U. S. Naval Reserve Force, was tried by general court martial on January 17, 1919, on board the U. S. S. *America*, by order of the Commander, Cruiser Force, Atlantic Fleet, and found guilty of the following charge, proved by plea:

Charge.—Theft (one specification).

SENTENCE

"The court therefore sentences him, Ensign John Elsman, United States Reserve Force, to be dismissed from the United States naval service."

RETURNED FOR REVISION

On February 8, 1919, the convening authority returned the record in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was grossly inadequate to the offense to which the accused pleaded guilty.

ACTION IN REVISION

The court decided "respectfully to adhere to its former sentence."

ACTION OF THE CONVENING AUTHORITY

On February 17, 1919, the convening authority approved the proceedings and findings, and in order that the accused might not entirely escape punishment, the sentence, of the general court martial in the foregoing case of Ensign John Elsman, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION OF THE JUDGE ADVOCATE GENERAL

On March 3, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case, in part, as follows:

> [P. 2] "After the plea of guilty the record should show affirmatively that the prosecution and defense offered no evidence, and also that the accused did not desire to make a statement. In view of the fact that the judge advocate made an argument in behalf of the accused, it is not believed that the accused's interests were neglected.

[C. M. O. 130—1919]

"The convening authority returned the record to the court for the purpose of reconsidering its sentence, which he considered inadequate. He also noted that the findings of the court were not recorded as directed by Naval Courts and Boards, 1917. The court, in revision, considered the irregularity in the findings as a clerical error and substituted an entire new page for the one containing the finding. Such procedure is not in accordance with Naval Courts and Boards, 1917, but this irregularity is not considered of an invalidating nature."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On March 7, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

ACTION OF THE SECRETARY OF THE NAVY

On March 10, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On April 8, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 130—1919

[P. 1] Lieutenant (Junior Grade) Lester B. Cranz, Medical Corps, U. S. Naval Reserve Force, was tried by general court martial on December 17, 1918, at Base Seven, by order of the Commander, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (two specifications).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) Lester B. Cranz, Medical Corps, United States Naval Reserve Force, to be dismissed from the United States naval service."

RETURNED FOR REVISION

On December 31, 1918, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering the sentence, which, in the opinion of the convening authority, was not adequate to the offense found proved.

SENTENCE IN REVISION

"The court therefore sentences him, Lieutenant (Junior Grade) Lester B. Cranz, Medical Corps, United States Naval Reserve Force, to be dismissed from the United States naval service, and to be confined for a period of three (3) months."

ACTION OF THE CONVENING AUTHORITY

On January 8, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) Lester B. Cranz, Medical Corps, U. S. Naval Reserve Force, designated the naval prison, at the Navy Yard, Portsmouth, N. H., as [P. 2] the place for the execution of so much of the sentence as relates to confinement, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

[C. M. O. 134—1919]

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On January 27, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case recommending that that part of the sentence involving confinement be remitted.

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On January 30, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

ACTION OF THE SECRETARY OF THE NAVY

On February 11, 1919, the Secretary of the Navy approved the foregoing recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record in the foregoing case to the President of the United States with the recommendation that the sentence, as reduced, be confirmed.

ACTION OF THE PRESIDENT

On April 8, 1919, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

C. M. O. 134—1919

[P. 1] Lieutenant (Junior Grade) Frank Pulaski, U. S. Naval Reserve Force, was tried by general court martial on February 7, 1919, at Base Twenty-nine, by order of the Commander, Base Twenty-nine, on the following charge:

Charge I.—Neglect of duty (three specifications).

Charge II.—Using abusive, obscene, and profane language toward another person in the service (three specifications).

FINDINGS

The court found the specifications of the first charge "not proved," the accused "not guilty" of the first charge, and fully acquitted the accused of the first charge; the first and second specifications of the second charge "proved"; the third specification of the second charge proved excepting as to certain words, and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) Frank Pulaski, U. S. Naval Reserve Force, to be confined for a period of five years, then to be dismissed from the United States naval service, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards, 1917."

ACTION OF THE CONVENING AUTHORITY

On February 15, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) Frank Pulaski, U. S. Naval Reserve Force, reduced that portion of the sentence involving confinement to one (1) year, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

[P. 2] OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 10, 1919, the Judge Advocate General placed the following endorsement on the record in the foregoing case:

> "It is noted that the sentence adjudged by the court provides that the accused 'be confined for a period of five years, then to be dismissed from the

United States naval service, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards, 1917.' This sentence is not in accordance with the requirements of sections 339 and 340, Naval Courts and Boards, 1917.

"The failure to comply with the provisions above noted is not, in my opinion, sufficient to invalidate the proceedings.

"The accused was found guilty of using abusive, obscene, and profane language toward other persons in the service. The proof clearly shows that this occurred at a time when the accused and all on the ship were working under great strain, and it is my opinion that, under the circumstances, a sentence providing for confinement is unnecessarily severe.

"In view of the above, it is recommended that the proceedings, findings, and sentence, of the general court martial in the foregoing case of Lieutenant (Junior Grade) Frank Pulaski, U. S. Naval Reserve Force, be approved, but that that portion of the sentence which involves confinement be remitted."

Concurrence and Recommendation of the Bureau of Navigation

On March 21, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, as amended by the endorsement of the Judge Advocate General, and recommended approval of said endorsement.

Action of the Secretary of the Navy

On March 27, 1919, the Secretary of the Navy approved the foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record in the foregoing case to the President of the United [P. 3] States, with the recommendation that the sentence, as reduced, be confirmed.

Action of the President

On April 14, 1919, the President of the United States confirmed the sentence, as reduced, in the foregoing case.

C. M. O. 136—1919

[P. 1] Ensign Carlton S. Westcott, U. S. Naval Reserve Force, was tried by general court martial on January 14, 1919, on board the U. S. S. *Nahant*, by order of the Naval Attaché and Commander U. S. Naval Aviation Forces in Italy, and found guilty of the following charge:

Charge.—Unlawfully selling property of the United States intended for the naval service thereof (two specifications).

Sentence

"The court therefore sentences him, Ensign Carlton S. Westcott, U. S. Naval Reserve Force, to be dismissed from the United States Naval Reserve Force and from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of three (3) years."

Action of the Convening Authority

On February 2, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Carlton S. Westcott, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Recommendation of the Bureau of Navigation

On March 20, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

[C. M. O. 141—1919]

ACTION OF THE SECRETARY OF THE NAVY

On March 27, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record in [P. 2] the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

The naval prison at the Navy Yard, Portsmouth, N. H., was designated as the place for the execution of that part of the sentence involving imprisonment.

ACTION OF THE PRESIDENT

On April 16, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

REMARKS

It was noted in the foregoing case that the court overruled an objection raised by the accused's counsel to a certain member of the court on the ground that he was present at an investigation of the offense for which the accused was being tried. Neither the presence of a member of the court at such investigation, his participation therein, nor his being called as witness for the prosecution, invalidates the proceedings. (See Naval Digest, 1916, p. 379, sec. 54–56.) The exigencies of the service permitting, however, the court should be composed of officers not cognizant of the circumstances attendant upon the offense for which an accused may be brought to trial.

C. M. O. 141—1919

[P. 1] Acting Pay Clerk Walter Wilson, Jr., U. S. Navy, was tried by general court martial on November 11, 1918, on board the U. S. S. *Agamemnon*, at Hoboken, N. J., by order of the Commander Cruiser Force, Atlantic Fleet, and found guilty of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (one specification).

SENTENCE

"The court therefore sentences him, Acting Pay Clerk Walter Wilson, Jr., U. S. Navy, to lose twenty-five dollars ($25) per month of his pay for a period of six (6) months."

RETURNED FOR REVISION

On November 27, 1918, the convening authority returned the record in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was grossly inadequate to the offense found proved.

SENTENCE IN REVISION

"The court therefore sentences him, Acting Pay Clerk Walter Wilson, Jr., U. S. Navy, to lose fifty dollars ($50) per month of his pay for a period of twelve (12) months."

ACTION OF THE CONVENING AUTHORITY

On December 3, 1918, the convening authority approved the proceedings, findings, and sentence in revision of the general court-martial in the foregoing case of Acting Pay Clerk Walter Wilson, Jr., U. S. Navy, and directed that he be released from arrest and restored to duty.

In the opinion of the convening authority the sentence in revision was inadequate to the offense of which the accused was found guilty, but due to the impracticability of reconvening the court the record was not again returned for revision.

[C. M. O. 141—1919]

[P. 2] OPINION OF THE JUDGE ADVOCATE GENERAL

On March 27, 1919, the Judge Advocate General placed an indorsement on the record in the foregoing case in substance as follows:

The accused in this case was found guilty of the charge, "Conduct to the prejudice of good order and discipline," and the specification thereunder alleging, in effect, that he unlawfully had intoxicating liquor in his possession on board the U. S. S. *Galveston*.

The record shows that the accused upon arraignment pleaded "guilty" to the specification and "not guilty" to the charge, whereupon the court notified him that it had decided to reject his plea and advised him to plead "not guilty" to the specification and to the charge. As the accused declined to plead as thus advised, the judge advocate was directed by the court to proceed as though a plea of "not guilty" had been entered.

The accused conceded all the facts alleged in the specification; took the stand in his own behalf and testified to the effect that the liquor found in his room was not his property and had been stowed there by another officer with the consent of the accused, who could not swear that the bottles contained intoxicating liquors, although he suspected at the time that they did.

The record then contains the following entries:

> "The accused stated that he desired to call Lieutenant Commander W_____ P_____ as a witness for the defense.
>
> "The president of the court asked what was the purpose of this witness.
>
> "The accused replied that he wanted to call him as a witness in extenuation.
>
> "The court directed the judge advocate to consult with the accused as to the necessity for calling this witness.
>
> "At 2 o'clock p. m. the court took a recess until 2:10 p. m., at which time the court reconvened. Present: All members, the judge advocate, the stenographer, and the accused.
>
> "The accused announced that he would not call Lieutenant Commander W_____ P_____ as a witness."

The accused submitted a letter to the department appealing for redress, in which he states that Lieutenant Commander P_____ was ready and willing to testify and stayed outside the [P. 3] court all during the trial waiting to be called, and that the accused at all times desired to call the said P_____ as a witness and at no time announced he was willing that he be not called.

The department, under date of December 16, 1918, addressed a letter to the accused stating in substance that it was not clear to the department whether he had appealed from the sentence of the court and had asked for a new trial, and that before the question of a new trial could be considered it was necessary for him to make formal petition therefor, upon receipt of which same would be considered in connection with the letters and inclosures submitted by the accused.

The reply of the accused, dated March 19, 1919, was to the effect that he did not feel he should ask for a new trial as he felt that the proceedings of his original trial were irregular and should be invalidated.

The suggestion cannot be regarded seriously "that one who holds that he has been improperly convicted is entitled to reject out of hand the opportunity to have his case heard again, and at the same time maintain that having been tried and convicted in a manner not wholly to his satisfaction, the charges pending against him should be dismissed without the carrying into effect of the sentence adjudged by the court" (File 26251–16994).

In view of the foregoing it is not necessary to consider in detail the alleged errors referred to by the accused. Said errors are not jurisdictional but pertain merely to matters of procedure, and as I consider that the department has already gone further than was required in offering the accused opportunity to apply for a new trial, and in holding up action upon the record pending determination by the accused upon the course which he desired to pursue with reference thereto, and as the accused has decided not to request a new trial in his case, I have to recommend that the department decline to go behind the record in order to ascertain what were the facts of any incidents alleged to be contrary thereto, and that the proceedings, findings, and sentence of the general court martial in the foregoing case of Acting Pay Clerk Walter Wilson, Jr., U. S. Navy, be approved.

[C. M. O. 142—1919]

The proceedings, findings, and sentence in this case were approved by the convening authority, the commander, Cruiser Force, Atlantic Fleet, on December 3, 1918, from which date execution of the sentence began. It appears from the records (P. 4) of this department, however, that the accused accepted, on December 5, 1918, an appointment as assistant paymaster in the Navy with the rank of ensign for temporary service. As it has been held by the Attorney General that the promotion of an officer is a constructive pardon of an unexecuted sentence (Naval Digest, p. 445, sec. 44), I am of opinion that the portion of the sentence remaining unexecuted on December 5, 1918, has been remitted.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On April 18, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved.

C. M. O. 142—1919

[P. 1] Lieutenant Frank I. Hart, U. S. Navy, was tried by general court martial on January 30, 1919, at the Naval Station, New London, Conn., by order of the Commandant, Naval Station, New London, Conn., on the following charge:

Charge.—Neglect of duty (two specifications).

FINDINGS

The court found the first specification of the charge "not proved," the second specification of the charge "proved," and the accused "guilty" of the charge.

SENTENCE

"The court therefore sentences him, Lieutenant Frank I. Hart, U. S. Navy, to be publicly reprimanded by the convening authority.

RETURNED FOR REVISION

On February 17, 1919, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of revising its sentence, which, in the opinion of the convening authority, was entirely inadequate to the offense found proved.

SENTENCE IN REVISION

"The court therefore sentences him, Lieutenant Frank I. Hart, U. S. Navy, to lose fifty dollars ($50) per month of his pay for a period of six (6) months."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his previous good record and in view of the present practice of the Submarine Force to generally disregard [P. 2] the use of the automatic blow valve in war times, we recommend Lieutenant Frank I. Hart, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On March 18, 1919, the convening authority approved the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Lieutenant Frank I. Hart, U. S. Navy, and directed that he be released from arrest and restored to duty.

[C. M. O. 144—1919]

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On April 19, 1919, the Bureau of Navigation recommended that, in view of the unanimous recommendation to clemency, the sentence be mitigated to the loss of twenty-five dollars ($25) per month for a period of six (6) months.

ACTION OF THE SECRETARY OF THE NAVY

In view of the recommendation of the Bureau of Navigation the sentence of the general court martial in the foregoing case of Lieutenant Frank I. Hart, U. S. Navy, is mitigated to the loss of twenty-five dollars ($25) per month of his pay for a period of six (6) months.

C. M. O. 144—1919

[P. 1] Lieutenant Commander Norman T. Henderson, U. S. Naval Reserve Force, was tried by general court martial on April 21, 1919, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Drunkenness on duty (two specifications).

Charge III.—Using abusive and obscene language toward another person in the Navy (two specifications).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted the accused of the first charge; the first specification of the second charge "proved," the second specification of the second charge "proved," excepting as to certain words, and the accused "guilty" of the second charge; the first specification of the third charge "proved," the second specification of the third charge "proved," excepting as to certain figures, and the accused "guilty" of the third charge.

SENTENCE

"The court therefore sentences him, Lieutenant Commander Norman T. Henderson, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 31, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case expressing the opinion that the court erred in not taking an adjournment before the close of the trial in order that the defense might procure the attendance of witnesses requested to testify as to charge II and the specifications thereunder, and recommending that the findings on said charge and specifications be disapproved.

[P. 2] CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On April 3, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General and recommended approval of said endorsement. It was further recommended that the sentence in the foregoing case be approved.

ACTION OF THE SECRETARY OF THE NAVY

On April 5, 1919, the Secretary of the Navy approved the proceedings, the findings, and acquittal on the first charge and specifications thereunder, and the findings on the third charge and specifications thereunder, of the general court martial in the foregoing case of Lieutenant Commander Norman T. Henderson, U. S. Naval Reserve Force; disapproved the findings on the second charge and specifications thereunder; approved the sentence; and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence be confirmed.

[C. M. O. 147—1919]

ACTION OF THE PRESIDENT

On April 22, 1919, the President of the United States confirmed the sentence of the court in the foregoing case.

C. M. O. 145—1919

[P. 1] Ensign George C. Simpson, U. S. Naval Reserve Force, was tried by general court martial on February 18, 1919, at the U. S. Naval Base Twenty-nine, by order of the Base Commander, on the following charges:

Charge I.—Assaulting and striking another person in the service (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (two specifications).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and acquitted him of the first charge; both specifications of the second charge proved, and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Ensign George C. Simpson, U. S. Naval Reserve Force, to be confined for a period of one (1) year, then to be dismissed from the United States naval service, and to suffer all the other accessories of said sentence as prescribed by section 349, Naval Courts and Boards."

ACTION OF THE CONVENING AUTHORITY

On February 26, 1919, the convening authority approved the proceedings, disapproved the findings on the first charge and the specification thereunder, approved the findings on the second charge and the specifications thereunder approved the sentence, and referred the record to the Secretary of the Navy for transmission to the President.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On March 25, 1919, the Judge Advocate General submitted the case, inviting attention to the fact that the sentence of the court was not in accordance with section 339, Naval Courts [P. 2] and Boards, 1917, since the dismissal should always be prior to the imprisonment, and recommending that the confinement be remitted and the dismissal be executed.

ACTION OF THE SECRETARY OF THE NAVY

On April 7, 1919, the Acting Secretary of the Navy approved the remarks and recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), the record of the proceedings of the general court martial in the foregoing case of Ensign George C. Simpson, U. S. Naval Reserve Force, was submitted to the President of the United States, with the recommendation that the sentence as reduced be confirmed.

ACTION OF THE PRESIDENT

On April 22, 1919, the President of the United States confirmed the sentence as reduced in the foregoing case.

C. M. O. 147—1919

[P. 1] Ensign Howard Hathaway, U. S. Naval Reserve Force, was tried by general court martial on March 26, 1919, at Hoboken, N. J., by order of the Commander, Cruiser Force, Atlantic Fleet, and found guilty of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (two specifications).

Charge II.—Falsehood (one specification).

[C. M. O. 147—1919]

SENTENCE

"The court therefore sentences him, Ensign Howard Hathaway, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On April 2, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Howard Hathaway, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 17, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case in substance as follows:

The judge advocate offered in evidence the testimony of the accused before a board of investigation, which amounted to a confession. Objection was made by the accused's counsel to the admission of the testimony on the ground that the confession was involuntary, and he requested permission of the court to call witnesses to show the same to be the involuntary act of the accused. The court admitted the confession of the accused, stating that if it was shown that the confession was given involuntarily, it would be stricken out. In this the court committed a prejudicial error, proof that a confession is voluntary being a condition precedent to the admission thereof [P. 2] (Naval Digest, p. 103, Confession 19); otherwise the court might be prejudiced by the admission of testimony which would afterward be stricken from the record.

The defense after the admission of this confession, proved by the testimony of the senior member of the board of investigation that the accused was not advised that he was an interested party or a defendant, and as such that he had a right to be represented by counsel, to be present and to be confronted by the witnesses against him, to call witnesses in his defense and to make a statement. These irregularities in themselves might not be sufficient to show the confession involuntary (Naval Digest, 1916, p. 105, Confessions 26–27). However, the defense further proved that the accused was brought before the board of investigation under arrest, and that he was compelled to testify under oath. This alone is sufficient to show the confession involuntary and a conviction based thereupon illegal (Naval Digest, 1916, p. 103, Confessions 17). The confession was allowed to remain in evidence after the introduction of this evidence.

Eliminating the confession of the accused, this office is of the opinion that there is not sufficient competent evidence to sustain the finding of the court of guilty as to either the first or second charge.

Among other errors the judge advocate stated in his closing argument to the court that he had witnesses whom he had not called that would have cleared up any doubt existing in the minds of the court; but that he had not called them, as to have done so would have delayed the proceedings. This procedure cannot but be considered as an effort to influence the decision of the court by other means than by the proper introduction of relevant and material evidence. The judge advocate further asked the court if they felt that the accused had been deprived of his rights, and if his guilt had not been established beyond a reasonable doubt, intimating that if such condition existed, he would call additional witnesses, should the court so decide. This was in fact a request that the court come to a finding as to the guilt or innocence of the accused in a manner not provided by law. The department is of the opinion that mere delay, due to the time necessary for the production of material witnesses, is inconsequential, in comparison with the right of the accused to have full justice accorded him, and to the right [P. 3] of the Government to have the prosecution conducted in a thorough and diligent manner. It is therefore recommended that the proceedings, findings, and sentence of the court in the foregoing case be disapproved.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On April 24, 1919, the Bureau of Navigation concurred in the foregoing endorsement of the Judge Advocate General.

[C. M. O. 150—1919]

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved. Ensign Hathaway will be released from arrest and restored to duty.

C. M. O. 150—1919

[P. 1] Lieutenant Robert A. Van Voorhis, Pay Corps, U. S. Naval Reserve Forces, was tried by general court martial on February 25, 1919, at the Marine Barracks, Parris Island, S. C., by order of the Secretary of the Navy, on the following charges:

Charge I.—Culpable inefficiency in the performance of duty (two specifications).

Charge II.—Embezzlement (one specification).

Charge III.—Scandalous conduct tending to the destruction of good morals (one specification).

FINDINGS

The court found the first specification of the first charge "not proved," the second specification of the first charge "proved," excepting as to certain words, and the accused "guilty of the first charge"; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of the second charge; the specification of the third charge "not proved," the accused "not guilty" of the third charge, and acquitted the accused of the third charge.

SENTENCE

"The court therefore sentences him, Lieutenant Robert A. Van Voorhis, Pay Corps, U. S. Navy Reserve Force, to lose pay amounting to one hundred dollars ($100)."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On April 24, 1919, the Bureau of Navigation recommended the approval of the proceedings, findings, and sentence in the foregoing case.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence in the foregoing case of Lieutenant Robert A. Van Voorhis, Pay Corps, U. S. Naval Reserve Force, are approved. He will be released from arrest and restored to duty.

[P. 2] REMARKS

It was noted in the foregoing case that the accused took the stand as a witness for the defense. After the defense rested, the court, over the objection of the counsel for the accused, had the accused twice take the stand for examinaion by the court to clarify his previous testimony. Under the circumstances of this case, the objection of the accused's counsel was properly overruled. Accused, in taking the stand at his own request, waived his constitutional privilege and had the same status as any other witness, and was thus subject to be recalled at any time during the proceedings, at the discretion of the court, for the purpose of examination or further cross-examination, to explain matter brought out in his original testimony (*Barnet* v. *State*, 176 S. W. 580; *State* v. *Kennade*, 26 S. W. 347; 40 Cyc. 2477–44). Such procedure, however, should be resorted to only under circumstances which clearly warrant recalling of the accused to the stand, and should not be employed ordinarily when the accused has taken the stand in his own behalf and been subjected to cross-examination, there having been ample opportunity at that time to clear up matters pertaining to examination in chief.

C. M. O. 151—1919

[P. 1] Lieutenant William F. Brodhead, Medical Corps, U. S. Navy, was tried by general court martial on January 15, 1919, at the Marine Barracks, Parris Island, S. C., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (two specifications).

Sentence

"The court therefore sentences him, Lieutenant William F. Brodhead, Medical Corps, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the fact that the accused was entirely ignorant of the weapon in question; that he was entirely inexperienced with service orders and customs and because he wrongfully assumed that a private who had completed his training was competent to demonstrate the proper use of the rifle; and because the accused showed a commendable desire to acquaint himself with the operation of the service rifle and offended only in his judgment as to time and place, we unanimously recommend Lieutenant William F. Brodhead, Medical Corps, U. S. Navy, to the clemency of the reviewing authority."

Returned for Revision

On February 1, 1919, the department returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering the finding on the second specification of the charge, and the sentence. After careful consideration, the department was of the opinion that the finding of the court on said specification was not in accord with the evidence adduced.

Finding in Revision

[P. 2] The court reconvened on February 12, 1919, and found the first specification of the charge "proved," excepting as to certain words, the second specification of the charge "not proved," and the accused "guilty" of the charge.

Sentence in Revision

"The court therefore sentences him, Lieutenant William F. Brodhead, Medical Corps, U. S. Navy, to lose five (5) numbers in his grade."

Returned for Revision

On March 19, 1919, the department again returned the record in the foregoing case to the court, and directed that the court reconvene for the purpose of recording the sentence as indicated in circular letter No. 11130–51 of March 28, 1918.

Sentence in Revision

The court having reconvened on March 27, 1919, decided to revoke its former sentence and substitute therefor the following:

> "The court therefore sentences him, Lieutenant William F. Brodhead, Medical Corps, U. S. Navy, to lose five (5) numbers in his temporary grade of lieutenant and to lose five (5) numbers in his permanent grade of lieutenant (junior grade)."

[C. M. O. 153—1919]

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 15, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case in substance as follows:

It appears from the record of proceedings in this case that the accused, by counsel, objected to each and every member of the court martial on the ground that "a similar case having been tried, said member has unconsciously formed an opinion; and regardless of what the finding was, said member will be influence thereby in this case, as the charge and specification are identical." One member replied that he had formed an opinion from the preceeding trial, but that he could try the case impartially; two other members did not desire to make reply; the remaining members replied, in substance, that they had formed no opinion and could give the accused a fair and impartial trial. The court refused to sustain the respective challenges of the [P. 3] accused, except in the case of the member who stated that he had formed an opinion.

In view of the challenges as aforesaid and the reasons advanced in support of said challenges, the department advised the accused that the question of a new trial in his case would be considered if he made formal petition therefor. The accused in reply stated that he did not desire a new trial and requested that the findings and sentence be set aside, because the court failed to sustain the challenges as aforesaid. The accused having thus declined the opportunity for a new trial, I am of the opinion that the sentence should be approved.

In the record of revision of March 27, 1919, it is noted that the president of the court took part in the proceedings without authority of law. It appears that said president of the court was relieved from duty with the court by the convening authority on March 20, 1919, and on March 28, 1919, was reappointed, temporarily, during revision of the accused's case. He could not sit legally as a member of the court on March 27, 1919, at which time he was not a member thereof for any purpose, and the said proceedings were thereby vitiated.

Subject to the foregoing remarks, it is recommended that the proceedings and sentence in the revision of March 27, 1919, of the general-court-martial case of Lieutenant William F. Brodhead, Medical Corps, U. S. Navy, be disapproved, and that the original proceedings, and the proceedings, findings, and sentence in the revision of February 12, 1919, be approved.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On April 24, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved. Lieutenant William F. Brodhead, Medical Corps, U. S. Navy, will be released from arrest and restored to duty.

C. M. O. 153—1919

[P. 29] ACCUSED: MAY WAIVE ASSISTANCE OF COUNSEL.

The right of a defendant in a criminal case in a court of the United States to have the assistance of, and to be heard by, counsel is absolutely guaranteed by the Constitution of the United States (sixth amendment). This is a fundamental right which may be waived by the accused but which cannot be denied by the court or by the convening authority. (See secs. 253, 254, 255, 265, 266, and 267, Naval Courts and Boards, 1917.)

In all cases the accused should be advised of his right to have counsel, and if he states that he does not desire assistance of counsel he is thereby deemed to have waived his constitutional right to be so represented unless he is mentally incompetent to make a decision in the matter, in which event the convening authority may, if he considers that the interests of the accused may not be sufficiently safeguarded by the judge advocate (sec. 255, Naval Courts and Boards, 1917), assign counsel to represent the accused even though the accused

[C. M. O. 153–1919]

has expressly stated that he does not desire counsel. It should be borne in mind, however, that the convening authority has no power to force counsel upon an accused unless the accused is mentally incompetent and thereby unable to look after his own interests. (See *Dietz* v. *State*, 149 Wis. 462; American and English Annotated Cases, 1913, C, p. 732, and footnotes, pp. 739–740, File 26504–358, J. A. G., Apr. 15, 1919.)

ARRAIGNMENT: ERROR IN, AS TO BRANCH OF SERVICE OF ACCUSED NOT FATAL.

The record in a recent general court martial case disclosed that the accused was arraigned as fireman, third class, U. S. Navy, instead of fireman, third class, U. S. Naval Reserve Force (the branch of the service to which he belonged).

[P. 30] *Held:* That the error was not of an invalidating nature (File 26251–20421, G. C. M., Rec. No. 43726).

EVIDENCE: SWORN TESTIMONY BEFORE A BOARD OF INVESTIGATION AND A COURT OF INQUIRY ADMISSIBLE BEFORE COURT MARTIAL.

In a recent court-martial case the defense offered in evidence the sworn testimony of two officers taken before a board of investigation and a court of inquiry, respectively. The testimony of these witnesses was material, they being the only eye witnesses to occurrences which formed the basis of a charge against accused, other than the prosecuting witness. At the time of the trial one of these witnesses was dead, and the other on the inactive list and outside the jurisdiction of the court. The court refused to admit this testimony on the ground that to do so would restrict the punishment that might be adjudged on a finding of guilty. The Judge Advocate General was of the opinion that the court erred in the above ruling. The testimony before the court of inquiry was admissible independently of article 60, Articles for the Government of the Navy (Naval Courts and Boards, sec. 198 (c)), which states that proceedings of a court of inquiry are admissible, when offered in evidence by the accused in his own behalf, the right of the accused to be confronted by his witnesses being one which he may waive (*Mullan* v. *United States*, 212 U. S. 516). Having thus waived the restriction of article 60, Articles for the Government of the Navy, the limitations to punishment set out in that article do not apply.

The testimony under oath before the board of investigation was clearly admissible (art 60, A. G. N., having no application to the proceedings of boards of investigation) under the general rules of evidence (Naval Courts and Boards, 1917, 198 (*a*), 198 (*b*); *Mullan* v. *U. S.*, 212 U. S. 516).

HEARSAY EVIDENCE: ADMISSION OF, HELD GROUNDS FOR DISAPPROVAL OF FINDING.

A specification of the charge of desertion in a recent case alleged that the accused "did, on or about November 20, 1918, desert from the receiving ship at Boston, Mass., and from the U. S. Navy, and did remain a deserter until he was delivered on board the aforesaid receiving ship, at the aforesaid place, on or about December 3, 1918; the United States then being in a state of war."

The evidence adduced showed that no "Absentee's slip" was made out for the accused, nor was a "Report of deserter received on board" prepared. The witness for the prosecution testified not from his own knowledge as to the absence of the accused, but from entries made by another in the report book. The report book was not submitted in evidence. The accused's counsel objected to said testimony [P. 31] on the ground of hearsay. It was the opinion of the Judge Advocate General that the court erred in refusing to sustain said objection. The department, therefore, disapproved the court's finding that said specification was proved (File 26251–19646, G. C. M. Rec. No. 42879).

REDUCTION TO ENLISTED RATING: SENTENCE OF, IN CASE OF AN OFFICER, LAWFUL ONLY FOR THE OFFENSE OF ABSENCE FROM HIS COMMAND OR HIS STATION AND DUTY WITHOUT LEAVE.

(See C. M. O. 34, 1918; File 26262–6212, J. A. G., Apr. 29, 1919.)

[C. M. O. 153—1919]

SENTENCE INVOLVING CONFINEMENT: SHOULD INCLUDE A DISHONORABLE OR BAD-CONDUCT DISCHARGE.

Where a case was returned to the court for revision, the court not having included a dishonorable or bad-conduct discharge in its sentence adjudging confinement, and the court adhered to its sentence on the ground of the bearing of the accused, his youth, coolness, diligence, and devotion to duty, the Judge Advocate General was of opinion that the action of the court in thus extending clemency was an encroachment upon the prerogatives of the reviewing authority, this power being vested by law not in courts martial, but in the reviewing authority (Naval Digest, 1916, Clemency 13). It is the duty of the court to adjudge a punishment commensurate with the offense in each case (Naval Digest, 1916, Adequate Sentences 2, 3, 4, 7, 9; File 26251–19911, J. A. G., Apr. 28, 1919).

STATEMENT INCONSISTENT WITH PLEA: NOTWITHSTANDING PLEA OF "GUILTY" TO OFFENSES MADE PUNISHABLE BY STATUTE REGARDLESS OF INTENT.

Where an accused was tried for "Violation of a lawful order issued by the commandant, Fifteenth Naval District" and "Absence from station and duty after leave had expired," and on being arraigned pleaded guilty to both charges and the specifications thereunder, the court accepted these pleas and the prosecution offered no evidence. The accused then interposed a statement to the effect that he had not intentionally violated the said order of the commandant or intentionally absented himself from station and duty after leave had expired, but did so through unavoidable accident or through force of circumstances due to the fact that while on leave he went out into the country and in returning to his ship at Cristobal, followed instructions as to the direction to travel, given him by certain natives, which instructions erroneously led him to the Republic of Panama instead of to Cristobal.

[P. 32] The Judge Advocate General was of the opinion that both charges must be held to be sufficiently specific to be of statutory creation; that while the statute (arts. 4 and 8, A. G. N.) has done away with the element of intent in the offenses charged in the instant case—the first offense being complete by the mere presence of the accused within the Republic of Panama, and the second offense on the mere nonpresence of the accused at his ship or station—nevertheless, in view of the well-recognized excuses which constitute exceptions to the rule that courts must give effect to the intention of the legislation to attach penalties for the mere violation of laws irrespective of criminal intent (see 8 A and E, Encyc., 291), such as where the accused, against his will, is prevented by force majeure, sickness, unavoidable accident, force or compulsion from complying with naval law (the reason being that all positive legislation contemplates some relation between guilt and punishment, and the law is not so unreasonable as to attach culpability and consequently to impose punishment where there is no intent to evade its provisions and the usual means to comply with them is adopted), the Judge Advocate General was further of opinion that the statement of accused contained matter of defense as an excuse for his acts which would have been legally admissible in evidence had he pleaded "not guilty," and was therefore clearly inconsistent with his plea of "guilty" to both charges; that said statement, rather than his plea of "guilty" should have been considered by the court as the more intelligent act of the accused; and that the court committed a material error by not proceeding in accordance with sections 310 and 312, Naval Courts and Boards, 1917 (File 26262-6020, J. A. G., Apr. 25, 1919).

[P. 33] LIQUORS, ALCOHOLIC: IMPORTATION, ETC., OF, INTO UNORGANIZED TERRITORIES OF GUAM AND TUTUILA.

The act of November 21, 1918, provides as follows:

> "After the approval of this act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization" (40 Stat. 1047).

[C. M. O. 153—1919]

Section 1891 of the Revised Statutes provides:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

The department was of the opinion that the islands of Guam and Tutuila, being unorganized territories, were not within the provision first quoted above.

However, on April 30, 1918, in the case of Guam, and on July 12, 1918, in the case of American Samoa, the respective Governors of said islands were directed to issue orders prohibiting the manufacture, importation, exportation, sale, giving away, and use of alcoholic liquors in such islands (File 26509–201: 154, Sec. Nav., Apr. 2, 1919).

MATES, RETIRED: NOT RENDERED ELIGIBLE FOR PROMOTION BY ACT OF JULY 1, 1919

As mates are neither commissioned nor warrant officers (see *U. S.* v. *Fuller*, 160 U. S. 593), retired mates who have performed active duty during the war with Germany are not eligible for promotion as officers on the retired list under the following provisions of the act of July 1, 1918:

> "That hereafter, during the existence of war or of a national emergency declared by the President to exist, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list may, in the discretion of the Secretary of the Navy, be ordered to active duty at sea or on shore; and any [P. 34] retired officer performing such active duty in time of war or national emergency, declared as aforesaid, shall be entitled to promotion on the retired list to the grade or rank, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, and shall thereafter receive the pay and allowances thereof, which his total active service as an officer both prior and subsequent to retirement, in the manner rendered by him, would have enabled him to attain in due course of promotion had such service been rendered continuously on the active list during the period of time last past.
>
> "That during the existence of war or of a national emergency, declared as aforesaid, any commissioned or warrant officer of the Navy, Marine Corps, or Coast Guard of the United States on the retired list, while on active duty, may be temporarily advanced to and commissioned in such higher grade or rank on the retired list, not above that of lieutenant commander in the Navy or major in the Marine Corps or captain in the Coast Guard, as the President may determine, and any officer so advanced shall, while on active duty, be entitled to the same pay and allowances as officers of like grade or rank on the active list: *Provided*, That any such commissioned or warrant officer who has been so temporarily advanced in grade or rank shall, upon his relief from active duty, or in any case not later than six months after the termination of the war or of the national emergency, declared as aforesaid, revert to the grade or rank on the retired list and to the pay and allowance status which he would have held had he not been so temporarily advanced: *Provided further*, That nothing in this act shall operate to reduce the pay and allowances now allowed by law to retired officers."

Further, a retired mate who is over 50 years of age is ineligible for promotion to warrant or commissioned rank under the act of May 22, 1917, as amended by the act of July 1, 1918, because of the express restriction as to age therein, as shown by the following excerpt therefrom:

> "That in making appointments authorized herein the maximum age limit shall be fifty years for enlisted men to ensign, enlisted men of the Navy to warrant rank, noncommissioned officers of the Marine Corps to commissioned rank, members of the Marine Corps Branch of the Naval Militia and National Naval Volunteers, Marine Corps Reserve, and civilians specially qualified to commissioned rank, and temporary chaplains and temporary acting chaplains" (File 4856–19, J. A. G., Apr. 30, 1919).

[C. M. O. 157—1919]

[P. 35] PROMOTION: ELIGIBILITY FOR, OF FORMER PAY CLERK TO CHIEF PAY CLERK.

On March 3, 1915, Ensign (T) ------, U. S. Navy, then a paymaster's clerk in the Navy, had completed approximately seven years' service as a paymaster's clerk and was, subject to examination, eligible for appointment as a chief pay clerk in accordance with the provisions of the act of March 3, 1915 (38 Stat. 942). He failed to qualify professionally on examination and his appointment as paymaster's clerk was revoked. At a later date he enlisted, and on October 24, 1917, was appointed as acting pay clerk in the Navy, and has recently been promoted to pay clerk to take rank from October 24, 1918.

Held: That in view of his previous service as a paymaster's clerk Ensign (T) ------ is now eligible for promotion to chief pay clerk upon qualifying on examination, in accordance with the following provision of the act of March 3, 1915 (38 Stat. 942):

> "That all pay clerks shall, after six years' service as such, be commissioned chief pay clerks and shall on promotion have the rank, pay, and allowances of chief boatswain: *Provided*, That in computing the six years' service herein provided for credit shall be given for all service in the Navy as pay clerk, acting pay clerk, and paymaster's clerk" (File 28554–135: 12, J. A. G., Apr. 3, 1919).

C. M. O. 156—1919

[P. 1] Ensign Raymond K. Bonsteel, Pay Corps, U. S. Naval Reserve Force, was tried by general court martial on February 13, 1919, on board the U. S. S. *Leviathan* by order of the Commander, Cruiser Force, Atlantic Fleet, and acquitted of the following charges:

Charge I.—Culpable inefficiency in the performance of duty (one specification).

Charge II.—Neglect of duty (one specification).

RETURNED FOR REVISION

On February 15, 1919, the convening authority returned the record in the foregoing case to the court and directed that the court reconvene for the purpose of reconsidering its finding on the first charge and specification thereunder.

After a careful consideration the convening authority was of the opinion that the finding on the first charge and specification thereunder were not in accord with established precedents. The fact that the accused in this case was not given special instructions in his duties might have been grounds for recommendation to clemency but not for an acquittal.

ACTION IN REVISION

The court decided "respectfully to adhere to its former finding."

ACTION OF THE CONVENING AUTHORITY

On February 19, 1919, the convening authority approved the proceedings of the general court martial in the foregoing case of Ensign Raymond K. Bonsteel, Pay Corps, U. S. Naval Reserve Force, disapproved the findings and acquittal, and directed that he be released from arrest and restored to duty.

C. M. O. 157—1919

[P. 1] Lieutenant Commander Haldor Smith, U. S. Naval Reserve Force, was tried by general court martial on April 1, 1919, at the navy yard, Norfolk, Va., by order of the Secretary of the Navy, on the following charges:

Charge I.—Assaulting and striking another person in the Navy (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (four specifications).

[C. M. O. 160—1919]

FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the first specification of the second charge "proved," the second, third, and fourth specifications of the second charge "not proved," and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Commander Haldor Smith, United States Naval Reserve Force, to be dismissed from the United States naval service."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 22, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case in substance as follows:

The accused's counsel offered in evidence the sworn material testimony of two officers taken before a board of investigation and court of inquiry, respectively. These officers were the only persons other than the prosecuting witnesses who were eyewitnessess to the transactions alleged in the specification of charge I. One of the said officers was deceased at the time of the trial, and the other had been placed on the inactive list and was outside the jurisdiction of the court. The court refused to admit this testimony on the ground that to do so would restrict the punishment that might be adjudged on a finding of guilty.

[P. 2] In this the court erred, the testimony before the court of inquiry being admissible independently of article 60, Articles for the Government of the Navy (see Naval Courts and Boards, 1917, sec. 198 (*c*)), which states that the proceedings of a court of inquiry are admissible when offered in evidence by the accused in his own behalf, the right of the accused to be confronted by the witnesses against him being one which he may waive (*Mullan* v. *United States*, 212 U. S. 516). Having thus waived the restrictions of article 60, Articles for the Government of the Navy, the limitations as to punishments set out in that article do not apply.

The testimony under oath before the board of investigation was clearly admissible, article 60, Articles for the Government of the Navy, having no application to the proceedings of boards of investigation under the general rules of evidence. (See Naval Courts and Boards, 1917, secs. 198 (*a*) and 198 (*b*); *Mullan* v. *United States*, 212 U. S. 516.)

As the aforementioned testimony constituted the entire defense of the accused, it is recommended that the proceedings, findings, and sentence in the foregoing case be disapproved, and that the accused be released from arrest and restored to duty.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On April 30, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

The proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Haldor Smith, U. S. Naval Reserve Force, are disapproved. The above-named officer will be released from arrest and restored to duty.

C. M. O. 160—1919

[P. 1] Boatswain (T) Lewis Aufdemorte, U. S. Navy, was tried by general court martial on March 20, 1919, at the U. S. Submarine Base, Coco Solo, C. Z., by order of the Commandant, Fifteenth Naval District, and found guilty of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (one specification).

Charge II.—Falsehood (one specification).

[C. M. O. 163—1919]

SENTENCE

"The court therefore sentences him, Boatswain (T) Lewis Aufdemorte, U. S. Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On April 1, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Boatswain (T) Lewis Aufdemorte, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 28, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case expressing the opinion that as to charge I, and the specification thereunder, scienter on the part of the accused had been neither alleged nor proved. The court found the accused guilty of dancing with a woman of doubtful character in a resort of bad reputation. It was the opinion of the Judge Advocate General that the evidence adduced failed to prove that the accused knew that the woman in question was of doubtful character or that the place was a "resort of bad reputation," and, further, that it is no offense to dance with a woman of doubtful character. It was therefore recommended that the first charge, the specification thereunder, and the findings thereon be disapproved.

[P. 2] In view of all the circumstances in the case, it is recommended that the sentence be mitigated to the loss of twenty-five dollars ($25) per month of the accused's pay for a period of six (6) months.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On May 1, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing remarks and recommendations of the Judge Advocate General concurred in by the Bureau of Navigation are approved.

C. M. O. 163—1919

[P. 1] Lieutenant (Junior Grade) William C. Van Ness, U. S. Naval Reserve Force, was tried by general court martial on March 12, 1919, at the U. S. Naval Aviation Repair Base, Eastleigh, England, by order of the Commander, U. S. Naval Forces operating in European Waters, and found guilty of the following:

Charge.—Neglect of duty (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) William C. Van Ness, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On March 25, 1919, the convening authority approved the proceedings, findings, and sentence in the foregoing case of Lieutenant (Junior Grade) William C. Van Ness, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 25, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case expressing the opinion that the prosecution had

[C. M. O. 165—1919]

failed to prove the specification of the charge beyond a reasonable doubt and recommending that the proceedings, findings, and sentence of the general court martial in the foregoing case be disapproved and that the accused be released from arrest and restored to duty.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On April 30, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendations of the Judge Advocate General concurred in by the Bureau of Navigation are approved.

C. M. O. 165—1919

[P. 1] Lieutenant (T) Philip A. Wilson, U. S. Navy, was tried by general court martial on March 10, 1919, on board the U. S. S. *Arkansas*, by order of the Commander in Chief U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Drunkenness.

SENTENCE

"The court therefore sentences him, Lieutenant (T) Philip A. Wilson, United States Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In view of the fact that this offense was committed on November 11, 1918, a day of great celebration; that the liquor was pressed upon the accused by foreign officers; that the offense was unintentional, as far as known, and furthermore that it was observed that the liquor of Scotland seemed to possess greater toxicity, and the symptoms produced were more acute and violent than those due to the American liquors (these extraordinary results were shown in different cases during the stay of the American Squadron while in foreign waters) we recommend the accused, Lieutenant (T) Philip A. Wilson, (G), U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On March 22, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (T) Philip A. Wilson (G), U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

It was noted by the convening authority that the accused was promoted eleven days after the commission of the offense for [P. 2] which he was tried. As to the question of whether or not such promotion would operate as a constructive pardon, the convening authority was of the opinion that this case differed from the class of cases exemplified by C. M. O. 185–1918, in that there the Secretary of the Navy ordered the court martial and thereafter the officer was promoted, while here the officer was promoted, the Bureau of Navigation and the Secretary of the Navy having no knowledge whatsoever of the pending charges.

It being impossible for the convening authority to exercise his power of mitigation and at the same time provide an adequate punishment for the offense of which the accused was convicted, the convening authority added his own recommendation to clemency to that of the members of the court.

[C. M. O. 166—1919]

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On May 3, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in the foregoing case.

It was further recommended that, in view of the unanimous recommendation to clemency and the remarks of the convening authority, that the sentence be mitigated to loss of fifty dollars ($50) per month of the accused's pay for a period of six (6) months.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendation of the Bureau of Navigation is approved. Lieutenant (T) Philip A. Wilson (G), U. S. Navy, will be released from arrest and restored to duty.

C. M. O. 166—1919

[P. 1] Acting Pay Clerk (T) Carlos J. Cox, U. S. Navy, was tried by general court martial on March 24, 1919, at the Submarine Base, Coco Solo, C. Z., by order of the Commandant Fifteenth Naval District, and found guilty of the following charge:

Charge.—Conduct unbecoming an officer and a gentleman (two specifications).

SENTENCE

"The court therefore sentences him, Acting Pay Clerk (T) Carlos J. Cox, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his previous excellent naval service and excellent character as established before the court, and because the court is absolutely convinced that the accused did not realize that he was committing any offense, and, furthermore, because the court is convinced that the accused is sincerely sorry and regrets his mistake, the court does therefore unanimously recommend Carlos J. Cox, acting pay clerk (T), U. S. Navy, the accused, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On April 8, 1919, the convening authority approved the proceedings, findings, and sentence in the foregoing case of Acting Pay Clerk (T) Carlos J. Cox, U. S. Navy, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 28, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case expressing the [P. 2] opinion that the evidence adduced at the trial failed to show that the accused had knowledge of the degraded character of the persons with whom he associated in public or that the place which he entered was a public bar of ill repute.

In view of the foregoing and the fact that the members of the court spread upon the record a unanimous recommendation for clemency on the ground that "the court was absolutely convinced that the accused did not realize that he was committing an offense," it was recommended that the charge, specifications thereunder, the findings, and the sentence be disapproved.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On May 6, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

[C. M. O. 175—1919]

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, are approved. Acting Pay Clerk (T) Carlos J. Cox will be released from arrest and restored to duty.

C. M. O. 173—1919

[P. 1] Captain Alfred G. Howe, U. S. Navy, was tried by general court martial on January 8, 1919, at U. S. Naval Base Seven, by order of the Commander Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Through negligence suffering a vessel of the Navy to be run upon a rock and hazarded (one specification).

SENTENCE

"The court therefore sentences him, Captain Alfred G. Howe, U. S. Navy, to lose twenty (20) numbers in his grade."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the excellent service of the accused as leader of convoy escorts in wartime on the coast of France, his established reputation as an able and careful officer, and of the unusual combination of circumstances which contributed to the grounding of the U. S. S. *Conner*, we unanimously recommend the accused, Captain Alfred G. Howe, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On January 18, 1919, the convening authority, after reviewing all the conditions attending the case, said, in part:

> "Therefore, considering the exemplary character, and the excellent record of the accused lasting over a long period of years, and in view of his excellent service as a leader of troop and cargo-convoy escorts during the present war, as well as his established record as a careful, thorough, and conscientious navigator and captain of naval vessels, and because of his prompt action in warning the other ships of his division after the U. S. S. *Conner* grounded, and of the extenuating circumstances set forth above, and giving due weight to the unanimous recommendation to clemency of the court, the proceedings and [P. 2] finding in the foregoing case are approved. The sentence is approved, but that part of the sentence which involves a loss of twenty numbers in grade is reduced to a loss of ten numbers in grade. He will be released from arrest and restored to duty."

ACTION OF THE BUREAU OF NAVIGATION

On May 6, 1919, the Bureau of Navigation recommended that the sentence be mitigated to the loss of five (5) numbers in grade.

ACTION OF THE SECRETARY OF THE NAVY

The sentence of the general court martial in the foregoing case of Captain Alfred G. Howe, U. S. Navy, is mitigated to the loss of two (2) numbers in his grade.

C. M. O. 175—1919

[P. 1] Boatswain (T) Otto Loux, U. S. Navy, was tried by general court martial on February 13, 1919, at U. S. Naval Base Twenty-seven, by order of the Base Commander, and found guilty of the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (one specification).

[C. M. O. 175—1919]

Charge II.—Conduct to the prejudice of good order and discipline (one specification).
Charge III.—Conduct unbecoming an officer and a gentleman (one specification).
Charge IV.—Drunkenness (one specification).

Sentence

"The court therefore sentences him, Boatswain (T) Otto Loux, U. S. Navy, to be dismissed from the United States naval service."

Returned for Revision

The convening authority returned to the court the record of the proceedings in the foregoing case for reconsideration, the sentence adjudged by the court being, in the opinion of the convening authority, inadequate to the offense found proved.

Sentence in Revision

The court decided to revoke its former sentence and substitute therefor the following:

> "The court therefore sentences him, Boatswain (T) Otto Loux, U. S. Navy, to be dismissed from the United States naval service, then to be confined for a period of five years, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards, 1917."

Action of the Convening Authority

On February 25, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Boatswain (T) Otto Loux, U. S. Navy, [P. 2] and referred the record to the Secretary of the Navy for transmission to the President in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes).

Opinion of the Judge Advocate General

On April 3, 1919, the Judge Advocate General placed on the record an endorsement, in part as follows:

> "The accused was found guilty of four charges, namely, 'Scandalous conduct tending to the destruction of good morals,' 'Conduct to the prejudice of good order and discipline,' 'Conduct unbecoming an officer and a gentleman,' and 'Drunkenness.' The specifications under the first three charges are identical in phraseology. It has repeatedly been held that while it is proper and, indeed, advisable to prefer as many charges as necessarily are required to provide for every contingency in the evidence, still it is contrary to the policy of the department to prefer a multiplicity of charges covering the same offense unless the legal character of the delictum cannot be precisely known or defined until developed by the proof. (Naval Courts and Boards, 1917, p. 77, and C. M. O. 42, 1914, p. 7; ibid. 49, 1915, 18). Inasmuch as the offense alleged in the specifications of the first three charges, which the court found proved, is fully covered in the specification of the first charge, and since there is no aggravating circumstance set forth under the second and third charges which distinguish them from the first, and in consideration of the foregoing remarks, it is recommended that the second and third charges and the specifications thereunder of the general court martial in the foregoing case of Boatswain (T) Otto Loux, U. S. Navy, be disapproved. It is further recommended that the naval prison at the Navy Yard, Portsmouth, N. H., be designated as the place for the execution of so much of the sentence as involves confinement, but that the period of confinement be reduced to three years.
>
> "Subject to the foregoing remarks, in the opinion of this office, the proceedings, the findings on the first and fourth charges, the specifications thereunder, and the sentence of the general court martial in the foregoing case of Boatswain (T) Otto Loux, U. S. Navy, are legal."

[C. M. O. 177—1919]

[P. 3] Concurrence of the Bureau of Navigation

On April 17, 1919, the Bureau of Navigation concurred in the action taken by the convening authority as amended by the endorsement of the Judge Advocate General and recommended approval thereof.

Action of the Secretary of the Navy

On April 24, 1919, the Acting Secretary of the Navy approved the remarks and recommendations of the Judge Advocate General and the Bureau of Navigation and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence, as reduced, be confirmed.

Action of the President

On May 11, 1919, the President of the United States confirmed the sentence, as reduced, in the foregoing case of Boatswain (T) Otto Loux, U. S. Navy.

C. M. O. 177—1919

[P. 1] Machinist (T) Willie Nelson Andress, U. S. Navy, was tried by general court martial on January 30, 1919, on board of the U. S. S. *Chester* by order of the Commander, Squadron Three, Patrol Force, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Absence from station and duty after leave had expired (two specifications).

Sentence

"The court therefore sentences him, Machinist (T) Willie Nelson Andress, United States Navy, to be reduced to the rating of chief machinist's mate, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards, 1917."

Action of the Convening Authority

On March 5, 1919, the convening authority endorsed the record as follows:

"In reviewing the record of proceedings of the general court martial in the foregoing case of Machinist (T) Willie Nelson Andress, U. S. Navy, the convening authority notes that although the accused was not represented by counsel, and made a statement to the court not under oath, the record does not disclose whether the provisions of section 253 (*a*), Naval Courts and Boards, 1917, were complied with. The convening authority is of the opinion, however, that this irregularity is not sufficient to invalidate the proceedings. Subject to the above remarks, the proceedings and findings are approved.

"The convening authority also notes that the sentence provides that the accused, a machinist (T), U. S. Navy, 'be reduced to the rating of chief machinist's mate.' Although the court has not expressly stated that the accused's provisional appointment is to be revoked, the convening authority is of the opinion that this is necessarily implied from the court's language, and that the omission to so expressly state does not invalidate the sentence. The sentence also provides that the accused 'shall suffer all the [P. 2] other accessories of said sentence as prescribed by section 349, Naval Courts and Boards, 1917,' although the sentence provides for no term of confinement which this provision is intended to accompany. This portion of the sentence can be given no legal effect, and is therefore considered as surplusage.

"The convening authority would return the record to the court for revision of its sentence in accordance with the above remarks, were it not impracticable to do so, owing to the fact that one member has already been relieved and the remaining five members are now on duty at various widely

separated points. Subject to the foregoing remarks, the sentence is therefore approved. The accused will be released from arrest, and restored to duty in the rating of chief machinist's mate, U. S. Navy."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 29, 1919, the Judge Advocate General placed an endorsement on the on the record, in part, as follows:

"The accused was found guilty of 'Absence from station and duty after leave had expired' (two specifications), and sentenced 'to be reduced to the rating of chief machinist's mate, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards, 1917.' That part of the sentence involving reduction to an enlisted rating was approved by the convening authority, March 5, 1919, and the accused ordered released from arrest and restored to duty in the rating of chief machinist's mate.

"The department has heretofore held that the sentence of reduction to an enlisted rating can lawfully be inflicted on an officer only for the offense of 'Absence from his command or his station or duty without leave,' and the sentence has been set aside by the department when imposed as a punishment for other offenses (C. M. O. 34–1918).

"Subject to the foregoing remarks, it is my opinion that the proceedings and findings of the general court martial in the foregoing case of Machinist (T) Willie Nelson Andress, U. S. Navy are legal, and that the sentence is illegal. It is recommended that the sentence be set aside."

CONCURRENCE OF THE BUREAU OF NAVIGATION

On May 6, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

On May 15, 1919, the Acting Secretary of the Navy approved the foregoing recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, and directed that the accused be restored to duty in his former status.

C. M. O. 181—1919

[P. 1] Lieutenant Robert N. Torrence, U. S. Naval Reserve Force, was tried by general court martial at the Navy Yard, New York, N. Y., on January 29, 1919, by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Using abusive, profane, and obscene language toward his superior officer (one specification).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and "acquitted" the accused of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Robert N. Torrence, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by one of the five members of the court, was spread upon the record:

"In consideration of the good character of the accused, as shown by the evidence, and the fact that he testified that he took the drug as a medicine,

[C. M. O. 182—1919]

I recommend Robert R. (sic) Torrence, lieutenant, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 12, 1919, the Judge Advocate General placed the following endorsement on the record:

"The accused was tried on the charge of 'Drunkenness' and 'Using abusive, profane, and obscene language toward his superior [P. 2] officer.' The evidence shows that the accused was suffering from a cold, for which he had taken some cough medicine containing, unknown to him, a narcotic and causing the condition as alleged in the specification under the charge of 'Drunkenness.' The court accordingly acquitted the accused of the charge of 'Drunkenness,' but found him guilty of 'Using abusive, profane, and obscene language toward his superior officer.' The department returned the record of proceedings to the court for revision of its findings on the second charge, being of the opinion that the accused, having been acquitted of drunkenness, should not, in view of the fact that his intoxication was caused by medicine and was not a voluntary act of drunkenness, be held accountable for the acts alleged in the specification under charge II. Owing to the detachment of a member, the court was unable to proceed in revision. It is, therefore, recommended that the proceedings and the findings on charge I be approved, but that the findings on charge II and the specification thereunder and the sentence be disapproved, and that the accused Lieutenant Robert N. Torrence, U. S. Naval Reserve Force be released from arrest and restored to duty."

CONCURRENCE OF THE BUREAU OF NAVIGATION

On May 16, 1919, the Bureau of Navigation concurred in the foregoing recommendation of the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

The foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved.

C. M. O. 182—1919

[P. 1] Commander James B. Gilmer, U. S. Navy, was tried by general court martial on March 7, 1919, at Hoboken, N. J., by order of the Commander, Cruiser Force, Atlantic Fleet, and found guilty of the following charges:

Charge I.—Through negligence suffering a vessel of the Navy to be run upon a rock and lost (one specification).

Charge II.—Culpable inefficiency in the performance of duty (two specifications).

SENTENCE

"The court therefore sentences him, Commander James B. Gilmer, U. S. Navy, to lose twenty (20) numbers in his temporary grade of commander, and to lose twenty (20) numbers in his permanent grade of lieutenant commander."

RETURNED FOR REVISION

On March 14, 1919, the convening authority returned the record to the court with the direction that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was not adequate to the offense found proved.

ACTION IN REVISION

The court decided to revoke its former sentence and substituted therefor the following:

"The court therefore sentences him, Commander James B. Gilmer, U. S. Navy, to lose fifty (50) numbers in his temporary grade of commander and

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to lose fifty (50) numbers in his permanent grade of lieutenant commander."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"Believing that the testimony clearly indicates that there was no conscious negligence on the part of Commander James [P. 2] B. Gilmer, U. S. Navy, we recommend him to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On March 15, 1919, the convening authority approved the proceedings, findings, and sentence in revision, of the general court martial in the foregoing case of Commander James B. Gilmer, U. S. Navy, but, in view of the unanimous recommendation to clemency, reduced the loss of numbers to forty (40) in his temporary grade of commander, and forty (40) in his permanent grade of lieutenant commander, and directed that the accused be released from arrest and restored to duty.

OPINION OF THE JUDGE ADVOCATE GENERAL

On March 31, 1919, the Judge Advocate General placed on the record an endorsement, in part, as follows:

"The first charge 'Through negligence suffering a vessel of the Navy to be run upon a rock and lost' is irregular in that such a charge is not in the language authorized by article 8, section 11, of the Articles for the Government of the Navy. The charge should have been 'Through negligence suffering a vessel of the Navy to be run upon a rock and stranded.'

"From a careful review of the evidence, I am of the opinion that the words 'well knowing' in the first specification of the second charge are not proved. Said words, however, are not vital to the specification, for without them the specification will still support the charge.

"Subject to the above remarks, in the opinion of this office, the proceedings, the findings and sentence, and the action of the convening authority thereon, of the general court martial in the foregoing case of Commander James B. Gilmer, U. S. Navy, are legal."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On April 22, 1919, the Bureau of Navigation concurred in the action taken by the commander, Cruiser Force, Atlantic Fleet, and further recommended that the sentence in the case of Commander Gilmer be mitigated to the loss of twenty (20) numbers in his temporary grade of commander and the loss of twenty (20) numbers in his permanent grade of lieutenant commander.

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

The sentence of the general court martial in the foregoing case of Commander James B. Gilmer, U. S. Navy, is mitigated to the loss of ten (10) numbers in his temporary grade of commander and the loss of ten (10) numbers in his permanent grade of lieutenant commander.

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[P. 1] Lieutenant Theodore E. Chandler, U. S. Navy, was tried by general court martial on January 13, 1919, at U. S. Naval Base Seven, by order of the Commander, Patrol Force, United States Atlantic Fleet, on the following charges:

Charge I.—Neglect of duty (one specification).

Charge II.—Culpable inefficiency in the performance of duty (one specification).

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FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charged "not proved," the accused "not guilty" of the second charge, and "fully acquitted" the accused of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Theodore E. Chandler, U. S. Navy, to lose twenty (20) numbers in his grade."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the inexperience of the accused, of his excellent reputation as a capable young officer of promise, and of the unusual combination of circumstances which contributed to the mistake made in identifying the light in question, we recommend Lieutenant Theodore E. Chandler, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On January 23, 1919, the convening authority, after reviewing the proceedings of the general court martial in this case, commenting upon the extenuating circumstances attending the disaster, and considering the unanimous recommendation to clemency [P. 2]__by the members of the court, approved the proceedings, findings, and sentence, but reduced the sentence of the accused to a loss of ten numbers in his grade, and directed that he be released from arrest and restored to duty.

REMARKS AND OPINION OF THE JUDGE ADVOCATE GENERAL

On April 22, 1919, the Judge Advocate General placed upon the record an endorsement, in part, as follows:

> "In reviewing this case it appears that the specification of charge II was objected to upon the ground that it was 'unreasonable, unjust, and illogical,' but that the objection was not sustained by the court. This specification was open to objection upon the ground of insufficiency, but no such objection was made, and, as the accused was acquitted upon charge II, no further comment appears necessary.
>
> "The letter transmitting the charge and specification is dated prior to to the precept convening the court. This method of procedure is clearly irregular, but not sufficiently so to invalidate (Court-Martial Record 39225).
>
> "Subject to the above remarks, in the opinion of this office, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Theodore E. Chandler, U. S. Navy, are legal."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On May 6, 1919, the Bureau of Navigation concurred in the action taken by the commander, Patrol Force, U. S. Atlantic Fleet, and further recommended that the sentence in this case be mitigated to the loss of five (5) numbers in grade.

ACTION OF THE SECRETARY OF THE NAVY

In view of all the circumstances of the case, and in accordance with the recommendation of the Chief of the Bureau of Navigation, the sentence in the foregoing case of Lieutenant Theodore E. Chandler, U. S. Navy, is mitigated to the loss of five (5) numbers in grade.

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[P. 1] Lieutenant Commander A. E. Hargreaves, U. S. Naval Reserve Force, was tried by general court martial on January 27, 1919, at U. S. Naval Base Twenty-nine, by order of the Base Commander, and found guilty of the following charges, proved by plea:

Charge I.—Absence from command without leave (one specification).

Charge II.—Desertion (one specification).

Sentence

"The court therefore sentences him, Lieutenant Commander A. E. Hargreaves, U. S. Naval Reserve Force, to be reduced to the rating of seaman second class, and to be confined for a period of fifteen (15) years; then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards, 1917."

Action of the Convening Authority

On January 29, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case, reduced the period of confinement to ten (10) years, and referred the record to the Secretary of the Navy for transmission to the President in conformity with article 53 of the Articles for the Government of the Navy.

Opinion and Recommendation of the Judge Advocate General

On March 17, 1919, the Judge Advocate General placed an endorsement on the record as follows:

"The accused in this case was charged with 'Absence from command without leave' and 'Desertion' for the same act or period of time during which he was absent.

[P. 2] "'The duplication of charges for the same act or omission will be avoided except when, by reason of lack of definite information as to available evidence, it may be necessary to charge the same act or omission as constituting two or more distinct offenses. When the same act or omission in its different aspects is charged as constituting two or more offenses the court, even though it arrives at a finding of guilty in respect of two or more specifications, should impose punishment only with reference to the act or omission in its most important aspect; and if this rule be not observed by the court the reviewing authority should take the necessary action' (Manual for Courts-Martial, 1917, U. S. Army, p. 33; see also Naval Digest, p. 63, sec. 61, and C. M. O. No. 35, 1913).

"The offense having been committed and trial held during time of war, the sentence adjudged for the highest degree of the crime of which the accused was found guilty is not in excess of that authorized by law.

"Subject to the above, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander A. E. Hargreaves, U. S. Naval Reserve Force, are, in the opinion of this office legal."

Concurrence of the Bureau of Navigation

On March 20, 1919, the Bureau of Navigation concurred in the action taken by the base commander, U. S. Naval Base No. 29.

Action of the Secretary of the Navy

On April 11, 1919, the Acting Secretary of the Navy took action as follows:

"In view of certain affidavits submitted relative to the physical condition of Lieutenant Commander A. E. Hargreaves, U. S. Naval Reserve Force, that part of the sentence involving imprisonment, with corresponding accessories, is remitted. In conformity with article 53 of the Articles for the

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Government of the Navy (section 1624 of the Revised Statutes), the record is submitted to the President of the United States, with the [P. 3] recommendation that the sentence, as mitigated, be confirmed."

ACTION OF THE PRESIDENT

On May 4, 1919, the President of the United States confirmed the sentence, as mitigated, in the foregoing case of Lieutenant Commander A. E. Hargreaves, U. S. Naval Reserve Force.

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[P. 23] CHALLENGE: FOR OPINION FORMED; ERROR FOR COURT NOT TO SUSTAIN, WHEN MEMBER ADMITS HE HAS FORMED AN OPINION PREJUDICIAL TO ACCUSED.

During the trial of an accused on the charges of "Perjury" and "Scandalous conduct tending to the destruction of good morals," counsel for accused challenged a member of the court on the ground that (in a former related case, while acting as counsel for A, when A was a witness, testifying in the case of B) he had formed an opinion as to several material points in issue in this case. The challenged member was examined on his voir dire. A consideration of the facts brought out by this examination shows the challenged member was convinced that one C had been manhandled and abused, as alleged in a specification of the second charge in this case, and that he considered a mere admission of one's presence during the above-mentioned procedure as incriminating. The Judge Advocate General is of opinion that the court erred in not sustaining the challenge under the circumstances as set out (File 26262–6318, J. A. G., May 9, 1919).

CHARGE: AS LAID, NOT ONE OF THOSE AUTHORIZED BY NAVAL COURTS AND BOARDS, 1917.

In a case recently reviewed by the department the accused was charged with "Violation of a lawful order issued by the commandant, fifteenth naval district." This charge is not one of those authorized by Naval Courts and Boards, 1917. The offense should have been laid under the charge of "Conduct to the prejudice of good order and discipline" or "Disobeying the lawful order of his superior officer" (File 26262–6394, J. A. G., May 3, 1919).

CONVENING AUTHORITY: REMARKS OF, SHOULD NOT CONTAIN, IN EFFECT, THREAT OF DISCIPLINARY ACTION TO MEMBERS OF COURT.

Where, in returning the record of proceedings in a recent case to the court for revision, the convening authority said, in part, as follows:

> "A failure to appreciate the principles set forth above indicates a lack of appreciation of the obligations and responsibilities of a commissioned officer to such an extent that corrective measures must be taken, as the Government has a right to [p. 24] expect and demands of its commissioned personnel that they shall exercise the power vested in them as members of a court-martial tribunal as a safeguard for other persons in the performance of their duty."

The Judge Advocate General was of opinion that this, in effect, constituted a threat of disciplinary action to members of the court, unless the finding and sentence were revised in accordance with the views of the convening authority, and is entirely contrary to the established principles of justice. "It is the duty of the convening authority when he considers the proceedings of the court erroneous or ill-advised to reconvene the court for the purpose of correcting the alleged defects, at the same time furnishing the court with the grounds of his opinion. However, it is not within the province of the convening authority to endeavor to coerce the court to adopt his view by threats of disciplinary action. There is an end to the administration of justice by a court martial if the con-

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vening authority may by threats cause a sentence to be increased until he gets the court to adjudge the sentence he desires." (File 26262–6318, J. A. G., May 9, 1919).

EVIDENCE: INCONCLUSIVE.

An accused was charged with "Neglect of duty," the specification thereunder alleging that he did suffer a prisoner to secure and indulge in intoxicating liquor.

> "The word 'suffer' is defined as 'to allow,' 'to admit,' or 'permit.' It implies a knowledge of the thing suffered or done; and a conviction for suffering a thing to be done cannot be sustained without proof of knowledge. (See *Gregory* v. *U. S.*, Fed. Cas. No. 5803.) The prosecution established the fact that the accused was on duty in charge of one of the prisoners, and that while on such duty both he and the prisoner were under the influence of intoxicating liquor. However, it is only to be implied from the evidence of the prosecution that the accused 'suffered' the prisoner to obtain and indulge in his liquor. Against the prosecution's case the defense introduced evidence to show that the prisoner had an opportunity to procure liquor unknown to the accused, his guard, and the prisoner testified as to how he had obtained the liquor and that it was done without the knowledge of the accused. Furthermore, the accused went on the stand in his own behalf and denied that he was aware of how the prisoner procured the intoxicating liquor."

The Judge Advocate General, being of opinion that the specification of the above charge was not proved beyond a reasonable doubt, recommended disapproval of the findings on said charge and the specification thereunder (File 26262–6453, J. A. G., May 28, 1919).

[P. 25] EVIDENCE: INSUFFICIENT TO CONVICT.

An accused was charged with, and found guilty of, "Stealing property of the United States intended for the naval service thereof." The evidence in support of the specification to the charge shows merely that the articles of Government property alleged to have been stolen were found in the room occupied by the accused. No attempt was made by the accused to explain this possession. However, no evidence was introduced to prove that these articles were actually stolen. In the opinion of the Judge Advocate General the finding of guilty on the above charge and specification thereunder is not supported by the evidence, as mere unexplained possession of Government property does not prove the theft thereof, unless it is shown by other evidence that a theft of the property in question has been actually consummated. (See G. C. M. Rec. No. 42393, File 26262–6012; File 26251–20069, J. A. G., May 15, 1919.)

FINDINGS: LESS DEGREE THAN CHARGED; IMPROPER WHEN SPECIFICATION ALLEGES FACTS SUFFICIENT TO SUPPORT CHARGE AS LAID; IMPROPER TO FIND IN ALTERNATIVE FORM.

An accused was charged with "Scandalous conduct tending to the destruction of good morals." The finding in revision of the court on a specification of said charge reads as follows:

> "The second specification of the second charge. Proved.
> "And that the accused, * * * is of the second charge guilty in a less degree than charged, guilty of cruelty toward, or oppression of, or maltreating of, a person subject to his orders."

The Judge Advocate General is of opinion that the finding is improper, in that it is in an alternative form and does not state affirmatively of what charge the accused is guilty. Further, that the court, having found the specification of the charge proved, erred in finding the accused "guilty in a less degree than charged," the facts alleged being sufficient to substantiate a charge of "Scandalous conduct

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tending to the destruction of good morals." The action of the court was such as to substitute an entirely new and separate charge, and not one contained in the original charge (File 26262–6318, J. A. G., May 9, 1919).

IDENTITY OF ACCUSED: ESSENTIAL IN PROVING DESERTION.

A alias B was charged with desertion, and found guilty. Accused pleaded not guilty to the charge. The only evidence introduced by the prosecution consisted of an entry in the service record book of one A, showing A to have been declared a deserter, and the enlistment contract of B. No evidence was introduced to identify B as being A. The Judge Advocate General, being of opinion that the prosecution had failed to identify [P. 26] B as A, recommended disapproval of the proceedings, findings, and sentence, and that the accused be released from arrest and restored to duty (File 26251–20590, J. A. G., May 23, 1919).

OFFENSE: FACTS AND CIRCUMSTANCES CONSTITUTING, MUST BE SET FORTH WITH CERTAINTY AND PRECISION.

Where an accused was charged with "Refusing to obey the lawful order of his superior officer," the specification thereunder alleging that the accused "having been assigned 20 hours extra duty by * * * his commanding officer and superior officer, did willfully refuse to perform said lawful duty assigned him by his superior officer," the Judge Advocate General was of opinion that the foregoing specification was insufficient to support the charge, in that it is not alleged therein that the accused was given an order to do any particular duty or indeed any duty at all. The word "assigned" is defined as "to allot." It is not at all synonymous with the word "order." It is a rule of pleading that the facts and circumstances constituting the offense must be set forth with certainty and precision, and the accused charged directly and positively with having committed such offense. (See Naval Courts and Boards, 1917, sections 63, 71, and 75; File 26262–6463, J. A. G., May 28, 1919).

RANK (REDUCTION IN): HOW SENTENCE TO, SHOULD BE CONSTRUED IN CASE OF CORPORAL AND PRIVATE FIRST CLASS.

In a recent summary-court-martial case a marine was sentenced to be reduced from corporal to private first class. As said corporal had never had the rank of private first class, and in view of File 26806–163, J. A. G., Dec. 13, 1918, cited in C. M. O. No. 190, Bul., p. 26, the legality of such sentence is questioned.

In the opinion of the Judge Advocate General, the sentence is legal, as article 30 of the Articles for the Government of the Navy provides for "reduction to the next inferior rating," and the next inferior rating to corporal is that of private first class, as shown by section 449 of Naval Courts and Boards, 1917, as amended by Changes No. 2, March 31, 1919—thus overruling in this regard the above-cited opinion (File 26287–5529, J. A. G., March 17, 1919).

SENTENCE, MITIGATION OF: CONDITIONS UNDER WHICH IT SHOULD BE CONSIDERED A NULLITY.

In a fleet general-court-martial case recently reviewed it was noted that the convening authority mitigated the sentence in accordance with articles 114 to 122, inclusive, of the Manual for the Government of U. S. Naval Prisons. As the charge of which the accused was found guilty was one involving moral turpitude, [P. 27] the mitigation prescribed by the convening authority was held to be a nullity. (See C. M. O. 141, 1918, 22; File 26262–6424, J. A. G., May 14, 1919).

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SPECIFICATION: AMENDMENT OF, MUST CONTAIN ALL MATERIAL AVERMENTS NECESSARY TO SUPPORT CHARGE.

Where an accused was charged with "Desertion," and found guilty of "Absence from station and duty without leave," and, in amending the specification, the court failed to include therein that his absence was without permission from proper authority, so that the specification as amended fails to support the charge of "Absence from station and duty without leave," the Judge Advocate General was of opinion that this constituted error sufficiently prejudicial to the interests of the accused to invalidate, and recommended that the findings upon the charge and specification thereunder be disapproved (File 26251–20106, J. A. G., May 7, 1919).

TESTIMONY INCONSISTENT WITH PLEA: BY ACCUSED.

Accused pleaded guilty to the charge of "Absence from station and duty after leave had expired." The prosecution offered no evidence. The accused took the stand in his own behalf and testified that he was taken sick after his leave began and before it expired, and that he was in bed for 25 days, during which time he was under a doctor's care. In corroboration of his testimony he presented a certificate from the doctor covering the entire period of absence. The Judge Advocate General was of opinion that the court committed a fatal error by not proceeding in accordance with sections 310 and 312, Naval Courts and Boards, 1917, inasmuch as the above testimony is clearly inconsistent with the accused's plea of guilty to the charge and specification thereunder, as sickness is a valid defense to the charge of "Absence from station and duty after leave had expired." (See Winthrop's Military Law and Precedents, 2d ed., p. 939; File 26251–20655, J. A. G., May 29, 1919).

[P. 28] SEA SERVICE (ACTUAL) ON SEAGOING SHIPS: WITHIN THE MEANING OF THE LAW ON SELECTION.

The Bureau of Navigation presents the question "whether or not the Secretary's definition of 'actual sea service on seagoing ships,' as used with reference to promotion in the act of August 29, 1916, as amended by the act of July 1, 1918 (40 Stat. 717, 718), is final and binding, or whether the final decision in such matter must come from the Treasury officials," and said Bureau prefers "to have the matter within administrative definition, such definition to be binding both upon the Board of Selection and the Treasury officials."

The act of August 29, 1916 (39 Stat. 579), as amended by the act of July 1, 1918 (40 Stat. 717, 718), provides:

> "On and after June thirtieth, nineteen hundred and twenty, no captain, commander, or lieutenant commander shall be promoted unless he has had not less than two years' actual sea service on seagoing ships in the grade in which serving, or who is more than fifty-six, fifty, or forty-five years of age, respectively: *Provided*, That in exceptional cases where officers are specifically designated during war or national emergency declared by the President by the Secretary of the Navy as performing, or as having performed, such highly important duties on shore that their services cannot be or could not have been spared from such assignment without serious prejudice to the successful prosecution of the war, the qualification of sea service in the cases of those officers so specifically designated shall not apply while the United States is at war, or during a national emergency declared by the President, or within two and one-half years subsequent to the ending of such war or national emergency."

In answer to the above, the Judge Advocate General held as follows:

> "Substantially, the identical question has frequently been considered by the courts in connection with the application of section 1571, Revised Statutes, which provided that,
>
> " 'No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department and in vessels employed

by authority of law.' In the case of [P. 29] *Symonds* v. *United States* (21 Ct. Cls. 148), it was held, quoting syllabus:

"'A secretary of the Navy cannot change the character of an officer's service from sea service to shore service by simply ordering that it be so regarded. Sea service is defined by Revised Statutes (sec. 1571) and the final construction of the statute is vested in the judiciary.'

"In the course of its opinion in the case cited, the Court of Claims stated:

"'The legal essence of things cannot be changed by a mere name—by the volition of an executive officer in the discharge of executive duty. Section 1571 was intended by Congress to define what is sea service, and it is not reserved to the Secretary of the Navy to perform that duty by regulation. If the section does not perform the function of definition in the clearest light, it is reserved to courts (which must ultimately construe the law) to gather, if possible, the purpose and will of the legislature from the best and highest sources of information.'

"The above decision of the Court of Claims was affirmed by the Supreme Court (120 U. S. 46), which held, quoting syllabus:

"'The authority of the head of an executive department to issue orders and regulations under directions of the President to have the force of law is subject to the condition that they conflict with no act of Congress; and an order by the Secretary of the Navy that a service shall not be a sea service which Congress has directed shall be a sea service is invalid.'

"In the course of its opinion the Supreme Court referred to a regulation issued by the Secretary of the Navy, defining which 'will be regarded by the department as sea service,' and stated with reference thereto:

"'Assuming that the first clause of that regulation contemplates services at sea under the orders of the department, in the vessel employed with authority of law, it is clear that all the different kinds of services described therein are services performed at sea in the meaning of section 1556. But they are to be deemed such, not because the Secretary of the Navy has announced that the department will so regard them, but because they are, in fact, services performed at sea, and not on shore.'

"In the case of *Strong* v. *United States* (23 Ct. Cls. 10), it appeared that the officer was ordered by the Secretary of the Navy to duty on board a receiving ship, the order containing the statement 'This employment on shore duty is required by the public interests.' The court held that the duty in question was, under the law, sea duty, and with reference to the order of the Secretary of the Navy, characterizing same as shore duty, decided, quoting syllabus:

"'The Navy Department cannot arbitrarily indicate the legal character of a service, and thereby determine the compensation incident to it.'

[P. 30] "This decision of the Court of Claims was also affirmed by the Supreme Court (*Strong* v. *U. S.*, 125 U. S. 656).

"The words of the present law, 'actual sea service on seagoing ships,' are clear and unambiguous. There is no one word in this expression which can properly be said to be doubtful, or which may be rejected as surplusage, or which cannot be given its ordinary meaning and effect. It is my opinion that this language is too plain to require construction, and no difficulty so far as I can see should be experienced in determining in any case whether the services rendered by a particular officer at a particular time are such as to constitute 'actual sea service on seagoing ships.' Insofar as this department is concerned, the application of this language to particular cases is an administrative question, under the cognizance of the proper administrative officers of the department, and not a question of law under the jurisdiction of the Judge Advocate General.

"It cannot, however, in the light of the decisions hereinbefore quoted, be said that the Secretary of Navy's designation of certain duty as 'actual sea service on sea-going ships,' will be binding on the Treasury officials. If the Secretary should, by mistake, designate that as 'actual' sea service which was merely 'constructive' sea service; or should designate that as service 'on' seagoing ships which was merely service in connection with seagoing ships, or should designate that as 'actual sea service' which was, in fact, actual shore service, the Treasury officials and the courts would undoubtedly apply the principle enunciated in the authorities above cited, that the Secretary

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cannot change the character of an officer's service by simply ordering that it shall be regarded as something different from that which it was in fact. Insofar as the board of selection is concerned, the question whether an officer has rendered the required 'actual sea service on seagoing ships' is not one for its consideration. He cannot be 'promoted' under the law until he has had the required service, but he may be recommended for promotion, and it becomes the duty of the Navy Department to see that he is not 'promoted' until he has had the necessary service.

"The law provides that the Secretary of the Navy shall submit to the selection board 'the names of all officers who are eligible for consideration for selection as herein authorized, together with the record of each officer'; and the board, in making its recommendations is required to certify that it 'has carefully considered the case of every officer eligible for consideration under the provisions of this law.' I have no hesitancy in advising you that, under the law it is the duty of the Secretary of the Navy to determine what officers are eligible for consideration for selection, and when he has done so and furnished the names of such officers to the board, it has neither the duty nor the responsibility of determining for itself whether or not the Secretary of the Navy has correctly decided.

[P. 31] "Further you state: 'In all cases so far considered, the difficulty is with officers on the staffs of flag officers, who, while attached to actual seagoing ships, themselves, actually live and perform duty on shore.' If, as you state, these officers 'actually * * * perform duty on shore,' it is clear that they are not performing 'actual sea service on seagoing ships.' The fact that they are attached to seagoing ships, and are performing duty in connection with seagoing ships, might give them a status of constructive sea service, but the law, for this purpose, requires 'actual' sea service 'on' seagoing ships, and not constructive sea service in connection with seagoing ships. If, therefore, you should finally determine in these cases, as an administrative matter, that the officers in question, as stated by you in the reference, 'actually live and perform duty on shore' (and not 'actual sea service on seagoing ships'), and this determination should be accepted by the Secretary of the Navy, I think these cases may properly be brought within the proviso of the law above quoted, relating to officers performing, or who have performed 'duties on shore,' and should their duties on shore be specifically designated by the Secretary of the Navy as so highly important 'that their services cannot be or could not have been spared from such assignment without serious prejudice to the successful prosecution of the war,' the qualification of sea service required by the law now under consideration will not apply to them 'while the United States is at war, or during a national emergency declared by the President, or within two and one-half years subsequent to the ending of such war or national emergency'" (File 28687–26, J. A. G., May 1, 1919).

CITIZENSHIP: RELATIVE TO CERTAIN PORTO RICANS ENLISTED OR ENROLLED IN THE NAVAL SERVICE.

An analysis of the provisions of the act of March 2, 1917, discloses that the following classes of Porto Ricans have not had United States citizenship conferred upon them, viz:

(*a*) Those inhabitants who, on or before April 11, 1900, elected to preserve their allegiance to the Crown of Spain;

(*b*) those natives who were temporarily absent from Porto Rico on April 11, 1899, and were not permanently residing therein on March 2, 1917;

(*c*) those natives who are citizens of any foreign country; and

(*d*) those persons who, within six months after March 2, 1917, made declarations to retain their previous political status.

Further provision for the naturalization of Porto Ricans was made in the act of May 9, 1918 (40 Stat. 542), which provides the manner in which "any alien, or any Porto Rican not a citizen of the United States, of the age of 21 years and upward," [P. 32] who is serving or has served in the naval service, may become naturalized. This provision is applicable to Porto Ricans coming within the four exceptions noted above, and was deemed necessary in view of the fact that some of the courts have held that persons owing permanent

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allegiance to the United States, such as Porto Ricans and Filipinos, are not aliens within the meaning of the naturalization laws and that therefore the provision heretofore, existing for naturalization of aliens in the naval service did not include such persons owing permanent allegiance to the United States.

The Judge Advocate General was therefore of opinion that if the Porto Ricans in question do not come within the exceptions as set forth above, they are to be regarded as citizens of the United States and are entitled to the benefits of article R–4427 U. S. Naval Regulations, 1913. On the other hand, if they come within the exceptions noted above and citizenship has not been conferred upon them individually, by special act of Congress, or by a court of competent jurisdiction, the mere fact of their serving in the naval service would not make them citizens of the United States, but such citizenship could be conferred upon them now by a court of competent jurisdiction in accordance with the provisions of the said act of May 9, 1918 (File 6693–29: 1, J. A. G., May 2, 1919).

DEATH, PRESUMPTIVE: TIME NECESSARY TO ELAPSE BEFORE ISSUE OF CERTIFICATE OF.

The Major General Commandant, U. S. Marine Corps, requested the opinion of the Judge Advocate General as to whether, in the case of marines serving overseas with the American Expeditionary Forces who have been reported missing in action or who have been unaccounted for during a period of over six months since the cessation of hostilities, they may be carried officially on the records as dead and certificates of presumptive death may be issued to the Auditor for the Navy Department, Bureau of War Risk Insurance, insurance companies, etc.

It was stated that after efforts made by the Army authorities abroad to locate all missing men, there remained on a certain date 262 marines unaccounted for; and a letter dated May 14, 1919, from the Compensation and Claims Division of the Bureau of War Risk Insurance, relative to the case of a certain marine who was reported wounded in action and missing on June 6, 1918, and ever since unaccounted for, was quoted, in part, as follows:

> "In view of the extremely long period over which he has been reported missing, we are wondering whether it is not possible for your office to take action similar to that of The Adjutant General's office in cases of this kind. It is their practice to assume death after a period of six months, when official report is furnished this office."

[P. 33] The Judge Advocate General rendered the following opinion:

> "The action of The Adjutant General's office, above referred to, is predicated on an opinion dated April 4, 1918, of the Judge Advocate General of the Army, holding as follows:
>
> "'*Presumption of death in case of officer or soldier reported "missing" in action, or in disaster at sea.*—When a man is last known of as going into action and has been reported as "missing in action," and when sufficient time has thereafter elapsed so that a report of him would have been received through the Red Cross or other recognized channel in case he has been taken prisoner, and there is still no information as to his existence or whereabouts, the only reasonable presumption, in view of present conditions and methods of warfare, is that he is dead. Consequently, where a man is reported as "missing in action," and reasonable efforts to locate him, made through regular channels, have proved unsuccessful, after the lapse of a reasonable time the records of The Adjutant General should carry the man as dead, and the rights of his beneficiaries to compensation and insurance should be settled on that basis. What constitutes such reasonable time is a question of fact in each case, but it would be an extraordinary case where such reasonable time would exceed six months. Similarly the officers and enlisted men on the *Tuscania* when she was torpedoed, who were reported missing after the disaster and who have remained unaccounted for for two months thereafter, should be recorded as dead on the records of The Adjutant General, since there is every reasonable probability that none of such persons have survived.'
>
> "Upon the question of presumptive death this department has heretofore decided, in a specific case where a submarine known to contain certain persons in the naval service, sank and remained submerged about two and

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one-half months, that said persons were dead and that the necessary steps should be taken without further delay to pay the death gratuity authorized by law to their beneficiaries (File 26453–137, Sec. Nav., June 17, 1915; C. M. O. 22, 1915, 7).

"In the matter submitted by you it is quite probable that in many instances the immediate families or dependent relatives of the marines, above referred to as being unaccounted for, are suffering a hardship through the delay in the adjudication of any claims they may have on account of the death of these marines, and it is in their interest as well as that of the Government that definite action be taken along the lines pursued by the War Department, as indicated above. I am, therefore, of opinion that where a marine is last known of as going into action and is thereafter reported as missing in action and reasonable efforts to locate him, made through regular channels, have proven unsuccessful after the lapse of at least six months, the records should carry such marine as dead, and the certificate of presumptive death should be issued to the Auditor [P. 34] for the Navy Department, Bureau of War Risk Insurance, insurance companies, etc. Care should, of course, be exercised so as not to report deserters as presumptively dead, and for that reason it is essential to ascertain definitely in each case whether the given marine was last known of as going into action and thereafter reported as missing in action. Cases not coming within the foregoing rules should be considered separately on their merits and action thereon will be dependent upon the evidence available" (File 11112–1320, J. A. G. May 21, 1919).

ENLISTMENT: FAILURE TO COMPLY WITH REQUISITES FOR.

The facts in this case, as disclosed by the papers, are that the man in question applied for enlistment in the Navy, but did not sign the shipping articles; that the officer supposed to have enlisted him did not sign the service record in his case; that he reported for duty, served as a machinist's mate, second class, and although not so stated, he presumably received the pay and allowances of such rating. He now desires to be released from the service.

The error in this case was the error of the Government, not the error, mistake, or fraud of the man; so there is no ground for application of the principle established in fraudulent enlistment cases that a man cannot take advantage of his own wrong.

This case differs from that of one who has taken all the steps necessary to complete his enlistment, but refuses to take the oath of allegiance, the taking of such oath not being essential to the validity of an enlistment. It also differs from cases of men who have served a full period of enlistment and who have thereafter been held to have constructively enlisted and to be entitled to the benefits of a regular enlistment. In the latter case what has been done is sustained as valid. But an irregular enlistment cannot be corrected as against the man; although entitled to retain all benefits received under such irregular enlistment, and subject to disciplinary action for offenses committed while occupying the status of an enlisted man in fact, he cannot be held for further service. The most that can be held here is that the man enlisted in the Navy upon an implied contract, but for no definite period, and if he now refuses to execute a formal contract and demands his release, and there are no charges pending against him, and he is not being held under sentence of court martial, he should forthwith be discharged (File 7657–882, Sec. Nav., May 2, 1919).

NAVAL ACADEMY (FOREIGN STUDENTS): STATUS OF, WITH REFERENCE TO GRADUATION AND GRANTING OF DIPLOMA TO.

A public resolution of Congress provides as follows:

"That the Secretary of the Navy be, and he hereby is, authorized to permit * * *, a citizen of Cuba, to receive instruction [P. 35] at the United States Naval Academy at Annapolis: *Provided*, That no expense shall be caused to the United States thereby, and that the said * * * shall agree to comply with all regulations for the police and discipline of the academy, to be studious, and to give his utmost efforts to accomplish the

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course in the various departments of instruction, and that the said * * * shall not be admitted to the academy until he shall have passed the mental and physical examinations prescribed for candidates from the United States, and that he shall be immediately withdrawn if deficient in studies, or conduct, and so recommended by the academic board."

The Judge Advocate General was of opinion that as the foregoing resolution did not authorize the admission of the student in question as a midshipman or authorize his admission into the naval service in any status whatever, he is not, while at the Naval Academy, subject to the laws and regulations for the government of the Navy and is not liable to trial by court martial and dismissal for misconduct; that he is not to be regarded as a member of the naval forces, but simply as a student at the Naval Academy whose presence there is authorized by law; that he is ineligible for a commission in the Navy under section 1428 of the Revised Statutes, which provides that the officers of vessels of the United States shall in all cases be citizens of the United States; that the act of July 9, 1913, which provides "That midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or staff corps of the Navy," has no application to this foreign student, for the reason that he does not occupy the status of a midshipman; and further, said statute could not be held to require the appointment of any midshipman upon graduation as an ensign in the Navy, as the commissioned officers of the United States are appointed and commissioned by the President, by and with the advice and consent of the Senate; that while the Congress of the United States may prescribe qualifications for appointment, it cannot appoint a man to office, or require the President to exercise his appointing power contrary to his judgment; and that no act of Congress can compel the President to appoint a midshipman to the office of ensign in the Navy unless he chooses to make such appointment; therefore, the said foreign student may be graduated from the Naval Academy and given a diploma as evidence of such graduation without in any way placing the Government under legal obligations to appoint him as an officer of the U. S. Navy (File 5252–120, J. A. G., May 13, 1919).

JURISDICTION: NAVAL AUTHORITIES HAVE, FOR OFFENSES COMMITTED WHILE IN UNIFORM OF THE NAVAL RESERVE FORCE.

A court of inquiry convened by the Navy Department found that A, late seaman, second-class, U. S. Naval Reserve Force, [P. 36] had illegally used while in uniform, furlough fare certificates. The act of July 1, 1918 (40 Stat. 112), provides that "Enrolled members of the Naval Reserve Force when in active service shall be subject to the laws, regulations, and orders for the government of the Regular Navy, and the Secretary of the Navy may, in his discretion, permit the members of the Naval Reserve Force to wear the uniform of their respective ranks, grades, or ratings while not in active service, and such members shall, for any act committed by them while wearing the uniform of their respective ranks, grades, or ratings, be subject to the laws, regulations, and orders for the government of the Navy." As the unlawful use of furlough fare certificates is an act punishable by the laws, regulations, and orders for the government of the Navy (sec. 1624, R. S.), in the opinion of the Acting Secretary of the Navy the jurisdiction of the naval authorities in the case of A is clearly established by the fact that the acts alleged to have been committed by him, and for which he was held under investigation, occurred while he was in the uniform of the Naval Reserve Force (File 26250–1969:7, Sec. Nav., May 3, 1919).

"LINE OF DUTY" CASES: UNDER COGNIZANCE OF SURGEON GENERAL OF THE NAVY, EXCEPT UNDER CERTAIN CIRCUMSTANCES.

Under the existing organization of the Navy Department the determination when directed by the Secretary of the Navy. However, the section of the law in cases arising upon reports of survey as to whether disease was incurred in line of duty is a matter under the cognizance of the Surgeon General, whose rulings thereupon cannot be reviewed by the Judge Advocate General except

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providing compensation for disease contracted in the line of duty provides: "That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service." Accordingly, the ruling of the Surgeon General of the Navy that an officer of the Naval Reserve Force was not in sound condition when accepted for service could not, under the law quoted (Act June 25, 1918, 40 Stat. 611), deprive any person of the compensation provided by law for disease contracted in line of duty. The administration of the law quoted is under the Bureau of War Risk Insurance of the Treasury Department (File 28550–1023, J. A. G., May 15, 1919).

JURISDICTION: OF ARMY COURT MARTIAL TO TRY MARINES DETACHED FOR DUTY WITH ARMY FOR VIOLATIONS OF ARTICLES OF WAR.

A marine was under charges for trial by Army court martial for offenses alleged to have been committed by him while an [P. 37] inmate of an Army hospital in Baltimore. It appears that the marine in question, having been wounded in the Argonne, was, upon his return to the United States, admitted to the naval hospital at Norfolk, Va., from which he was later sent to an Army hospital in Baltimore. A request that he be transferred to the naval hospital, Washington, D. C., was not complied with by the Army authorities, the reason given being that charges were pending against him. On the foregoing statement of facts, and after a review of the laws pertinent thereto, the Judge Advocate General was of opinion that inasmuch as the afore-mentioned marine was detached for duty with the Army, and it not appearing that he has ever been returned to the jurisdiction of the Navy, it follows that, under the provisions of section 1621 of the Revised Statutes, an Army general court martial has jurisdiction to bring him to trial for violations of the Articles of War (File 27228–547, J. A. G., May 26, 1919).

"MEDAL OR DECORATION": MEANING OF, AS USED IN ACT OF JULY 9, 1918.

In answer to the question, "Does the term 'medal or decoration,' as contained in the act of July 9, 1918, cover all articles such as bowls, cups, and photographs, which have been or may be tendered by such foreign governments, or has this term a meaning limited and restricted to the usual sense in which the words 'medal' and 'decoration' are employed," the Attorney General in an opinion of May 9, 1919, held that the words "medal or decoration" are used in the above-cited act in their usual meaning and do not include such articles as bowls, cups, and photographs.

MEDALS, FOREIGN: ACCEPTANCE OF, BY OFFICERS OF THE NAVY AND MARINE CORPS; "MILITARY" DEFINED.

The Army appropriation act of July 9, 1918, (40 Stat. 872), contains the following provision:

> "That any and all members of the military forces of the United States serving in the present war be, and they are hereby, permitted and authorized to accept during the present war or within one year thereafter, from the government of any of the countries engaged in war with any country with which the United States is or shall be concurrently likewise engaged in war, such decorations, when tendered, as are conferred by such government upon the members of its own military forces; and the consent of Congress required therefor by clause eight of section nine of article I of the Constitution is hereby expressly granted: *Provided*, That any officer or enlisted man of the military forces of the United States is hereby authorized to accept and wear any medal or decoration heretofore bestowed [P. 38] by the government of any of the nations concurrently engaged with the United States in the present war."

The word "military" as used in the expression "military forces of the United States" is undoubtedly broad enough to include the Navy and Marine Corps.

It has been used in this sense by the Attorney General in the statement that "every person who enters the military service of the country—officer, soldier, sailor, or marine—takes upon himself certain moral and legal engagements of duty" (7 Op. Atty. Gen. 162). It has also been used in this sense by the Supreme Court, in the statement that "the military establishment of this country is divided by the general laws of the United States into the army and the navy" (*U. S.* v. *Dunn*, 120 U. S. 249).

It does not follow from this that the word "military" whenever used in a statute by Congress is intended to include the Navy and Marine Corps; on the contrary, the cases in which the word has been used in a narrower sense are numerous. The true meaning of the word depends upon the context of the statute in which used. Thus in one case it was specifically held by the Attorney General that a statute did not embrace the Navy by the use of the word "military" therein, while in another case the word "military" as used in a statute was administratively construed by the Department of Justice to include the Navy. In the former case the Attorney General stated: "It is certain that in many instances in legal as well as ordinary literary uses military service is a comprehensive term and refers to both fighting branches of Government, the Navy as well as the Army * * *. Therefore if the context of the law would permit, I should unquestionably hold that the words 'the military service of the United States' should be construed broadly and should be deemed to include the Navy as well as the Army."

The present statute is one of a class to be liberally construed (23 Op. Atty. Gen. 78, 82), and its proper interpretation is not at all affected by the fact that it is a part of an act making appropriations for the army (7 Op. Atty. Gen. 303, 306). The context of the law indicates that the word "military" was used in this provision in a broad sense, as in preceding paragraphs the word "Army" was used repeatedly by Congress, while in this paragraph and others on this same general subject it discarded the word "Army" and substituted the phrase "military forces" or "military service" thus plainly indicating an intention to broaden the scope of such provisions. Also, an unreasonable and unwarranted discrimination would result from construing the word in a narrow sense, and to avoid such discrimination in another statute the Attorney General construed the word "soldier" as used therein "to comprehend also sailor and marine" (19 Op. Atty. Gen. 586, 588).

Confining the words "military service" or "military forces" of the United States within strictly technical limits, they would, [P. 39] at the time this act was passed, embrace the Army in all of its branches; that part of the Marine Corps which was detached for service with the Army by order of the President in accordance with section 1621 of the Revised Statutes, and which, while so detached, is a part of the Army (28 Op. Atty. Gen. 15, 19; *Jonas* v. *U. S.*, 50 Ct. Cls. 281); and the Coast Guard, which is expressly declared by statute to "constitute a part of the military forces of the United States" (act of Jan. 28, 1915, sec. 1, 38 Stat. 800). Such narrow definition would, however, exclude the Navy proper, the Naval Reserve Force, and that part of the Marine Corps which was not detached for service with the Army. This discrimination would be the more pronounced as the Coast Guard is and was at the time the law was passed operating as "a part of the Navy," and the Marine Corps is but one organization, notwithstanding a part may be detached for service with the Army and the remainder continue as part of the Navy. In one case, where the Secretary of the Navy thought such discrimination was required by a statute concerning service in the Mexican war, the Attorney General gave the statute a liberal construction under which such discrimination would not exist (5 Op. Atty. Gen. 155).

Debates in Congress, while not appropriate sources of information from which to discover the meaning of the language of a statute, may be referred to for the purpose of confirming a construction otherwise arrived at, and in this case it is shown by the Congressional Record that on July 15, 1918, a bill providing specifically for the wearing of foreign medals in the "naval service" was tabled in the House of Representatives for the expressed reason that the medal legislation in the Army Act of July 9, 1918, now under consideration, had already "covered" or "taken care of" the matter.

The first sentence in the paragraph of legislation now under construction has heretofore been interpreted by the Navy Department as including the naval service, and accordingly medals have been accepted by officers of the Navy, with

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the approval of the Secretary of the Navy, from countries concurrently engaged with the United States in the present war. The words "military forces" must have the same construction wherever they appear in this paragraph.

For the foregoing reasons, *held*, that the Department of State should be requested to transfer to the Navy Department for delivery to officers of the Navy and Marine Corps, medals or decorations in the custody of that department which belong to these officers and which they are authorized by law to accept and wear in accordance with the act of July 9, 1918, as herein construed (File 9644–55, J. A. G., Mar. 22, 1919, following file 9644–44, July 25, 1918, 9644–45, Aug. 30, 1918, and 9644–48, Feb. 26, 1919; see also *Stocker* v. *U. S.*, 39 Ct. Cls. 300, stating that "The Army and Navy constitute the military forces of the Government"; *U. S.* v. *North*, 112 U. S. 510, referring to persons [P. 40] in the Regular Army or Navy who were "engaged in the military service of the United States in the war with Mexico"; and act of July 17, 1862 (12 Stat. 596), "to define the pay and emoluments of certain officers of the Army, and for other purposes," section 17 of which act provided "That the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service either in the Army, Navy, Marine Corps, or volunteer force, in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service").

NOTE.—The foregoing opinion of the Judge Advocate General was sustained by the Attorney General of the United States in an opinion rendered May 9, 1919.

MILEAGE: TO WHAT PLACES MEN DISCHARGED OR RELEASED TO INACTIVE DUTY MAY CLAIM.

The act of February 28, 1919 (40 Stat. 1203), provides for furnishing an enlisted man honorably discharged from the Army, Navy, or Marine Corps with mileage, under certain conditions, from the place of his discharge to his "actual bona fide home or residence, or original muster into the service, at his option"; and makes similar provision for furnishing mileage to reservists "honorably released from active service."

The case stated, upon which opinion is requested, is as follows: "A man whose bona fide home is Batesburg, S. C., enrolled in the Naval Reserve Force at Columbia, S. C., and returned to his position at Winston-Salem, N. C., to await his call to active duty. He was ordered to active duty in Charleston, S. C., at which place he was placed on an inactive duty status." In this case, *held*, that there are three places to which the man is entitled at his option to claim mileage, viz: 1. His actual bona fide home, which is stated to be Batesburg, S. C.; 2. His actual bona fide residence at time of enrollment, which appears upon the facts stated to have been Winston-Salem, N. C.; and 3. His place of "original muster into the service," being in this case place of enrollment, which is stated to be Columbia, S. C.

As has been judicially stated, "the words 'residence' and 'home' are not, as ordinarily used, synonymous." In the present case, the purpose of the statute as gathered from the language used and the surrounding circumstances as they existed at the time of its enactment, indicates that each of these words was intended to have a meaning of its own, which is in accordance with the general rules for interpretation of statutes that "every word or clause used in a statute is presumed to have a meaning of its own."

The word "home" is used in the statute practically in the sense of "domicile" or "legal residence" as distinguished from actual residence. However, in order to hold that a given place [P. 41] is a man's "actual bona fide home" he must have actually lived there at some time with the intention of continuing indefinitely to reside and have his home at that place. If he has since actually resided elsewhere, his actual bona fide home has nevertheless continued to be at the former place, provided he has retained the intention of returning and making it his permanent abode.

To satisfy the terms of the law relating to residence, the place to which mileage may be furnished must be the "actual" residence of the man. "The actual residence is not always the legal residence or inhabitancy of a man. The foreign minister actually resides and is personally present at the court to which he is accredited, but his legal residence or inhabitancy or domicile are in his own

country." (See *In re Brannock*, 131 Fed. Rep. 822.) A man's legal residence may be merely ideal, but his actual residence must be substantial; he may not actually abide at his legal residence at all, but his actual residence must be his abiding place. (See 1 W. and P. (2d series) 100.)

Although passed during the period of demobilization, following cessation of hostilities in the war against the Central Powers, the act of February 28, 1919, is permanent legislation and not a wartime measure. Nevertheless its immediate purpose was to provide for those who had service during the war, and this is evidenced by the fact that it is in terms made retroactive so as to include men discharged or relieved from active duty "since November eleventh, nineteen hundred and eighteen," the date the armistice was signed. It is common knowledge that not only the Government but patriotic employers in private life undertook, in a very large number of cases, to hold open positions for their former employees who left to serve in the war, and that it has been the policy of the Government and patriotic organizations to encourage the return to their former employment of persons discharged from military service. Under these circumstances it would seem quite evident that the intention of the law was to provide mileage from the place of discharge to the place of former employment in the cases of those who were willing and able to return to their positions. Thus, persons employed by the Government departments in the District of Columbia, who were willing and able to return to their former places after discharge, were entitled to claim mileage to the District of Columbia or vicinity, that being their "actual bona fide residence" at the time of entering the service. On the other hand, persons employed in the Government departments, although actually residing in the District of Columbia or vicinity, quite commonly have their home, domicile, or legal residence in distant parts of the country. Where unable or unwilling to return to their former employment in the District of Columbia, it would be natural both on their part and on the part of the Government to desire their return to their "actual bona fide home," domicile, or [P. 42] legal residence. Hence, to cover such cases, the statute provides for furnishing mileage to the latter place. In all cases it is, under the law, optional with the man, and not with the administrative officers of the Government, whether mileage shall be furnished to the "actual bona fide home" or to the "actual bona fide residence" of the person concerned.

The statute further makes it optional with the man in any case to claim mileage to the place of "original muster into the service." These words are construed as referring to the place shown by the records as his place of enlistment or enrollment under his current contract.

Remarked, in this connection, that the words "actual bona fide home or residence," as herein construed, do not embrace a place of which the man may claim to be a legal resident, but to which he has no bona fide intention of ever returning to make it his permanent abode. As stated by the Attorney General in a somewhat similar connection (20 Op. Atty. Gen. 60), "a person who leaves his home in one of the States, and, with his family, makes a home and engages in business, public or private, in the District of Columbia or elsewhere, denies his liability to enrollment for any purpose at his former State home, is not there listed for taxation, and recognizes no obligations of domicile there, is certainly not an actual bona fide resident at that place within the meaning the statute under consideration. The fact that such a person might still claim (a claim of very doubtful validity) the right to vote in the State from which he came would not make him a proper applicant for the examination provided for in this section. In my opinion it was the purpose of this act to discriminate against persons of the latter class—persons who claim the benefit of State citizenship, and disclaim or fail to discharge any of the obligations of such State residence and citizenship." These remarks of the Attorney General apply equally to the words "actual bona fide home" in the present statute, as herein construed (File 9209–114: 4, J. A. G., April 5, 1919).

NAME: CORRECTION IN SPELLING OF, IN THE RECORDS OF THE DEPARTMENT.

An officer requested through official channels that the spelling of his middle name be changed on the records, stating that it is at present incorrectly spelled and that the error therein is probably a clerical one on the part of the recruiting office where he enlisted.

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In acting upon this request the Secretary of the Navy said:

"In accordance with the custom of this department to approve changes in the case of persons who, while still in the naval service, satisfactorily establish that their true names are different from those shown on the records, and in order that the records of the Navy Department, which are an important part of the historical records of the country, should so far as possible [P. 43] be correct (file 24368–13, Mar. 29, 1915), authority is granted to change the spelling of the name of this officer on the records from '_____ _____ _____' to '_____ _____ _____' if an investigation satisfactorily establishes the fact that an error in the spelling of his middle name was made when he first entered the naval service and that his true name then was _____ _____ _____'" (File 24368–29, Sec. Nav. May 22, 1919).

PILOTAGE: PROPOSED RECIPROCAL AGREEMENT BETWEEN THE U. S. NAVY DEPARTMENT AND THE FRENCH NAVY DEPARTMENT RELATING TO.

A reciprocal agreement between the U. S. Navy Department and the Navy Department of France was proposed whereby the French Government was to assume, in the ports of Cherbourg, Brest, Lorient, Rochefort, Toulon, and Bizerte the charges of pilotage, towage, and branch piloting in connection with the United States war and hospital ships, and the United States was to assume in all ports of the United States similar charges in connection with French war and hospital ships.

Reviewing the authorities, the Judge Advocate General was of opinion that the regulation of pilotage is left to individual states "until further provision is made by Congress"; that towage in the United States is simply a matter of local private business arrangement and is not regulated by federal laws of the United States; that up to this time Congress has made no provision to authorize any governmental agency to assume the payment of pilotage and towage incurred by French war and hospital ships in the ports of the United States, nor has any specific appropriation been made to cover such charges; and that in the absence of specific appropriation by Congress there is no authority for the U. S. Navy Department to enter into the proposed reciprocal agreement with the Navy Department of France (File 5806–218:3, J. A. G., May 8, 1919).

APPOINTMENTS: PROBATIONARY OFFICERS APPOINTED UNDER PROVISIONS OF ACT OF AUGUST 29, 1916; RIGHT TO RETIREMENT, ETC.

Under the provisions of the act of August 29, 1916, a person was appointed dental surgeon, probationary, with the rank of lieutenant (Junior Grade), U. S. Navy. He was later tendered a permanent commission, in accordance with the provisions of the act of July 1, 1918, which he rejected and returned with a request for discharge from the naval service, which request was not granted. A subsequent examination of this officer by a board of medical survey resulted in a finding of suspected tuberculosis, and its recommendation that he be transferred to a naval hospital was approved.

On the foregoing statement of facts, and after a consideration of the various provisions of law in respect thereof, the [P. 44] Judge Advocate General was of opinion that the appointment of the person in question by the President by and with the advice and consent of the Senate, although only for a period of two years, during which time said appointment may be revoked by the President at his discretion, makes him an officer in the naval service of the United States; and while serving under this appointment he may not be dismissed or discharged therefrom except in the manner prescribed by the law governing his case. In providing for the permanent appointment of probationary officers in the Dental Corps (act of July 1, 1918), it appears that the most that Congress intended was to make all probationary officers immediately eligible for permanent appointment. The law does not provide that they must accept a permanent appointment prior to the expiration of the probationary period on the penalty of being dropped from the service. Noting that the resignation of this officer was not accepted, the tender and rejection of the permanent commission under the terms of the act of July 1, 1918, did not operate to terminate

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his services under the probationary appointment. In view of the fact that he might now be considered physically disqualified, the permanent commission for which he was found qualified prior to the outbreak of his present physical condition, should be withheld until it is affirmatively determined that he is suffering from no physical disability which would disqualify him for said commission. The tender of a commission in the naval service of the United States is an offer to the one to whom it is directed which must be accepted to become effective. If rejected, the offer is at an end and may not be renewed except in the manner prescribed by law for granting a commission in said service.

A probationary officer appointed under the provisions of the act of August, 29, 1916, is entitled to be retired for physical disability arising in the line of duty. (See File 26253–550, Feb. 18, 1918; File 13707–72, J. A. G., May 31, 1919).

OFFENSES: COMMITTED AFTER ENLISTMENT EXPIRED; ENLISTED MAN (PROBATIONER) TRIED FOR.

In the particular case presented for consideration a court-martial prisoner, shortly before the expiration of his enlistment, was, by order of the Secretary of the Navy, released from arrest and restored to duty, on probation, for one year, the unexecuted portion of the sentence being remitted, conditioned upon his conduct while on probation. After the expiration of his enlistment contract, and while still held for duty, he committed an offense against naval discipline for which he was tried by court martial and sentenced to a period of confinement and dishonorable discharge. The Secretary of the Navy thereupon terminated the probation previously granted, and directed that the unexecuted portion of the [P. 45] former sentence be added to the confinement under the new sentence. His enlistment record does not show an extension of enlistment, or any entry that he was held in the naval service for the convenience of the Government.

On the above state of facts the department held substantially as follows:

The sentence under which the man in question was serving had been "remitted." "It is true that this remission of sentence was upon a condition subsequent, the breach of which condition would revive the sentence; nevertheless, pending a breach, the status of the man was not that of a prisoner, but of an enlisted man on duty," the order placing him on probation having expressly provided that he was to be "restored to duty." While so serving in the Navy on duty under the department's action, he was not, therefore, held in the service under the sentence of the court but under the terms of his enlistment, and when his enlistment expired and he continued to serve thereafter his status was no different, so far as concerns the question now presented, than that of any enlisted man who might continue to serve after expiration of enlistment, in a case in which his retention in the service was not specifically provided for by law. That this man continued to serve voluntarily after expiration of his enlistment is plainly indicated by his sworn testimony before the court martial by which he was subsequently tried.

Upon authority of Attorney General's opinion of July 22, 1907 (26 Op. Atty. Gen. 319), Comptroller's decision of November 20, 1908 (93 S. and A. Memo 896), and department's action on General-Court-Martial Record No. 39180, *held*, this man not only occupied the status of a sailor in fact at the time of the offense now in question, but was entitled to receive pay for services so rendered by him, and while so serving and in pay as an enlisted man of the Navy, having committed the offense for which he was tried and convicted, under the circumstances he was amenable to the jurisdiction of a court martial, and is now lawfully held to serve out the sentence adjudged, as mitigated.

However, the probationary period in this man's case could not legally extend beyond the period of his current enlistment and, upon the expiration of his enlistment his probationary period automatically terminated; his conduct on probation until his enlistment expired not having been deemed such as to warrant his recommitment to prison, such probationary period should be regarded as satisfactorily completed on the date that his enlistment expired, and the conditional remittance of the sentence in his case thereby made absolute. Accordingly the department's action requires modification insofar as it purported to require that this man serve out the unexecuted portion of the former sentence (File 26251–17942 : 2, Sec. Nav., May 5, 1919).

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[P. 46] RETIREMENT: OFFICER OF FLEET MARINE CORPS RESERVE, WHO TRANSFERRED FROM MARINE CORPS AS AN ENLISTED MAN.

An enlisted man, transferred from the Marine Corps to the Fleet Marine Corps Reserve, was later appointed a second lieutenant in said Reserve. His total service, counting double time, amounted to over thirty years. The question is presented whether or not this second lieutenant is entitled to retirement upon his own request, after thirty years' service. The Judge Advocate General was of opinion that this officer, being a transferred member of the Fleet Marine Corps Reserve, having transferred as an enlisted man from the Marine Corps, is entitled, under provisions of the act of August 29, 1916, to retirement after thirty years' service, including service in the Fleet Marine Corps Reserve. His appointment as a second lieutenant was authorized by said act by adapting the provisions of the Fleet Naval Reserve to the Fleet Marine Corps Reserve, "as near as may be," there being no commissioned grade of ensign for deck or engineering duties in the Marine Corps. The nearest corresponding grade is that of second lieutenant. The provision of law which authorizes his appointment as a second lieutenant provides that "those so commissioned shall not be deprived of the retainer pay, allowances, or gratuities to which they would be otherwise entitled." A fair construction of this provision justifies the department in counting service rendered by this officer as a commissioned officer in determining his total service for retirement as an enlisted man in the Marine Corps; therefore, he is entitled to retirement as an enlisted man after thirty years' service, both enlisted and commissioned, in the Fleet Marine Corps Reserve, and also entitled to count his double time just as though he had not been transferred to the Fleet Marine Corps Reserve (File 27231–115: 4, J. A. G., May 9, 1919).

RETIREMENT: RANK ON, FOR PHYSICAL DISABILITY INCURRED IN LINE OF DUTY; OFFICERS HOLDING PERMANENT AND TEMPORARY RANK.

An officer of the Marine Corps incurred disability in line of duty, the result of an incident of the service, while holding the permanent rank of second lieutenant and the temporary rank of first lieutenant. At the time of his examination by a marine retiring board he was holding the permanent rank of second lieutenant and the temporary rank of captain. On the question of which rank said officer should be retired in, the Judge Advocate General, after an analysis of the laws pertinent thereto, was of opinion that officers holding both a permanent grade or rank and a higher temporary grade or rank at the time of retirement, if found incapacitated for active service on account of "physical disability incurred in line of duty" should be retired with the higher grade or rank (temporary) held by them at the time of their examination by the marine examining board—in [P. 47] the instant case, the rank of captain (File 26253–624, J. A. G., May 22, 1919).

SENTENCES: OF CONFINEMENT; DATE FROM WHICH, COMMENCE WHEN NOT SPECIFIED.

An officer of the U. S. Naval Reserve Force having been sentenced to dismissal and confinement, and such sentence having been confirmed by the President without specifying the date from which the period of confinement should commence to run, the question was presented whether such period of confinement should be reckoned from the date the sentence was confirmed by the President, or from the date the proceedings, finding, and sentence were approved by the convening authority.

Article 53, Articles for the Government of the Navy, provides that "no sentence of a court martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President. * * * ." Section 339, Naval Courts and Boards, 1917, provides that "in all cases where an officer is sentenced to imprisonment the sentence shall provide for his dismissal prior thereto."

Article 53, Articles for the Government of the Navy (section 1624, R. S.), in providing that a sentence extending to the dismissal of a commissioned or war-

rant officer shall not be carried into execution until confirmed by the President, refers to the whole sentence and not only to the part involving dismissal. Furthermore, it has not been the custom of the naval service to confine commissioned or warrant officers in naval prisons pursuant to sentence of court martial and it is only where such officers are sentenced to dismissal that they are so confined. It is therefore specifically provided by section 339 that where an officer is sentenced to imprisonment his sentence shall provide for his dismissal prior thereto.

In view of the foregoing the Secretary of the Navy, on the question above presented, decided that the period of confinement should be reckoned from the date the sentence was confirmed by the President (File 26262–5505 : 6, Sec. Nav., May 24, 1919).

NAVAL RESERVE FORCE: ENLISTED STATUS OF TEMPORARY OFFICERS CANNOT BE TRANSFERRED TO FLEET NAVAL RESERVE.

Upon the question being presented, the Judge Advocate General was of opinion that an enlisted man in the Regular Navy, who holds a temporary commission under the act of May 22, 1917, and whose term of enlistment expires while he holds such temporary commission, cannot transfer his enlistment status, on expiration of his term of enlistment, to the Fleet Naval Reserve and still retain his temporary commission in the Regular Navy.

In considering the pertinent provisions of the act of May 22, 1917, the department has held that enlisted men who are serving [P. 48] as temporary commissioned officers under the provisions of the above act need not be discharged from their enlistment upon the expiration thereof while they are holding such temporary commissions, but their discharge should be withheld until the termination of their temporary appointments in order that they may revert to their enlisted status in accordance with the provision of the above act; that by their acceptance of such appointments under the conditions imposed by the above act they are deemed to have voluntarily waived their right to discharge upon the expiration of their terms of enlistment and to have accepted all of the conditions imposed by the statute, including the requirement that upon the termination of their temporary appointments they "shall revert to the grade, rank, or rating from which temporarily advanced," unless in the meantime they become entitled to promotion to a higher grade in the permanent Navy or Marine Corps; and upon reverting to their status as enlisted men they shall be entitled to count the time they have served as temporary commissioned officers in computing the service required under the act of August 29, 1916, to entitle them to be transferred to the Fleet Naval Reserve (File 7657–445 : 1, 2, 3, and 4).

What has been said with regard to the requirement that such temporary officers must first revert to the enlisted rating from which they were temporarily advanced before they can be discharged therefrom applies with equal force to the transfer of the enlisted status of such temporary officers to the Fleet Naval Reserve, and in the absence of a specific provision of law to that effect I know of no way in which such enlisted status of a temporary officer can be changed while he is still holding the temporary commission as an officer.

Furthermore, the act of August 29, 1916, establishes the Fleet Naval Reserve as a part of the Naval Reserve Force. Said act provides, in part, as follows:

> "* * * No existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service, except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay. * * *."

This provision of law clearly prohibits the transfer of the enlisted status of a temporary officer in the Regular Navy to the Fleet Naval Reserve while he is holding such temporary commission, because upon becoming a member of the Naval Reserve Force he is prohibited from holding an office in the Navy (File 28550–1026, J. A. G., May 24, 1919).

[C. M. O. 191–1919]

C. M. O. 189—1919

[P. 1] Machinist Philip V. Lynch, U. S. Naval Reserve Force, was tried by general court martial on March 25, 1919, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, on the following charges:

Charge I.—Absence from station and duty after leave had expired (one specification).

Charge II.—Absence from station and duty without leave (one specification).

Charge III.—Drunkenness (one specification).

Charge IV.—Conduct to the prejudice of good order and discipline (one specification).

Findings

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "proved in part," and the accused "guilty" of the second charge; the specification of the third charge "proved," and the accused "guilty" of the third charge; the specification of the fourth charge "proved," and the accused "guilty" of the fourth charge.

Sentence

"The court therefore sentences him, Philip V. Lynch, machinist, United States Naval Reserve Force, to be dismissed from the United States naval service."

Opinion and Recommendation of the Judge Advocate General

On April 12, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case recommending that, owing to the insufficiency of evidence adduced by the prosecution, the findings on charges III and IV, and the specifications thereunder, be disapproved.

Concurrence of the Bureau of Navigation

On April 24, 1919, the Bureau of Navigation concurred in the recommendation of the Judge Advocate General, and further [P. 2] recommended that the proceedings, findings on charges I and II and the specifications thereunder, and the sentence, be approved.

Action of the Secretary of the Navy

On April 25, 1919, the Acting Secretary of the Navy, in accordance with the recommendation of the Judge Advocate General, concurred in by the Bureau of Navigation, disapproved the findings on charges III and IV and the specifications thereunder; approved the proceedings, the findings on charges I and II and the specifications thereunder, and the sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence be confirmed.

Action of the President

On May 17, 1919, the President of the United States confirmed the sentence of the court martial in the foregoing case of Machinist Philip V. Lynch, U. S. Naval Reserve Force.

C. M. O. 191—1919

[P. 1] Ensign Hugh J. McNulty, U. S. Naval Reserve Force, was tried by general court martial on March 25, 1919, at the Navy Yard, Norfolk, Va., by order of the Secretary of the Navy, on the following chages:

Charge I.—Absence from station and duty after leave had expired (one specification).

Charge II.—Absence from station and duty without leave (one specification).
Charge III.—Conduct to the prejudice of good order and discipline (one specification).

FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge; the specification of the third charge "proved in part," and the accused "guilty" of the third charge.

SENTENCE

"The court therefore sentences him, Ensign Hugh J. McNulty, United States Naval Reserve Force, to be dismissed from the United States naval service."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On April 12, 1919, the Judge Advocate General placed an endorsement on the record in the foregoing case recommending that the finding on the third charge and specification thereunder be disapproved owing to the insufficiency of evidence, saying:

> "Charge III, 'Conduct to the prejudice of good order and discipline,' alleges that the accused 'was on board said ship, on or about February 18, 1919, the United States then being in a state of war, from previous indulgence in intoxicating liquor, incapacitated for a proper performance of his duties to such an extent as to necessitate his being placed on the sick list.' [P. 2] There are two witnesses who testified as to the condition of the accused, the commanding officer, and the pharmacist's mate attached to the ship. The commanding officer is of the opinion that the accused was in the condition alleged, but does not state any reason therefor, except that he was reported as in that condition by the officer of the deck, and that the pharmacist's mate made a written report to that effect. However, when the pharmacist's mate took the stand, he qualified this report by saying that the accused showed no signs of drinking, but that he based his report on the statement of the accused that 'They had been drinking,' and not on his examination. The accused was examined at the same time as another officer, and claimed his statement referred to that officer and not to himself."

CONCURRENCE OF THE BUREAU OF NAVIGATION

On April 17, 1919, the Bureau of Navigation, concurring in the endorsement of the Judge Advocate General, recommended approval of the proceedings, findings, and sentence.

ACTION OF THE SECRETARY OF THE NAVY

On April 29, 1919, the Acting Secretary of the Navy approved the remarks and recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation, and, in conformity with article 53, Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record of proceedings of the general court martial in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On May 17, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Ensign Hugh J. McNulty, U. S. Naval Reserve Force.

C. M. O. 193—1919

[P. 1] Lieutenant Commander Hans L. Mortensen, U. S. Naval Reserve Force, was tried by general court martial on March 5, 1919, at the U. S. Naval Aviation Repair Base, Eastleigh, England, by order of Commander, U. S. Naval Forces Operating in European Waters, on the following charges:

Charge I.—Through negligence suffering a vessel of the Navy to be stranded (one specification).

Charge II.—Culpable inefficiency in the performance of duty (one specification).

Findings

The court found the specification of the first charge "proved in part," and the accused "guilty" of the first charge; the specification of the second charge "proved in part," and the accused "guilty" of the second charge.

Sentence

"The court therefore sentences him, Lieutenant Commander Hans L. Mortensen, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Recommendation to Clemency

The following recommendation to clemency, signed by four of the seven members of the court, was spread upon the record:

> "In consideration of his age and previous experience in the Spanish-American War, we recommend Lieutenant Commander Hans L. Mortensen, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

Action of the Convening Authority

On March 24, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Recommendation of the Judge Advocate General

On April 22, 1919, the Judge Advocate General placed an endorsement on the record as follows:

> [P. 2] "In the opinion of this office the findings on the second charge and the specification thereunder are not in accordance with the facts adduced at the trial. It clearly appears that the stranding of the ship was due to failure on the part of the accused to fix the position of the ship at her anchorage, and, thereafter, getting under way without having such knowledge, and was not due to the facts set forth in the specification. In view of the foregoing it is recommended that the findings on the second charge and the specifications thereunder be disapproved.
>
> "Subject to the foregoing remarks, in the opinion of this office the proceedings, the findings on the first charge and the specification thereunder, and the sentence are legal."

Concurrence and Recommendation of the Bureau of Navigation

On April 30, 1919, the Bureau of Navigation, concurring in the action of the convening authority as amended by the endorsement of the Judge Advocate General, recommended approval of said endorsement.

Action of the Secretary of the Navy

On May 1, 1919, the Acting Secretary of the Navy approved the recommendations of the Judge Advocate General, concurred in by the Bureau of Navigation,

[C. M. O. 194—1919]

and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record of proceedings of the general court martial in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On May 21, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant Commander Hans L. Mortensen, U. S. Naval Reserve Force.

C. M. O. 194—1919

[P. 1] First Lieutenant (Provisional) William W. Head, U. S. Marine Corps Reserve, was tried by general court martial on February 27, 1919, at the Marine Flying School, Miami, Fla., by order of the Secretary of the Navy, on the following charge:

Charge.—Violation of a lawful regulation issued by the Secretary of the Navy (one specification).

FINDINGS

The court found the specification of the charge "proved in part, proved except the words 'while so serving at the Miami Flying Field, Miami, Fla., did, at or near said flying field, on or about September 1, 1918,' which words are not proved," and the accused guilty of the first charge.

RETURNED FOR REVISION

On March 26, 1919, the department returned the record in the foregoing case and directed that the court reconvene for the purpose of reconsidering its findings (which, in the opinion of the department, were not grammatically correct. The court found certain words "not proved," but no substitution was made for the excepted words, and thus the specification as amended is vague and indefinite in that the time and place of the commission of the offense are not specified).

FINDINGS IN REVISION

The court (in revision) found the specification of the charge "proved in part, proved except the words 'while so serving at the Miami Flying Field, Miami, Fla., did, at or near said flying field, on or about September 1, 1918,' which words were not proved," and for which the court substitutes the words "while so serving at La Fresne, France, did, at or near La Fresne, France, and while en route to the United States on board ship, between September 1, 1918, and December 1, 1918," which words are "proved," and the accused guilty of the charge.

[P. 2] "The court therefore sentences him, First Lieutenant (Provisional) William W. Head, U. S. Marine Corps Reserve, to be dismissed from the United States Marine Corps and from the United States naval service."

RECOMMENDATION OF THE MAJOR GENERAL COMMANDANT

On April 26, 1919, the Major General Commandant, U. S. Marine Corps, recommended that the sentence in the foregoing case be confirmed.

ACTION OF THE SECRETARY OF THE NAVY

On April 30, 1919, the Acting Secretary of the Navy approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence be confirmed.

[C. M. O. 195—1919]

ACTION OF THE PRESIDENT

On May 17, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of First Lieutenant (Provisional) William Head, U. S. Marine Corps Reserve.

C. M. O. 195—1919

[P. 1] Gunner (T) Fred H. Wurth, U. S. Navy, was tried by general court martial on April 1, 1919, in General Court Martial Room, Steneck Building, Hoboken, N. J., by order of the Commander, Cruiser Force, U. S. Atlantic Fleet, on the following charges:

Charge I.—Neglect of duty (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (one specification).

FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "proved," and the accused "guilty" of the second charge.

SENTENCE

"The court therefore sentences him, Gunner (Temporary) Fred H. Wurth, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The members of the court spread upon the record the following unanimous recommendation to clemency:

> "In consideration of his previous good record while serving on board the U. S. S. *Louisville*, and his former service as an enlisted man in the Navy, we recommend Gunner (Temporary) Fred H. Wurth, U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On April 8, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

On April 25, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record of proceedings of the general court martial in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On May 17, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Gunner (T) Fred H. Wurth, U. S. Navy.

REMARKS

It is noted in the foregoing case that a witness claimed the privilege of not answering a certain question on the ground that the answer would tend to incriminate him. The privilege was properly denied by the court, the witness having been previously tried in connection with the occurrence upon which the charges in the instant case are based. His trial having been finished, evidence he might give in this case could not be used against him.

[C. M. O. 196—1919]

Accused's counsel made a motion to strike out the answer to a certain question on the ground of hearsay. The court improperly denied the motion to strike out as to that part of the answer reciting conversation with third parties not taking place in the presence of accused.

The court again erred in not striking out the answer to a question upon objection of the accused's counsel upon the ground that the answer was in the nature of a conclusion of the witness.

However, the improper admission of the above testimony is not regarded sufficiently prejudicial to the interest of the accused to invalidate the proceedings, there being abundant evidence to sustain the findings on the charges and the specifications thereof.

C. M. O. 196—1919

[P. 1] Lieutenant (Junior Grade) William E. Clayton, U. S. Navy, was tried by general court martial on April 8, 1919, on board the U. S. S. *Oklahoma*, Guantanamo Bay, Cuba, by order of the Commander in Chief, United States Fleet, and found guilty of the following charge:

Charge.—Drunkenness (one specification).

Sentence

"The court therefore sentences him, Lieutenant (Junior Grade) William E. Clayton, U. S. Navy, to lose one hundred (100) numbers in his temporary grade of lieutenant (Junior Grade), and to lose one hundred (100) numbers in his permanent grade of ensign."

Recommendation to Clemency

The members of the court spread upon the record the following unanimous recommendation to clemency:

> "On account of his youth, his previous good conduct, and the ability shown by him in an encounter with an enemy submarine during the present war, we recommend Lieutenant (Junior Grade) William E. Clayton, U. S. Navy, to the clemency of the reviewing authority."

Action of the Convening Authority

On April 18, 1919, the convening authority placed an endorsement on the record, in part, as follows:

> "It is the opinion of the reviewing authority that the court erred in allowing the certificate of the resident physician of the Barbados General Hospital to be admitted in evidence. The court, after careful consideration, correctly refused to admit this certificate as such, but later admitted incorrectly, in the opinion of the reviewing authority, the certificate on the ground that 'Owing to the fact that it is impossible for the defense to obtain depositions, the court is of opinion that the accused [P. 2] is entitled to the benefits stated in paragraph 199, Naval Courts and Boards, 1917.' The paper in question was ex parte, was not the best evidence, and the witness was not dead or insane, and therefore not one of those cases contemplated under the rule laid down in section 199, page 175. This certificate having been introduced by the defense and being favorable to the accused, the error is not considered fatal. * * *
>
> "Subject to the foregoing remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) William E. Clayton, U. S. Navy, are approved, and he will be released from arrest and restored to duty."

Opinion and Recommendation of the Judge Advocate General

On May 13, 1919, the Judge Advocate General referred the record in the foregoing case to the Chief of the Bureau of Navigation for comment, with the following endorsement:

> "From a careful review of the evidence in this case this office is of the opinion that the evidence adduced before the court fails to establish beyond

[C. M. O. 197—1919]

a reasonable doubt that the accused was suffering from acute alcoholic poisoning. The testimony of Robert S. G. Welch, lieutenant (Medical Corps), U. S. Navy, who was the principal witness for the prosecution, sets forth (p. 6, question 5, of the record) in answer to the question whether he considered the accused under the influence of intoxicating liquor, 'He presented the general symptoms of acute alcoholic poisoning from the examination I made.' But pursuing this testimony further, it is noted (p. 7, question 18, of the record) that he stated in reply to the question as to what he officially diagnosed the case, 'I think my diagnosis was acute alcoholic poisoning; however, it had already been diagnosed at the hospital, and I did not make any special diagnosis; I just made a report.' Referring to the diagnosis which was made at the hospital (exhibit 1), which was received in evidence, it is noted that the resident surgeon of the Barbados General Hospital, E. W. Roberts, made a diagnosis as 'a severe attack of acute gastritis.' From this it is rather difficult to understand upon what Lieut. Welch made his diagnosis of acute alcoholic poisoning, since he states that he did not personally make an examination, but relied upon the diagnosis of the [P. 3] hospital, said diagnosis being that of acute gastritis. R. Roller Richardson, commander, Medical Corps, U. S. Navy, who testified before the court as an expert witness, testified in answer to the following question (p. 16, question 16, of the record): 'If a white man goes ashore from a ship in a tropical country, say, Barbados, eats some bananas and drinks some ginger ale, walks around for 20 or 30 minutes in the sun, then rides for an hour or so in an automobile exposed to the rays of the sun, could not the following happen—becomes unconscious, vomits, and perspires?' answer, 'It could.'

"The testimony of C. L. Nicholson, ensign (T), U. S. Navy, was to the effect that he was with the accused throughout the entire afternoon, saw him drink ginger ale, but did not see him drink any alcoholic liquor, although the party had alcoholic liquor with them. No evidence other than that pertaining to the illness of the accused and certain presumptions concerning the cause of said illness was submitted.

"For the foregoing reasons it is recommended that the findings and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) William E. Clayton, U. S. Navy, be disapproved."

Concurrence of the Bureau of Navigation

On May 16, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

Action of the Secretary of the Navy

On May 19, 1919, the Secretary of the Navy approved the recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation.

C. M. O. 197—1919

[P. 1] Machinist William M. Jones, U. S. Naval Reserve Force, was tried by general court martial on April 26, 1919, at U. S. Naval Base No. 29, Cardiff, Wales, by order of the Base Commander, and convicted of the following charge, proved by the plea:

Charge.—Conduct to the prejudice of good order and discipline (one specification).

Sentence

"The court therefore sentences him, Machinist William M. Jones, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Action of the Convening Authority

On April 29, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in con-

[C. M. O. 199—1919]

formity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

ACTION OF THE SECRETARY OF THE NAVY

On May 24, 1919, the Judge Advocate General, being of opinion that the proceedings, findings, and sentence of the general court martial in the foregoing case are legal, but the sentence for this offense is excessive, referred the record to the Chief of the Bureau of Navigation for comment as to disciplinary features.

On May 28, 1919, the Chief of the Bureau of Navigation recommended approval of the proceedings, findings, and sentence, and, concurring in the endorsement of the Judge Advocate General, further recommended that the sentence be mitigated to restriction to his ship or station for a period of six months and to loss of $20 per month of his pay for a period of six months.

On June 12, 1919, the Secretary of the Navy mitigated the sentence of the general court martial in the foregoing case of Machinist William M. Jones, U. S. Naval Reserve Force, to a reprimand.

C. M. O. 199—1919

[P. 1] Gunner James A. Moran, U. S. Navy, was tried by general court martial on February 20, 1919, at the U. S. Naval Air Station and Submarine base, Coco Solo, C. Z., by order of the Commandant, Fifteenth Naval District, on the following charges:

Charge I.—Perjury (seven specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

FINDINGS

The court found all specifications of the first charge "not proved," and honorably acquitted the accused of the first charge; the specification of the second charge "proved," and the accused "guilty in a less degree than charged," guilty of "maltreating a person subject to his orders."

SENTENCE

"The court therefore sentences him, Gunner James A. Moran, United States Navy, to be restricted to his ship or station for a period of three (3) months and to lose fifty dollars ($50) per month of his pay for a period of six (6) months."

RETURNED FOR REVISION

On March, 24, 1919, the convening authority returned the record in this case to the court for a reconsideration of its findings and sentence, subject to the following remarks:

> "The record in the case of Gunner Moran, U. S. Navy, is returned herewith, as the findings rendered by the court are in direct conflict with the evidence adduced by the prosecution and the facts alleging the offense—admitted by the accused and his counsel. The first charge, and the seven specifications thereunder, allege that the accused perjured himself in giving testimony during the trial, by general court martial, of one T. S. Roberts; the second charge, 'Scandalous conduct tending to the destruction of good morals,' and the specification thereunder, [P. 2] allege that the accused permitted certain enlisted men to assault and strike another man in the naval service. In the second charge the court has found the specification proved as alleged, but has found the accused guilty of the second charge in a less degree than charged; i. e., guilty of 'maltreating a person subject to his orders.' The specification as found proved supports a finding of guilty under the charge 'Scandalous conduct tending to the destruction of good morals,' but will not support a charge alleging maltreatment, as the specification does not allege that the accused maltreated the enlisted man in question. The attention of the court is directed to these findings in order that a reconsideration thereof may be had.

[C. M. O. 199—1919]

"Reverting to the offenses alleged in charge one, and the specifications supporting same, it must be clear to the court, particularly as pointed out by the counsel for the defense, that there is no denial that perjury was committed on the date alleged, but endeavor has been made by the defense to show that the accused was in a state of 'mental unstableness' at the time he testified. The attention of the court is particularly invited to the fact that 'insanity is not pleaded'; in fact, testimony has been introduced by the defense to show the ability of the accused, but the defense is based upon the 'mental unstableness' of the accused at the time of the commission of the offense. Inasmuch as the defense does not urge that the criminal acts were committed under the impulse of appetite or passion, which by long indulgence has acquired mastery over the accused, it must be assumed that such defense is based upon the alleged inability of the accused on December 27, 1918, to distinguish between right and wrong; this allegation is based upon the testimony of the accused that some time during the preceding interval of thirty hours, more or less, he had taken what he claims to have been seventy-five grains of quinine. It will be noted that there is no corroboration of this testimony, and if the quinine in question was taken it was an act done upon the responsibility of the accused and in conflict with the regulations providing for the treatment of the naval personnel. On this particular point it might be stated that the accused is somewhat doubtful as to the amount taken, as the total amount alleged to have been taken is referred to as seventy-five grains, whereas counsel for the accused contends that the total amount taken was over one hundred grains.

[P. 3] "Admitting for the moment that the accused should be exculpated on account of his physical condition before the general court martial before which he perjured himself, the attention of the court must be invited to the fact that on the date of the trial of Roberts the accused appeared and gave false testimony along the same lines that three other witnesses gave as the result of a prearranged plan; that he made no request to be placed on the sick list to delay testifying before the general court martial; that there is no evidence to show that he was 'mentally unstable' prior to appearing before the general court martial, nor has his condition subsequent thereto been such as to warrant treatment for the alleged 'mental unstableness.' Furthermore, in the absence of any protestation by the accused, prior to being sworn, in the case of Roberts, and the fact that three of the officers composing the court were men advanced in age, having had considerable naval and other experience in life, and the further fact that the remaining two members of the court were medical officers, it is peculiar, indeed, that a defense of 'mental unstability' should be urged.

"The circumstances and facts as set forth in the foregoing paragraph alone rebut any merit which may attach to the claim that during the time the perjury was committed the accused was suffering from a state of 'mental unstableness.' However, the accused has testified that during such time, while not remembering every feature of the trial and his perjurious and criminal act, that 'I had a severe headache, my ears rung, and I was feeling very ill' as indicative of his physical condition. There is no corroboration of such a physical condition, no record of application for medical treatment immediately subsequent to the trial.

"The most charitable grounds upon which such a defense can be urged is that the accused during the committing of perjury before the general court martial in the case of Roberts was unable to distinguish between right and wrong and to know that he was culpable in offering perjurious testimony along a well-preconceived line. It is for the court to decide, from evidence which has been adduced, as to whether or not Gunner Moran was impelled without intent, reason, or purpose to act as he did and whether he would have acted in the same manner and given the perjurious testimony had he been in the presence of his commanding officer and confronted with immediate disciplinary [P. 4] action. His physical condition as set forth above are the only facts upon which the court may draw a deduction as to whether or not his condition was such as to render him 'mentally unstable' during the short period of time which he appeared before the general court martial as a witness in the case of Roberts. Certainly his physical condition both prior to the trial and subsequent thereto, as shown by the evidence or lack of evidence—and evidence would

certainly be necessary to establish such 'mental unstability'—only serve to rebut even a presumption of 'mental unstability.'

"In the reconsideration of this case the court will carefully weigh the evidence, taking into consideration only such facts as are brought before the court in regard to the condition of the accused. Certain physicians and medical officers have been brought before the court and a great deal of testimony, based upon hypothetical questions, has been introduced into the record; unfortunately the assumed facts are not substantiated by the evidence adduced. The court also allowed opinion evidence to be given by medical officers on hypothetical questions; such witnesses had not qualified as experts and were consequently unable to give expert opinions. Such procedure has mitigated to the benefit of the accused, so much so that a serious miscarriage of justice would result were the findings permitted to stand. The court must necessarily base their findings upon the evidence adduced and not upon the opinions of alleged experts, as such experts may accept facts as true which the court may know to be untrue.

"In considering the findings in this case the court must be guided by their oaths, and while it may be a very unpleasant duty to brand an officer in the naval service as a perjurer, still condoning such a villainous practice cannot do other than detrimentally affect the interest of justice and discipline, lower the standards of the naval service, and the self-respect of the officers composing the court. To permit the commission of the crime of perjury and allow the accused to escape upon such a subterfuge cannot be accepted as other than a condonation of such offenses by officers in the naval service.

"Subject to the foregoing remarks, the court will convene to reconsider the findings and a sentence in the foregoing case of Gunner Moran, U. S. Navy. The proceedings, in revision, will be conducted in accordance with Naval Courts and Boards. [P. 5] 1917, and upon completion thereof the report will be forwarded to this office."

Findings in Revision

The court decided to revoke its former findings in the case of Gunner (Temporary) James A. Moran, U. S. Navy, and to substitute the following findings: All specifications of the first charge "proved" and the accused "guilty" of the first charge; the specification of the second charge "proved" and the accused "guilty" of the second charge.

Sentence in Revision

The court decided to revoke its former sentence and to substitute therefor the following:

"The court therefore sentences him, Gunner (Temporary) James A. Moran, U. S. Navy, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his long naval service and splendid previous good record, as testified to by his immediate commanding officer and other officers of high rank, long naval service, and experience, and in consideration of the extenuating circumstances surrounding this case, and also due to the fact such sentence would visit untold hardship upon his wife and innocent babies, the court unanimously recommend Gunner (Temporary) James A. Moran, U. S. Navy, the accused, to the clemency of the reviewing authority."

Action of the Convening Authority

On March 31, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy,

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referred the record to the Secretary of the Navy for transmission to the President of the United States, subject to the following remarks:

> "In the opinion of the convening authority the sentence adjudged is grossly inadequate for the offenses found proved. [P. 6] However, in order that final action in this case may not be further delayed and that the interests of the Government may not suffer further by reason of having to divert officers from important duty for the purpose of further revision, and in order that the accused may not entirely escape punishment, the sentence has been approved.
>
> "Only to the youth and inexperience of the court, composed of the only officers available for such duty in this district, can their action, in imposing such a lenient sentence for such a nefarious offense, be ascribed."

ACTION OF THE SECRETARY OF THE NAVY

On May 14, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record of proceedings of the general court martial in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On May 31, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Gunner (Temporary) James A. Moran, U. S. Navy.

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[P. 1] Ensign Robert H. Spahn (Pay Corps), U. S. Naval Reserve Force, was tried by general court martial at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (two specifications).

FINDINGS

The court found the first specification of the charge "proved by plea," the second specification of the charge "proved in part by plea," and the accused "guilty" of the charge.

SENTENCE

"The court therefore sentences him, Ensign Robert H. Spahn, Pay Corps, U. S. Naval Reserve Force, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of one (1) year, and to perform hard labor during said confinement."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 13, 1919, the Judge Advocate General recommended that the proceedings, findings, and sentence of the general court martial in the foregoing case be approved, but, in view of the good record of the accused, the fact that he confessed his guilt, and the further fact that he did not profit financially by the transaction, that the period of confinement be remitted.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On May 16, 1919, the Bureau of Navigation concurred in the recommendations of the Judge Advocate General.

[P. 2] ACTION OF THE SECRETARY OF THE NAVY

On May 20, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence, but in view of the recommendation of the Judge Advocate Gen-

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eral, concurred in by the Bureau of Navigation, remitted that portion of the sentence involving imprisonment, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record of proceedings of the general court martial in the foregoing case to the President of the United States, with the recommendation that the sentence as reduced be confirmed.

ACTION OF THE PRESIDENT

On June 5, 1919, the President of the United States confirmed the sentence as reduced of the general court martial in the foregoing case of Ensign Robert H. Spahn (Pay Corps), U. S. Naval Reserve Force.

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[P. 1] Boatswain (T) Stephen F. Leitner, U. S. Navy, was tried by general court martial on February 10, 1919, on board the U. S. S. *Raleigh*, Key West, Fla., by order of the Commander, American Patrol Detachment, on the following charges:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Drunkenness (one specification).

Charge III.—Using abusive, obscene, and threatening language and gestures toward his superior officer (three specifications).

Charge IV.—Disobeying the lawful order of his superior officer (one specification).

Charge V.—Using threatening language toward another person in the Navy (one specification).

FINDINGS

The court found the specification of the first charge "proved" and the accused "guilty" of the first charge; the specification of the second charge "proved by plea" and the accused "guilty" of the second charge; all specifications of the third charge "proved" and the accused "guilty" of the third charge; the specification of the fourth charge "proved" and the accused "guilty" of the fourth charge; the specification of the fifth charge "proved" and the accused "guilty" of the fifth charge.

SENTENCE

"The court therefore sentences him, Boatswain (T) Stephen F. Leitner, U. S. Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of five (5) years, and to perform hard labor during said confinement."

ACTION OF THE CONVENING AUTHORITY

On February 21, 1919, the convening authority approved the proceedings, findings, and sentence in the foregoing case and, [P. 2] in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General referred the foregoing record to the Chief of the Bureau of Navigation for comment as to disciplinary features, and with the following opinion and recommendations:

> "The accused was charged with (I) Absence from station and duty without leave; (II) Drunkenness; (III) Using abusive, obscene, and threatening language and gestures toward his superior officer (three specifications); (IV) Disobeying the lawful order of his superior officer; and (V) Using threatening language toward another person in the Navy. He pleaded guilty to charge II and not guilty to all other charges. He was found guilty of all charges, all specifications thereunder being found proved, and was sentenced to dismissal and imprisonment for five years.

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"The evidence, in brief, shows that the accused had been ashore at Ponta Delgada, Azores, on liberty, on Saturday, November 2; that Machinist Zirkle, a shipmate of the accused, spent the night at the same hotel with him, and the following morning, Sunday, was unable to arouse the accused, who was apparently in a stupor from the effects of intoxicants. Machinist Zirkle reported the condition of the accused to the executive officer, who was on shore, and asked for an extension of liberty for the accused until Monday morning, which was granted by the executive officer; that the same evening the accused visited the executive officer at a club and requested a loan. The answer was, 'All right; I will be right down. Go down below and wait for me.' The accused left the club and shortly afterward the executive officer came down to the street and saw the accused in conversation with several officers, the accused having just remarked, 'I want to see somebody try to take me back to the ship,' or words to that effect. The executive officer said, 'Boatswain, I am going to take you back to the ship. I am not going to "try." Come along.' The accused thereupon accompanied the executive officer and Pay Clerk Mercer to the boat landing, and, in the language of the executive [P. 3] officer: 'I got a boat for him and sent Mr. Mercer with him back to the ship, sending a message by Mr. Mercer to the officer of the deck that the accused was not to be permitted to leave the ship again. I went back to the club after the boat shoved off.'

"Pay Clerk Mercer went on board the ship and delivered the message to the officer of the deck. There is no evidence that the accused accompanied Mercer on board, but shortly afterward he was seen by the officer of the deck in a native boat and was told to 'come aboard.' After some persuasion by other officers, the accused came aboard 'and wanted to know whose order it was that he, the accused, was to be kept aboard.' The officer of the deck replied that 'it was the commanding officer's order.' The accused went below to the wardroom, where the officers were at dinner, and asked, 'Who ordered him to be kept aboard the ship?' Lieutenant Kenyon, acting commanding officer, replied that he didn't know the accused was aboard the ship 'and didn't know who had ordered him kept aboard the ship.' The accused thereupon made obscene and abusive remarks concerning the officers of the ship. Lieutenant Kenyon said, 'You had better go below and keep quiet; you are not yourself. You have said enough here; I want you to go below, and go to your room and sleep it off.' The accused replied, 'I am not going below; I am going ashore.' The commanding officer said, 'You will not go ashore; you will go below to your room, and you are going to keep quiet.'

"At this point the accused began to grow violent, and the commanding officer went up to the officer of the deck, Ensign Southall, and directed that the accused be taken to his room and kept there. In the meantime the accused went to his room, got a loaded revolver but was persuaded to surrender it to Machinist Burgess. After walking up and down with Burgess for a few minutes, the accused went back, got his revolver again, 'said he was going ashore, and wanted to see anybody try to stop him.' He was again persuaded by Burgess to put the revolver away in his room and walked up and down in front of his door. Ensign Southall appeared at this time with three men, and said he 'had orders from the commanding officer to put him in his room.' The accused then made a dash into his room, and Machinist Burgess warned Ensign Southall that the accused had a 'gun.' At this there seems to have been a general [P. 4] scattering, Ensign Southall 'hurriedly' going over to report to the commanding officer for further orders. Afterward, the accused came out of his room with his revolver and walked up and down the deck. He was persuaded to go back into his room and put the revolver away. He came out again, paced up and down the deck in front of his door, then started toward the officers' quarters, saying he was going ashore again, struck his head against some obstruction, and was 'knocked out.'

"Applying this evidence to the charges: The first charge of absence without leave is based upon an alleged unauthorized absence of fifteen minutes while the accused was in the boat after Pay Clerk Mercer came on board. The trend of the evidence is that the accused had been given an extension of liberty until Monday morning by the executive officer, but that the latter on Sunday morning had revoked this expension by sending the accused

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back to the ship. However, there is no positive evidence that the accused had reported back on board previous to this alleged unauthorized absence. No witness who testified saw the accused on board until he came on board in compliance with the order of the officer of the deck. This charge, therefore, should be disapproved.

"The next charge is 'Drunkenness,' and to this the accused pleaded guilty. In addition the evidence definitely establishes that he was either 'drunk' or 'doped,' the former opinion predominating.

"The next charge (charge III) is 'Using abusive, obscene, and threatening language and gestures toward his superior officer.' This is not an authorized charge, the language of the law being, 'Who * * * quarrels with, strikes, or assaults, or uses provoking or reproachful words, gestures, or menaces toward, any person in the Navy' (Art. 8 (3), A. G. N.). The form of charge under this article is, 'Using provoking and reproachful words, gestures, and menaces toward another person in the Navy' (Naval Courts and Boards, 1917, 130). In addition, the following form charges are given in Naval Courts and Boards, 1917 (pp. 129, 130), apparently laid under article 22, Articles for the Government of the Navy; 'Using abusive obscene, and threatening language toward his superior officer,' 'Using abusive and profane language toward his superior officer,' 'Using abusive, profane, and threatening language [P. 5] toward his superior officer.' 'Using abusive and threatening language toward his superior officer,' and 'Using threatening language toward his superior officer.' In this case, it will be seen that the charge has been extended to include something more than is authorized either by law or instructions, and apparently resulted from an attempt to combine two charges in one.

"In addition to the defective charge, the specifications thereunder are also defective. The first specification sets forth language which is abusive and obscene, but hardly threatening, and does not allege any 'gestures,' threatening or otherwise.

"It is elementary military law that each specification must be complete and in itself support the charge, and that it is not sufficient that several specifications taken together may support the charge. Any specification which, standing alone, does not support the charge is fatally defective. The first specification of this charge, therefore, cannot be sustained.

"The second specification of charge III sets forth language which may be regarded as abusive, obscene, and possibly threatening, but it does not contain any allegations from which it definitely appears that said language was used 'toward his superior officer.' The language is, 'I can lick any s_____ of b_____ on this ship.' Taking this specification alone, there is no warrant in law for inferring that the accused meant to apply this appellation to his superior officer, in whose presence the remark was made, nor does the specification charge that he meant thereby to refer to his superior officer. Furthermore, in this specification, likewise, there is nothing whatever said about any 'gestures,' threatening or otherwise, used by the accused.

"The third specification sets forth the use of threatening language, but no abusive or obscene. It also sets forth a threatening gesture, but the evidence completely fails to support this latter allegation. The specification alleges that when the officer of the deck, Ensign Southall, told the accused that he had orders to confine him, the accused, to his room, the accused replied, 'Come and put me in. It will take the whole ship's company to do it,' or words to that effect, and that the accused 'did then and there take possession of a loaded revolver and hold it ready for use as a weapon.' Ensign Southall himself testified that he did not see the accused have a revolver or other weapon, as he left 'hurriedly' when someone remarked that the accused [P. 6] had a gun. No witness testified that the accused had a weapon in his possession, ready for use, at this time, as all scattered upon the warning given by Machinist Burgess.

"Wholly aside from the insufficiency of the evidence upon these specifications, the findings thereupon and upon charge III should be disapproved for the reason, as above stated, that no one specification supports the charge.

"Charge IV is 'Disobeying the lawful order of his superior officer.' The question presented in this connection is whether voluntary drunkenness is a defense to this charge.

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"In Winthrop's Military Law and Precedents (vol. 1, p. 441) it is stated upon this point: 'Where a deliberate purpose or peculiar intent is necessary to constitute the offense, as in cases of disobedience of orders * * *, the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defense to the specific act charged.' This statement is quoted and applied in Navy Department C. M. O. No. 86, 1898, digested in two places in Navy Digest, 1916, as follows:

"'A deliberate purpose or peculiar intent is necessary to constitute the offense of disobedience of orders, and drunkenness may be a matter of legal defense insofar as it affects the capacity to entertain such purpose or intent' (Naval Dig., 190 (8)).

"'While it is an established principle of law that voluntary drunkenness furnishes per se no excuse or palliation for criminal acts committed during its continuance, yet in military law, where a deliberate purpose or peculiar intent is necessary to constitute the offense, as in the cases of disobedience of orders, drunkenness, if shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defense' (Naval Dig., 1916, 196 (52)).

"On the other hand, it has been held by this department that no specific intent is necessary to sustain a charge of disobedience of orders, and accordingly that drunkenness, when voluntary, is no defense to such charge. Thus, in C. M. O. No. 77, 1906, it was stated by Secretary Bonaparte:

"'The department cannot concede that intoxication forms any excuse for failure to render prompt and implicit obedience [P. 7] to orders from superior officers * * *.' This case is noted in Naval Digest, page 195, paragraph 36. Again, in C. M. O. No. 5, 1912 (9, 10), it was remarked:

"'If the Articles for the Government of the Navy be examined, many acts and neglects will be found which are made punishable where only a general intent is necessary; that is, where merely doing the act or omitting to do some duty constitutes the offense, the presumption of a general wrongful intent being raised by proof of such act or omission. Some of these are * * * "Negligent or careless in obeying orders," "Violating or refusing obedience to any lawful general order" * * *.'

"Notwithstanding these later decisions of 1906 and 1912, the department, in C. M. O. No. 50, 1918 (pp. 18, 19), reverted to the ruling made in 1898, based upon the above quotation from Winthrop, without even citing the contrary rulings of 1906 and 1912, which were apparently overlooked.

"With these conflicting decisions now before me, I have given careful consideration to the subject and am of the opinion that the views expressed in C. M. O. No. 77, 1906, and C. M. O. No. 5, 1912, are correct, and that C. M. O. No. 50, 1918 (pp. 18, 19), which conflicts with said prior court-martial orders of 1906 and 1912, and which inadvertently followed earlier rulings overruled by said orders, should be expressly overruled.

"Although clearly of the opinion that no specific intent is required to sustain a charge of disobeying orders, I do not mean to suggest that voluntary drunkenness affords no greater defense in such case than it does in any other case where specific intent is not required. One could not be guilty of willfully disobeying an order given him in a foreign language which he did not understand; no more could he be guilty of willfully disobeying an order which he for any other reason was incapable of understanding, because it is first of all necessary that the order be understood before it can be charged that it was willfully disobeyed. Hence drunkenness to such extent as to render one incapable of understanding an order will constitute a good defense to this particular charge of 'Disobeying the lawful order of his superior officer.' Also, drunkenness to such extent as to render one incapable of obeying an order, or which might cause him to forget the order after he had started to execute it, would likewise be a defense. But in such cases it is obvious that even the general criminal intent required by law would be lacking.

[P. 8] "In this connection (see C. M. O. No. 37, 1912) where accused was convicted of 'Drunkenness' and 'Willful injury to Government property,' notwithstanding it was shown that he injured the property in ques-

tion while in a 'drunken frenzy,' (see also *Newby* v. *State*, 105 N. W. 1099, 1100; 75 Nebr. 33; and C. M. O. 10, 1912, p. 6) where the word 'willful' is defined, and is said to be 'a word of familiar use in every branch of the law, and it amounts to nothing more than this: That the person knows what he is doing and is a free agent.'

"In the present case there is no doubt from the evidence that the accused understood the order and knew what he was doing when he refused to obey same. The evidence as shown above is, upon this point, that the acting commanding officer told the accused to go below, and the latter replied, 'I am not going below, I am going ashore.' Here was a disobedience of orders and a willful disobedience, there being no room for doubt from the reply made by the accused that the order was understood by him.

"Nothing contained in the foregoing must be construed as in conflict with the opinion in the case of Peter J. Valente, seaman, second-class, U. S. Navy, G. C. M. Record No. 41933, for the reason that the question of drunkenness in connection with the charge of 'Disobeying the lawful order of his superior officer' was not raised nor discussed therein. The principle, laid down in the Valente case that drunkenness, per se, is not a defense where no specific intent is necessary is, on the contrary, reiterated and affirmed.

"Charge V is 'Using threatening language toward another person in the Navy.' The language set forth is 'threatening,' being as follows: 'I will kill or shoot anyone that tries to prevent me from going ashore,' or words to that effect. This language is charged as having been used 'in the presence of Machinist Charles E. Burgess, U. S. Naval Reserve Force,' but it is not alleged that it was used 'toward' the said Machinist Burgess, nor is there any allegation whatever in the specification that there were any other persons present or that the aforesaid language was used by the accused 'toward' any particular person or persons, in or out of the naval service. The evidence shows that no one else was present when the language was used, and that Machinist Burgess was not intended by the accused, who was apparently very docile and tractable in the [P. 9] hands of said Burgess, toward whom there is no evidence that he displayed animosity or desire to do violence at any time. As no one else was present, the evidence does not supply the omission in the specification, although as it appears from the record that certain officers of the ship, viz, the officer of the deck and the acting commanding officer, had told the accused that he was not to go ashore, it might be inferred that he meant them, or anyone else who might attempt to interfere with his going ashore. It is considered, however, that to constitute this offense the threatening language used 'toward' another person in the Navy must be used in the presence of the person threatened, and that the specification should distinctly set forth who was intended by the accused, where the specification would otherwise be ambiguous, as shown by the following form in Naval Courts and Boards, 1917 (page 130), under the charge 'Using provoking and reproachful words, gestures, and menaces toward another person in the Navy.'

"'* * * use provoking and reproachful words, gestures, and menaces toward Acting Assistant Surgeon _____, U. S. Navy, serving at the recruiting office aforesaid, by shaking his fist in the face of the said _____, and saying to him: "That thing there reported me. That sneak is watching me and just waiting to report me for drinking," the words "that thing there," and "that sneak" meaning and intending to refer to the said _____.'

"For the reasons set forth above it is recommended that the findings upon charges I, III, and V, and the specifications thereunder, be disapproved; that the proceedings and the findings under charges II and IV and the specifications thereunder be approved. It is further recommended that the sentence be approved, but that so much of the sentence as relates to imprisonment at hard labor be remitted."

Concurrence of the Bureau of Navigation

On May 13, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

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ACTION OF THE SECRETARY OF THE NAVY

On May 14, 1919, the Acting Secretary of the Navy approved the recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and in conformity with article 53 of the Articles for the Government of the Navy [P. 10] (section 1624 of the Revised Statutes), submitted the record of the proceedings of the general court martial in the foregoing case to the President of the United States, with the recommendation that the sentence, as mitigated, be confirmed.

ACTION OF THE PRESIDENT

On May 31, 1919, the President of the United States confirmed the sentence, as mitigated, of the general court martial in the foregoing case of Boatswain (T) Stephen F. Leitner, U. S. Navy.

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[P. 15] ACQUITTAL: NOT JUSTIFIED BY EVIDENCE ADDUCED.

Accused was charged with and acquitted of "Theft," notwithstanding evidence that having found a belt containing money near barracks he removed said money from the belt and disposed of the latter; that later, after announcement of the loss had been made at quarters, accused did not make any effort at that time to return the money to its owner; that subsequently the belt was found under such conditions as to cast suspicion upon the accused, and a search of accused resulted in finding the money contents of the belt in his sock. Testifying in his own behalf, accused stated he did not at quarters acknowledge finding the money because he was afraid it would be taken away from him and would not get to its proper owner; that he intended turning it in to the Knights of Columbus canteen when it opened.

The Judge Advocate General, being of opinion that the acquittal of accused was not justified by the evidence adduced, recommended disapproval of the acquittal and that the accused be released from arrest and restored to duty (File 26251–19894, June 12, 1919).

[P. 16] BEST-EVIDENCE RULE: RELATES TO WRITINGS ONLY.

Where counsel for accused moved to strike out the testimony of certain witnesses concerning stains which they claimed to have seen on certain garments worn by accused, on the ground that the garments were the best evidence and were in existence, *Held*, The best-evidence rule, as now understood, relates to writings only (McKelvey, 425, 426). Further, that whenever evidence of the condition of clothes or other articles of personal property is competent and material, the same may be described by witnesses without producing the articles themselves (*Comm.* v. *Pope*, 103 Mass. 440; *Underwood* v. *Comm.*, 84 S. W. (Ky.) 310; *State* v. *McAfee*, 50 S. W. (Mo.) 82; File 26262–6441, J. A. G., June 4, 1919.).

CONSPIRACY: ESSENTIAL ELEMENTS OF.

An accused was charged with "Conduct to the prejudice of good order and discipline," the specification of the charge alleging a conspiracy. An examination of the record disclosed an entire absence of evidence to show the existence of a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. The aforesaid elements being essential to establish conspiracy (8 Cyc., 620; *Pettibone* v. *United States*, 148 U. S. 197), the Judge Advocate General recommended disapproval of the findings and sentence because the evidence adduced failed to support the specification (File 26262–6491, June 9, 1919).

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FINDINGS: NOT IN ACCORD WITH EVIDENCE.

Accused was charged with "Willful destruction of public property," said charge being supported by a specification which alleged that accused did "while engaged in driving the regimental car, willfully drive the said car at an excessive rate of speed, thereby causing him * * * to lose control of said car and run the same into a curbing * * * breaking the said regimental car beyond repair."

The prosecution introduced no evidence to show that the car was driven at an excessive rate of speed, nor any other evidence than the fact that the car was damaged. The defense introduced evidence to prove that the accused was driving the car on duty ; that the car was not being driven at an excessive rate of speed; that the accident was caused by a blowout; that the car was not seriously damaged, and was at the time of the trial in use. There being no evidence tending to show the accused guilty of willful destruction of public property, the Judge Advocate General was of opinion that the finding of "guilty" on the above charge was not in accordance with the evidence (File 26262–6518, J. A. G., June 11, 1919).

[P. 17] JURISDICTION: LACK OF, BY COURT AT TIME OF TRIAL.

The department ordered the trial of an accused before a general court martial to convene at naval training camp B for the reason that the accused was restricted at that place. Subsequently camp B was demobilized and the accused was transferred to navy yard C. A letter revoking the order for trial at camp B was mailed to the president of the general court martial at navy yard C, authorizing the trial of accused at that place. But this court prior to the receipt of this order proceeded with the trial, thus, in the opinion of the Judge Advocate General, performing a function not within the scope of the authority then vested in it. Inasmuch as the court was without jurisdiction at the time of the trial, it was recommended that the proceedings, findings, and sentence be set aside as null and void (File 26251–20637, J. A. G., June 5, 1919).

MEDICAL EXAMINATION: SUBMISSION BY DEFENDANT TO.

Objection was made at trial, by accused's counsel, to the testimony of a medical officer with regard to a physical examination of the accused, made shortly after his arrest, the objection being based upon the theory that the examination was in violation of the constitutional rights of the accused, he being thereby compelled to give evidence against himself. Counsel contended that the accused in obeying the medical officer's order to expose his person did so believing it was obligatory upon him to comply with the same. Accused, testifying in his own behalf, said that had he known he was being examined in order to obtain evidence to be used against him he would have protested against such examination.

The Judge Advocate General was of the opinion that the submitting by a defendant to a medical examination is not a confession, although the result is to disclose facts of a criminating character (see 12 Cyc. 460). Moreover, the accused in this case made no protest when asked to expose his person for examination. Consequently the testimony of the medical officer was properly admitted by the court; the fact that the accused was ignorant of the purpose of the examination, also the question whether he exhibited his person voluntarily or by order, are immaterial; the evidence obtained from such examination, if material, was competent. (See *Adams* v. *New York*, 192 U. S. 585; *Holt* v. *United States*, 218 U. S. 245; *State* v. *Garrett*, 71 North Carolina 85; File 26262–6441, J. A. G., June 4, 1919.

SPECIFICATIONS: MUST SUPPORT CHARGE.

An accused was charged with "Conduct to the prejudice of good order and discipline," the specification thereunder alleging that he "did * * * enter and ransack the office in the after deck house of the U. S. S. *Piqua*, then secured

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alongside the U. S. S. *Bridgeport*, [P. 18] said office containing a mail bag regularly used for the reception of outgoing United States mail, as a result of which entry and ransacking one or more pieces of United States mail, addressed to persons residing in the United States, were missing."

In the opinion of the Judge Advocate General the above-quoted specification is bad and does not sustain the charge, inasmuch as it alleges no offense. It is not alleged that the accused entered the office unlawfully, nor is it alleged that the ransacking was unlawful or for some wrongful purpose. It is charged that said office contained a mail bag "regularly used for the reception of outgoing United States mail," and that as a result of such entry "one or more pieces of United States mail * * * were missing." This latter part of the specification is vague and indefinite, in that it is not specifically alleged that the accused was directly responsible for the fact that mail was missing. The above charge and specification thereunder were accordingly disapproved (File 26262-6492, J. A. G., June 7, 1919).

[P. 19] AIRCRAFT: LICENSE FOR CIVILIAN PILOTS OF.

Certain questions in regard to licenses for civilian pilots of aircraft were answered by the Judge Advocate General substantially as follows:

By the President's proclamation of February 28, 1918, the Joint Army and Navy Board of Aeronautics Cognizance was charged with the issuance of licenses to persons contemplating flying in aircraft, in any part of the United States, during the period of the war. Persons flying in aircraft in any part of the United States without a license, and in violation of the President's proclamation, are liable to arrest and punishment.

The President's proclamation of February 28, 1918, being issued long before the armistice was signed or even considered, the same was not affected in any way by the armistice and remains in full force and effect until the end of the war or until amended or revoked by the President.

There can be no doubt as to the legality and constitutionality of the President's proclamation of February 28, 1918, regulating flying in aircraft during the period of the war, it being a war measure.

For administrative purposes, the department considers that the war did not come to an end with the signing of the armistice, the opinion of a district judge to the contrary not being regarded as controlling upon the department (File 26983-982, J. A. G., June 4, 1919).

APPLICANTS FOR ENLISTMENT (MARINE CORPS): STATUS OF.

The question was presented as to the military status of an applicant for enlistment in the Marine Corps who is alleged to have lost his life May 1, 1918, in the collision of the steamship *City of Athens* with the French cruiser *Gloire*.

With reference to the status of applicants for enlistment in the Army, in *Union Pacific Railroad Company* v. *United States* (52 Ct. Cls. 226, 233), it was held:

> "This class is in no way connected with the military organization or any movement of the same, and may never become so. 'In order [P. 20] to become a soldier of the United States Army—i. e., in order to become a fully enlisted man—the party must first enlist by signing the prescribed application, and he must then be accepted and sworn into the service by the proper officer' (*Coe* v. *United States*, 44 Ct. Cls. 419, 427). 'Such persons have not changed their status in life from that of ordinary citizens to that of a soldier, and are not amenable to military jurisdiction. They are not members of the military organization, and therefore are not included within the term "troops of the United States"; and are not entitled to the reduced rates provided by the land-grant act and the decisions and arrangements under the same.' " (See also File 10060-85, J. A. G., Feb. 28, 1917; 18 Comp. Dec. 103, as modified by 19 Comp. Dec. 307, 371.)

That such applicants for enlistment are civilians and are not persons in the military service is apparent from the detailed explanations of this system of recruiting which were made to the department by the Major General Com-

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mandant in connection with his recommendation that said system be adopted in the Marine Corps. Since this system was put into effect, it has been consistently held in every case in which the question has arisen that the status of applicants is, as stated, that of civilians and not persons in the military service.

The above decision of the Court of Claims with reference to the status of such applicants in the Army applies equally to the Marine Corps, and is a judicial determination that they are not persons in the military service.

In the instant case the applicant, not having completed his enlistment by being sworn in, could refuse to take the oath. Also, he was subject to rejection by the Government upon reexamination. It follows, therefore, that the man in question was not in the military service (File 28909–229, Sec. Nav., June 18, 1919; also see C. M. O. 39, 1919, p. 22).

BOARD OF SELECTION: REEXAMINATION AFTER SELECTION FOR PROMOTION BY.

The question presented for consideration was whether or not an officer who had been examined professionally and physically prior to being selected by the Board of Selection for promotion must be reexamined after such selection.

Citing a former ruling of the department (File 26260–3630: 2) that the act of August 29, 1916, "requires that an officer of the designated grades, before being eligible for examination, be first selected by a board and approved by the President," the Judge Advocate General was of opinion that said ruling is conclusive and that the query must be answered in the affirmative (File 26521–337, J. A. G., June 23, 1919).

[P. 21] DISMISSAL (BY SENTENCE OF COURT MARTIAL): EFFECT OF, AS TO REINSTATEMENT.

Section 1441 of the Revised Statutes is as follows:

> "No officer of the Navy who has been dismissed by a sentence of court martial, or suffered to resign in order to escape such dismissal shall ever again become an officer of the Navy."

The Attorney General on February 15, 1918, stated that in his opinion an officer who has been dismissed from the service by sentence of court martial, or suffered to resign in order to escape such dismissal, cannot again become an officer of the Navy, even though he should be pardoned by the President for the offense for which dismissed (File 26262–5846: 3, J. A. G., June 18, 1919; See also Pardon (Unconditional), etc., *post*).

FURLOUGHED ENLISTED MEN: DISCHARGE OF, ON EXPIRATION OF ENLISTMENT.

In connection with the question as to whether or not an enlisted man furloughed in accordance with the provisions of the act of August 29, 1916, should upon the expiration of his enlistment be discharged, the act of August 29, 1916, provides:

> "The Secretary of the Navy is hereby authorized to grant furlough without pay to enlisted men for a period covering the unexpired portion of their enlistment: *Provided*, That such furlough be granted under the same conditions and in lieu of discharge by purchase or by special order of the department. Enlisted men so furloughed shall be subject to recall in time of war or national emergency to complete the unexpired portion of their enlistment, and shall be in addition to the authorized number of enlisted men of the Navy."

The granting of a furlough under the above act to an enlisted man does not operate to discharge him from his enlistment or from the service, because the act specifically provides that he shall be subject to recall in time of war or national emergency to complete the unexpired portion of his enlistment, thereby clearly indicating that he is not to be regarded as having been discharged from the service. Such furlough merely operates to place him in an inactive status until the expiration of his enlistment unless sooner recalled to active service in

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time of war or national emergency. In view, however, of the proviso that such furlough be granted under the same conditions and in lieu of discharge by purchase or by special order of the department, repayment of deposits to men furloughed may be made on the date the furlough is granted. (See File 7657–402:1).

For the above reasons, the Judge Advocate General was of opinion that an enlisted man who is in an inactive status on furlough pursuant to the above provisions of the act of August 29, 1916, should be given a discharge from the service at the expiration of the period of his enlistment (File 7657–905, J. A. G., June 6, 1919).

[P. 22] JURISDICTION: TO PUNISH PERSONS IN THE NAVAL RESERVE FORCE FOR OFFENSES COMMITTED WHILE NOT ACTUALLY ENGAGED ON ACTIVE DUTY WITH THE NAVY.

The question of the jurisdiction of the department to try and punish the following classes of persons was submitted for the opinion of the Judge Advocate General, viz:

(*a*) Those enrolled in the Naval Reserve Force but not ordered to active duty with the Navy.

(*b*) Those enrolled in the Naval Reserve Force and ordered to report for active duty with the Navy, but who had not actually reported for active duty at the time of the commission of the offense.

(*c*) Members of the Naval Reserve Force who committed offenses while on active duty with the Navy and who were relieved from active duty with the Navy before the offense became known to the naval authorities.

In the opinion of the Judge Advocate General, concerning persons coming within class (*a*) above mentioned, the Navy Department is without jurisdiction to try or otherwise punish them. With reference to class (*b*), the jurisdiction of the Navy Department to try by court martial or otherwise punish offenders against the laws, regulations, and orders for the government of the naval service attaches when no travel is involved, on the date specified in their orders as the date on which they are required to submit themselves to naval jurisdiction; and this is true whether they report or not. Concerning offenders falling within class (*c*), the question of jurisdiction involved has been submitted to the Attorney General for his opinion.

The foregoing does not refer to transferred members of the Fleet Naval Reserve, as such persons are at all times subject to the laws and regulations for the government of the Navy (File 26251–16994:14, J. A. G., June 4, 1919; see also File 4032–207, J. A. G., June 20, 1919).

LINE OF DUTY: DEATH IN, NOT THE RESULT OF MISCONDUCT.

From the "findings of fact" arrived at by the court of inquiry in a recent case it appears that deceased was placed under arrest upon the charge of absence over leave, and on the way to the place of confinement, while in charge of an acting master at arms, was struck by a Navy truck, which passed over his chest, causing his death shortly thereafter.

The opinion of the Attorney General of May 17, 1855 (7 Op. Atty. Gen. 149), which has been accepted by the department as the basis for its rulings in line of duty cases, is in part as follows:

> "In regard to arrest, again, suppose that on march, in camp or garrison, or on a voyage, an officer is put in arrest on charges. In the first place, those charges may not be substantiated, and then it would be manifestly unjust that the mere fact of his being charged should operate to deprive himself or his family of pension. Or, [P. 23] while he is in arrest, he dies of camp fever or ship fever, and then it is unjust to presume a criminality not proved in the course of law. Or, whether guilty or not, if he die of wounds, casualty, or disease contracted while in arrest, still the death is not the consequence of the arrest, but of the public service. If not dying in arrest, and on trial being convicted and sentenced, that sentence be of death or dismissal for some grave military crime, that, of course, terminates the question of pension; but if his offense be a light one, with a sentence of

reprimand, for instance, and he shall have happened to contract disability or mortal disease while in arrest, as by the hazards of a long march or voyage, it seems not just to add to his legal sentence the serious indirect aggravation of incapacity of pension."

The view taken by the Interior Department in pension cases involving this question was expressed in the decision of the Assistant Secretary of the Interior of October 26, 1903 (14 P. D. 213), in which it was held (quoting syllabus):

"A disease contracted by soldier while in confinement awaiting trial for a breach of military duty is not necessarily incurred without the line of duty, and when the soldier is acquitted, or died while awaiting trial, a disease so contracted is held to have been incurred in line of duty."

In the course of the decision the Assistant Secretary of the Interior stated:

"From the records it does not appear with what offense the soldier was accused, but it does appear that he was never tried; therefore, in the eyes of the law and of the department it must be and is presumed that he was innocent, no competent authority having pronounced him guiity. * * * The very essence of the long line of decisions holding that a soldier is not in line of duty when undergoing punishment is the fact that he, by his own disobedient act, knowingly and willfully placed himself without the line of duty; and when this is not the fact, in submitting to arrest and confinement awaiting trial, he is merely obeying his superior officers, thus doing his duty as a soldier."

In view of the foregoing the department decided that the death of the man in question was incurred in the line of duty and was not the result of his own misconduct, thus overruling a former decision of April 30, 1919, in the same case (File 26250–2015, Sec. Nav., June 6, 1919).

NAVAL RESERVE FORCE: ELIGIBILITY OF MEN IN THE REGULAR NAVY FOR TRANSFER TO, WITH CONFIRMATION IN RATING

On the question "Under what conditions may a member of the Regular Navy be transferred to the Naval Reserve Force," the Judge Advocate General rendered an opinion that the act of August 29, 1916, provides the only way in which such transfer may be effected, viz:

"In addition to the enrollments in the Fleet Naval Reserve above provided, the Secretary of the Navy is authorized to transfer to the [P. 24] Fleet Naval Reserve at any time within his discretion any enlisted men of the naval service with twenty or more years' naval service, and any enlisted man, at the expiration of a term of enlistment who may be then entitled to an honorable discharge, after sixteen years' naval service: *Provided*, That such transfers shall only be made upon voluntary application and in the rating in which then serving, and the men so transferred shall be continued in the Fleet Naval Reserve until discharged by competent authority" (File 28550–123:9, J. A. G., June 17, 1919).

NAVAL RESERVE FORCE: JURISDICTION OF GENERAL COURT MARTIAL TO PUNISH AN OFFICER OF, FOR OFFENSES COMMITTED WHILE SERVING IN AN ENLISTED RATING IN.

The records of the department show that the person in question enrolled in the Naval Reserve Force on December 14, 1917, as a yeoman, first class, for a period of four years and later was given the provisional grade of assistant paymaster with the rank of ensign in the U. S. Naval Reserve Force, class 4, for general service.

On the foregoing statement of facts, the Judge Advocate General was of opinion that, as the person in question was not discharged from his enrollment and said enrollment does not expire until December 14, 1921, and that as he was not commissioned an officer in the Navy but was given a provisional assignment as such, the department has not lost jurisdiction to bring him to trial by general court martial for offenses committed by him while serving in an enlisted rating under his current enrollment (File 26251–20099:5, J. A. G., June 2, 1919).

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PARDON: CONSTRUCTIVE OR IMPLIED.

An officer of the Navy requested that the department reconsider its action upon the record of this trial by general court martial (C. M. O. 2, 1919), on the ground that his temporary promotion to lieutenant (junior grade) after charges were preferred against him but prior to his trial thereupon was a constructive pardon. The question so raised was submitted to the Attorney General, who rendered an opinion thereupon, April 4, 1919, holding that "a pardon by implication or construction is a thing not known to or recognized by the law," and that prior opinions of the Attorneys General, holding that the promotion of an officer under charges is an implied or constructive pardon, which were the basis of the Judge Advocate General's opinion in this case, are not supported by authority. The Attorney General accordingly concluded that the promotion of an officer of the Navy while under charges awaiting trial by general court martial does not operate as a constructive pardon of the offenses charged against him, notwithstanding the opinions of former Attorneys General to the contrary (File 26251–18107:4; see also C. M. O. 71, 1918, p. 21, and 185, 1918).

[P. 25] PARDON (UNCONDITIONAL): DOES NOT REMOVE DISABILITY IMPOSED BY SECTION 1441, REVISED STATUTES, ON OFFICERS DISMISSED BY SENTENCE OF COURT MARTIAL AS TO REINSTATEMENT.

In reply to the request of this department for an opinion of the Attorney General as to whether an unconditional pardon removes the disability imposed by section 1441 of the Revised Statutes, the Attorney General on February 15, 1918, expressed the opinion that an officer who has been dismissed from the Navy by sentence of court martial, or suffered to resign to escape such dismissal, can not again become an officer of the Navy even though he should be pardoned by the President for the offense for which dismissed, and that such officer is not eligible for enrollment in the Fleet Naval Reserve.

The basis of the Attorney General's opinion is that the disability imposed by section 1441 is not a punishment which might be pardoned by the President, but is a qualification for appointment as an officer in the Navy. As a provision of law enacted by Congress prescribing qualifications for appointment as an officer of the Navy, the disability cannot be removed by Executive pardon, but can only be removed by legislative action on the part of Congress (File 26251–12993:3, Sec. Nav., June 16, 1919; see also Dismissal by Sentence of Court Martial)—Effect of, as to reinstatement, ante).

RANK AND PRECEDENCE: ADMIRALS ASSUMING COMMAND ON SAME DATE.

It being proposed to detail three officers (two of whom have the rank of vice admiral, and now rank as follows: A, vice admiral; B, vice admiral; and C, rear admiral) by orders bearing the same date to command afloat with the rank of admiral, the question is presented, How will said officers rank with each other? In the permanent grade of rear admiral their precedence is as follows: Rear admiral B (temporarily vice admiral); rear admiral C (rear admiral); and rear admiral A (temporarily vice admiral).

Held, That the three officers in question when designated as admirals will not take precedence in accordance with their standing in the grade of rear admiral, nor will their precedence be affected in any manner by the fact that two of said officers have previously held the rank of vice admiral. Their precedence as admirals will be governed by their respective dates "of assuming command." In the event that these three officers or any two of them should assume command on the same date, which is of course a possibility, if the orders are issued to them at the same time, their precedence would be governed by article 1010 (2), Navy Regulations, 1913, which reads as follows:

> "In fixing the relative rank of officers of the Army, officers of the Navy, and officers of the Marine Corps, of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, [P. 26] whether continuously or at different periods, shall be taken into account."

This rule for determining precedence between officers of the same grade and date is statutory in the Army and the rule so prescribed by statute for

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the Army is extended to the Navy by the foregoing regulation. Such a regulation for the Navy is almost a necessity in view of the law governing the Army, as should a different rule be prescribed for the Navy than that which governs by law in the Army such rules would necessarily conflict where officers of the Army and Navy serve or associate together, and it would be impossible to fix their relative precedence except by the adoption of the same rule to govern all. Nevertheless, it is true that no statute limits the Secretary of the Navy in fixing the precedence of such officers of the Navy as between themselves where they are of the same grade and date of rank, and therefore the regulation above quoted might by authority of the Secretary be departed from and some different rule of precedence be adopted to govern the situation which would result should two of the three officers in question assume command on the same date (File 11130–53:1, J. A. G., June 25, 1919; see also C. M. O. 37, 1918, p. 18).

RETIREMENT: AFTER 45 YEARS' SERVICE.

The following questions were submitted for the opinion of the Judge Advocate General, viz:

"(1) Whether or not an officer in the Pay Corps, U. S. Navy, having served forty-five years therein, may be retired with the rank of commodore?" and

"(2) Whether or not an officer in the U. S. Navy may count as continuous service in the Regular Navy service in the Naval Academy and in the U. S. Army?"

The Judge Advocate General expressed the following views:

"Under the provisions of section 1481 of the Revised Statutes an officer in the Pay Corps, U. S. Navy, who has 'served faithfully for forty-five years' may be retired with the rank of commodore. The term 'relative rank of,' found in this section, has been changed to 'rank of' by the act of March 3, 1899. Query 1, therefore, must be answered in the affirmative.

"Service as a midshipman prior to the act of March 4, 1913, is counted in computing the length of service of an officer in the Navy and subsequent to the act of March 3, 1883, an officer of the Navy is entitled to be credited with the actual time he may have served as an officer or enlisted man in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said services had been continuous and in the regular Navy. Query 2. therefore must be answered in the affirmative" (File 27231–141, J. A. G., June 10, 1919).

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[P. 1] Ensign Richard B. Tschudy, U. S. Naval Reserve Force, was tried by general court martial on May 6, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and acquitted of the following charge:

Charge.—Neglect of duty (one specification).

RETURNED FOR REVISION

The department, being of opinion that the findings of the court are not in accord with the evidence adduced, and calling attention to the fact that all the substantial and necessary averments in the specification alleged in support of the charge "Neglect of duty" (which averments contained the gravamen of the offense and are entirely sufficient to support said charge) were admitted by accused, returned the record of proceedings in this case and directed that the court reconvene for the purpose of reconsidering its findings.

FINDINGS IN REVISION

The court decided to revoke its former finding and acquittal in the case of Ensign Richard B. Tschudy, U. S. Naval Reserve Force, and to substitute therefor the following finding:

"The specification of the charge 'proved,' and the accused, Ensign Richard B. Tschudy, U. S. Naval Reserve Force, is of the charge 'guilty.'"

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SENTENCE IN REVISION

"The court therefore sentences him, Ensign Richard B. Tschudy, U. S. Naval Reserve Force, to lose fifty dollars ($50) per month of his pay for a period of three (3) months."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On June 14, 1919, the Judge Advocate General placed the following endorsement upon the record:

> "Respectfully referred to the Chief of the Bureau of Navigation for comment as to disciplinary features, with the information that, in the opinion of this office, the proceedings, findings, [P. 2] and sentence in revision of the general court martial in the foregoing case of Ensign Richard B. Tschudy, U. S. Naval Reserve Force, are legal."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On June 20, 1919, the Bureau of Navigation recommended that, in view of all the circumstances connected with the accident for which the accused was tried by general court martial, the sentence be remitted and the accused be released from arrest and restored to duty.

ACTION OF THE SECRETARY OF THE NAVY

On June 23, 1919, the Acting Secretary of the Navy approved the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Ensign Richard B. Tschudy, U. S. Naval Reserve Force, but in view of all the circumstances in this case and the recommendation of the Bureau of Navigation, remitted the sentence and directed that the accused be released from arrest and restored to duty.

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[P. 1] Lieutenant (Junior Grade) John Anderson, U. S. Naval Reserve Force, was tried by general court martial on June 2, 1919, at U. S. Naval Base No. 29, Cardiff, Wales, by order of the Base Commander, and found guilty of the following charge, proved by plea:

Charge.—Absence from station and duty without leave (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) John Anderson, U. S. Naval Reserve Force, to be publicly reprimanded by the convening authority."

RETURNED FOR REVISION

On June 3, 1919, the convening authority returned the record in the foregoing case to the court, with the direction that the court reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, is not adequate to the offense of which the accused by his own admission is guilty.

SENTENCE IN REVISION

"The court therefore sentences him, Lieutenant (Junior Grade) John Anderson, U. S. Naval Reserve Force, to lose fifty dollars ($50) per month of his pay for a period of four (4) months."

ACTION OF THE CONVENING AUTHORITY

On June 4, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) John Anderson, U. S. Naval Reserve Force.

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OPINION OF THE JUDGE ADVOCATE GENERAL

On June 21, 1919, the Judge Advocate General, in referring the record to the Chief of the Bureau of Navigation for comment as to disciplinary features, was of opinion as follows:

"It is noted that the precept is dated May 29, 1919, and the letter transmitting the charge and specification is dated May 23, 1919. While this mode of procedure is clearly irregular, it has been held that it is not sufficiently so to invalidate (G. C. M. Rec. No. 39225).

[P. 2] "Subject to the foregoing, in the opinion of this office, the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Lieutenant (Junior Grade) John Anderson, U. S. Naval Reserve Force, are legal."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On June 25, 1919, the Bureau of Navigation, concurring in the opinion of the Judge Advocate General, recommended approval of the proceedings, findings, and sentence in revision of the general court martial in the foregoing case, but in view of the short length of time that the accused has been in the naval service, his apparent lack of knowledge of naval customs and regulations, and other circumstances, further recommended that the loss of pay be reduced to $25 per month for two months.

ACTION OF THE SECRETARY OF THE NAVY

On June 27, 1919, the Secretary of the Navy mitigated the sentence in revision of the general court martial in the foregoing case of Lieutenant (Junior Grade) John Anderson, U. S. Naval Reserve Force, to the loss of twenty-five dollars ($25) per month of his pay for a period of two (2) months.

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[P. 1] Gunner Frederick E. Peterson, U. S. Navy, was tried by general court martial on February 24, 1919, at the U. S. Naval Air Station and Submarine base, Coco Solo, C. Z., by order of the Commandant, Fifteenth Naval District, on the following charges:

Charge I.—Perjury (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and honorably acquitted the accused of the first charge; the specification of the second charge "proved" and the accused of the second charge "guilty in a less degree than charged," guilty of "maltreating a person subject to his orders."

SENTENCE

"The court therefore sentences him, Gunner Frederick E. Peterson, U. S. Navy, to be restricted to his ship or station for a period of four (4) months, and to lose fifty dollars ($50) per month of his pay for a period of six (6) months."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by ten of the eleven members of the court, was spread upon the record:

"In consideration of the long naval service and previous good character of the accused, and because we, the undersigned members of the court, believe that the accused was acting for what he considered the best interests of the naval service, inasmuch as he was attempting to prevent liquor traffic to the enlisted men of the naval service, we recommend

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Gunner Frederick E. Peterson, U. S. Navy, the accused, to the clemency of the reviewing authority."

RETURNED FOR REVISION

On March 28, 1919, the convening authority returned the record in the foregoing case to the court, with the direction that the court reconvene for the purpose of reconsidering the findings and sentence, and subject to the following remarks:

* * * "The court is informed that, in order for criminality to attach in a trial for perjury, it is necessary that the prosecution [P. 2] show that the accused has willfully and corruptly given upon lawful oath, in a judicial proceeding, false testimony material to the issue. A witness may commit perjury by testifying that he knows a thing to be true when, in fact *he either knows nothing about it or is not sure about it*, and this is true whether the thing be true or false *in fact*. It is no defense that such testimony would have been excluded if objected to as incompetent, or that it is not believed by reason of other testimony having been introduced to rebut the perjurious testimony. In fact, it has been held that perjury is committed when a witness swears that he does not remember certain facts when he actually does remember them (vide Clark's Criminal Law, and Manual for Courts Martial, U. S. Army).

"Having in mind the foregoing, it is a question of fact for the court to decide as to whether or not the accused in this case, having engineered a 'third degree' in the case of Roberts and having warned other parties to the affair to keep quiet about the entire transaction (R. P. 9, Q. 24 and A., and R. P. 10, Q. 25 to 31 and A), was guilty of perjury when he gave the false testimony as set forth in the above specification—the giving of this testimony having been admitted in open court by the accused (R. P. 14). In other words when the accused gave the alleged perjurious testimony was he stating the truth and the whole truth, according to his oath as a witness, and did his statement of this particular circumstance cover every fact known to him insofar as the circumstances leading to the first blow. It may be stated that the evidence is positive that no profanity was used at the beginning of the striking of Roberts, whereas the accused testified positively that profanity was used by Roberts; and that he believed that Bennett, a member of the investigating party, had been called a s_____ b_____. Either the accused has testified falsely to the facts as he knew them, by testifying that Bennett or someone had been called a foul name or a s——— b———, or he has testified falsely in averring that profanity was used, whereas in truth and fact it was not used. As to the manner in which the accused has perjured himself is a question of fact for the court to decide and in this connection the testimony of the accused should not be overlooked as indicative of how lightly he regarded his oath (R. P. 42, Q. 45).

"In regard to the second charge and the specification thereunder the court has found the accused guilty of 'Maltreating a person subject to his orders' after having found the accused guilty of the specification upon which a charge of 'Scandalous conduct tending to the destruction of good morals' was based. In the opinion of the convening authority the specification as alleged and found proved supports a charge of 'Scandalous conduct tending to the destruction of good morals' and does not [P. 3] support a charge of 'Maltreatment' as 'maltreatment' is not alleged in the specification."

FINDINGS IN REVISION

The court decided to revoke its former findings and substitute therefor the following:

The specification of the first charge "not proved," and the accused "not guilty" of the first charge; the specification of the second charge "proved" and the accused "guilty" of the second charge.

SENTENCE IN REVISION

"The court therefore sentences him, Gunner (Temporary) Frederick E. Peterson, U. S. Navy, to be dismissed from the United States naval service."

[C. M. O. 212—1919]

RECOMMENDATION TO CLEMENCY, IN REVISION

"In consideration of his previous excellent record covering a period of long naval service, as testified to by his commanding officer and other officers of high rank, long naval service and experience, and in consideration of the extenuating circumstances surrounding this case in which the evidence specifically shows that the offense with which Gunner Peterson is found guilty was the result of an excess of zeal done on the spur of the moment and at the suggestion of his superior officer, and having in mind as he believed the best interests of the naval service, and furthermore that this sentence if carried into effect would work untold hardship on his wife and innocent boy, the court unanimously recommends Gunner (Temporary) Frederick E. Peterson, U. S. Navy, the accused, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On March 31, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President of the United States, subject to the following remarks:

> "In the opinion of the convening authority the sentence adjudged is grossly inadequate for the offenses found proved. However, in order that final action in this case may not be further delayed and that the interests of the Government may not suffer further by reason of having to divert officers from [P. 4] important duty for the purpose of further revision, and in order that the accused may not entirely escape punishment, the sentence has been approved.
>
> "Only to the youth and inexperience of the court, composed of the only officers available for such duty in this district, can their action in imposing such a lenient sentence for such a nefarious offense, be ascribed."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

"The accused was charged with 'Perjury,' and 'Scandalous conduct tending to the destruction of good morals,' and was acquitted of the first charge, 'Perjury,' and found guilty of the second charge, 'Scandalous conduct tending to the destruction of good morals,' and the specification thereof, and sentenced to be dismissed from the naval service. The proceedings, findings, and sentence were approved by the convening authority March 31, 1919.

"This office does not consider it necessary to comment on the plea in bar to the first charge, the accused having been acquitted thereof.

"The accused's counsel objected to the jurisdiction of the court to try the accused on the second charge on the ground that the accused had been compelled, while testifying in the case of one Roberts, to incriminate himself, and that the charges in this case were based on his previous incriminating testimony, given under compulsion.

"The accused at the trial of Roberts objected to answering the following question on the ground of incrimination: '10 Q. Was force used to make the accused (Roberts) answer your question?'

"The court ordered the accused to answer, the answer being in the affirmative. The accused also maintains, although it does not appear in the record of the Roberts case, that the court went further, and stated that he would be compelled to answer all similar questions, that he had the right to assert his privilege, but that his objection would probably be overruled. Whereupon, the accused stated in detail, in answer to subsequent questions, the acts set out in the specification in this case.

"It is maintained by the accused's counsel that the action of the court in compelling the witness to incriminate himself was not only a bar to using his testimony against him but was a bar to prosecution on any charge arising out of the facts disclosed thereby. Counsel in support of this contention cites *Brown* v. *Walker* (161 U. S. 591), but does not quote from the opinion of the court, but from the dissenting opinion. This case is not in point, being a case arising under an immunity statute, which gives the court power to compel the witness to answer incriminating questions, but makes the witness no [P. 5] longer

[C. M. O. 212—1919]

liable to prosecution from any charge arising out of such incriminating testimony. There is no such statute applicable to a witness before a naval court martial.

"The witness in this case having been ordered to answer an alleged incriminating question, the only immunity arising therefrom being that such evidence shall not be used against him in a future criminal proceeding (*U. S.* v. *Prescott*, 2 Dill, 405–27; Fed. Cas. No. 16085). In this trial the testimony of the witness at the previous trial was not used against him with reference to charge II; further, there was sufficient evidence in the previous trial, independent of the testimony of the accused in this case, to warrant an investigation of his conduct.

"The foregoing was the only question, the answering of which was specifically objected to by the witness on the ground of privilege, he maintaining that the remaining questions were answered without specific objection, due to the court's statement that he would be compelled to answer. This mere general assertion of privilege is not sufficient, the witness must claim his privilege to each specific question, stating his reason therefor (*In re Druggist Cases*, 85 Tenn. 449; 3 S. W. 490), in which the court *held* 'In order to be available, a witness must, at the time he is examined claim his exemption upon the ground that his answer would criminate himself. Where only a general objection is made, and the witness is not shown to have answered only because he was compelled, his answer cannot afterward be suppressed.'

"It is noted that on page 21 of the record the judge advocate having taken the stand, in answer to question 2 'If you recognize the accused, state as whom?' answered 'James A. Moran, gunner, U. S. Navy, attached to the U. S. S. *C 5*,' whereas the accused in this case was Frederick E. Peterson, gunner (T), U. S. Navy. This office considers this to be a clerical error in the preparation of the record, the Judge Advocate without doubt knowing the proper name and designation of the accused, and it being unreasonable to suppose, had that been the actual answer, that objection would not have been interposed by the accused's counsel.

"There is no doubt as to the guilt of the accused as to the second charge, the accused taking the stand in his own behalf and admitting the allegations of the specification of the charge, endeavoring to excuse and justify his actions by the serious conditions existing at the station, and that his actions were acquiesced in and in accordance with the orders of his superior officer. This, however, does not constitute a defense. 'A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime' (*U. S.* v. *Carr*, 25 Fed. Cas. 307).

[P. 6] "It is unreasonable to believe, that the accused, a man with 16 years naval service, did not know the conduct indulged in to be unlawful, and of such a nature as not to be warranted under any circumstances.

"Subject to the foregoing, this office is of the opinion that the proceedings, findings in revision, and sentence in revision, of the general court martial in the foregoing case of Frederick E. Peterson, gunner (T), U. S. Navy, are legal.

"Referred to the Chief of the Bureau of Navigation for comment as to disciplinary features."

Recommendation of the Bureau of Navigation

On May 22, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence of the general court martial in the foregoing case.

Action of the Secretary of the Navy

On May 24, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record in the foregoing case to the President of the United States, with the recommendation that the sentence be confirmed.

Action of the President

On June 12, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Gunner (T) Frederick E. Peterson, U. S. Navy.

C. M. O. 213—1919

[P. 1] Lieutenant Commander Charles Geddes, U. S. Naval Reserve Force, was tried by general court martial on May 7, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charge:

Charge.—Neglect of duty (one specification).

Findings

The court found the specification of the charge "not proved," the accused "not guilty," and acquitted the accused of the charge.

Returned for Revision

On May 22, 1919, the department, being of opinion that the findings of the court were not in accordance with the evidence adduced, returned the record in the foregoing case, and directed that the court reconvene for the purpose of reconsidering its findings, subject to the following remarks:

"The accused admitted every word of the specification except the last three lines, which are as follows:

"'* * * and the said Geddes did therein and thereby neglect his duty as commanding officer of said ship *Winding Gulf*, the United States then being in a state of war.'

"The attention of the court is directed to the following part of the specification, which was admitted by the accused:

"'* * * and it then and there being his, the said Geddes', duty to report the arrival of said ship to the United States naval port officer at La Pallice, France, did, on or about December 28, 1918, at the place aforesaid, neglect and fail to report the arrival of said ship to the United States naval port officer at La Pallice, France, as it was his duty to do.'

"The part of the specification above quoted, contains the gravamen of the offense, and is entirely sufficient to support the charge of neglect of duty without the last three lines of the specification, which were not admitted by the accused, and which in this case are not absolutely necessary to the specification."

Action in Revision

The court decided to revoke its former findings and acquittal, and to substitute therefor the following findings and sentence:

The specification of the charge "proved" and the accused "guilty" of the charge.

"The court therefore sentences him, Lieutenant Commander Charles Geddes, U. S. Naval Reserve Force, to lose fifty dollars ($50) of his pay per month for a period of three (3) months."

[P. 2] Recommendation to Clemency, in Revision

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of the long and highly creditable service of the accused, as specified in exhibits Nos. 1 and 2, the extenuating circumstances attending his arrival at La Pallice, and the very favorable impression produced upon us by him, we recommend Charles Geddes, lieutenant commander, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

Recommendation of the Bureau of Navigation

On June 20, 1919, the Bureau of Navigation, in recommending approval of the proceedings, findings, and sentence, placed the following endorsement upon the record:

"After considering all the attending circumstances at the time of the arrival of the U. S. S. *Winding Gulf* in port and the long and highly cred-

[C. M. O. 214—1919]

itable service rendered by the accused, the Bureau recommends that the loss of pay be reduced to $25 per month for three months."

ACTION OF THE SECRETARY OF THE NAVY

On June 23, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Lieutenant Commander Charles Geddes, U. S. Naval Reserve Force, but, in view of all the circumstances and the recommendation of the Bureau of Navigation, reduced the loss of pay to the loss of twenty-five dollars ($25) per month for a period of three (3) months, and directed that accused be released from arrest and restored to duty.

C. M. O. 214—1919

[P. 1] Lieutenant (Junior Grade) Edgar R. Winckler, U. S. Navy, was tried by general court martial on May 19, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Sleeping on watch (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) Edgar R. Winckler, U. S. Navy, to lose one hundred (100) numbers in his grade."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of the accused's youth and inexperience, the high estimate of the accused as an officer, as testified to by his commanding officer, and the statement of the accused relative to his lack of a proper amount of rest and sleep prior to going on duty, we recommend Lieutenant (Junior Grade) Edgar R. Winckler, U. S. Navy, to the clemency of the reviewing authority."

RETURNED FOR REVISION

On May 31, 1919, the Department returned the record in the foregoing case to the court, directing the court to reconvene for the purpose of reconsidering its sentence, and subject to the following remarks:

"The attention of the court is directed to Circular Letter No. 11130–51 of March 28, 1918, which suggests a form of sentence to be followed by the court in adjudging loss of numbers, as follows:

"'The court therefore sentences him, Commander X_____ Y. Z_____, U. S. Navy, to lose _____ numbers in his temporary grade of commander, and to lose _____ numbers in his permanent grade of lieutenant commander.'

"The letter further states: 'Unless there are special reasons to the contrary, it is considered that the loss of numbers should be equal in both the permanent and temporary grades.'"

[P. 2] ACTION IN REVISION

The court decided to revoke its former sentence and substitute therefore the following:

"The court therefore sentences him, Lieutenant (Junior Grade) Edgar R. Winckler, U. S. Navy, to lose one hundred (100) numbers in his temporary grade of lieutenant (junior grade), and to lose one hundred (100) numbers in his permanent grade of ensign."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On July 2, 1919, in recommending approval of the proceedings and findings, and sentence in revision, of the general court martial in the foregoing case,

[C. M. O. 216—1919]

the Chief of the Bureau of Navigation placed on the record the following endorsement:

"In view of the unanimous recommendation for clemency, the bureau recommends that the loss of numbers be mitigated to 50 in the temporary grade of lieutenant (junior grade) and 50 in the permanent grade of ensign."

ACTION OF THE SECRETARY OF THE NAVY

On July 8, 1919, the Acting Secretary of the Navy approved the proceedings and findings, and the sentence in revision, of the general court martial in the foregoing case of Lieutenant (Junior Grade) Edgar R. Winckler, U. S. Navy, but, in view of the recommendation of the Bureau of Navigation, mitigated the sentence to the loss of fifty (50) numbers in his temporary grade of lieutenant (junior grade) and fifty (50) numbers in his permanent grade of ensign.

C. M. O. 216—1919

[P. 1] Ensign Harry M. Scholder, U. S. Naval Reserve Force, was tried by general court martial on April 16, 1919, at U. S. naval headquarters, 30 Grosvenor Gardens, London, England, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charges, charges II, III, IV, V, and VI "proved by plea":

Charge I.—Desertion (two specifications).
Charge II.—Scandalous conduct tending to the destruction of good morals (seven specifications).
Charge III.—Forging a signature for the purpose of fraudulently obtaining money (one specification).
Charge IV.—Fraud (three specifications).
Charge V.—Theft (one specification).
Charge VI.—Breaking arrest (one specification).
Charge VII.—Assaulting and striking a civilian (one specification).
Charge VIII.—Robbery (one specification).

SENTENCE

"The court therefore sentences him, Ensign Harry M. Scholder, U. S. Naval Reserve Force, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of twenty (20) years."

ACTION OF THE CONVENING AUTHORITY

On April 19, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Harry M. Scholder, U. S. Naval Reserve Force, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record of proceedings to the Secretary of the Navy for transmission to the President.

[P. 2] RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 17, 1919, the Judge Advocate General recommended that the period of confinement, with corresponding accessories, be reduced to six (6) years, and referred the record to the Chief of the Bureau of Navigation for comment as to disciplinary features.

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On May 22, 1919, the Chief of the Bureau of Navigation concurred in the action taken by the commander, U. S. Naval Forces Operating in European Waters, as amended by the endorsement of the Judge Advocate General, of which endorsement the bureau recommended approval.

[C. M. O. 220—1919]

ACTION OF THE SECRETARY OF THE NAVY

On May 26, 1919, the Secretary of the Navy reduced to six years that portion of the sentence of the general court martial in the foregoing case involving confinement, designating the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On June 17, 1919, the President of the United States confirmed the sentence as reduced of the general court martial in the foregoing case of Ensign Harry M. Scholder, U. S. Naval Reserve Force.

C. M. O. 220—1919

[P. 1] Ensign Paul Beck, Pay Corps, U. S. Naval Reserve Force, was tried by general court martial on June 4, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (fifteen specifications).

FINDINGS

The court found the first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, and fourteenth specifications of the charge "proved by plea," the ninth and fifteenth specifications of the charge "proved in part by plea," proved excepting as to certain words, and the accused "guilty" of the charge.

SENTENCE

"The court therefore sentences him, Ensign Paul Beck, Pay Corps, U. S. Naval Reserve Force, to be publicly stripped of the insignia of his rank, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of twelve (12) years."

OPINION OF THE RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On June 24, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment as to disciplinary features, with the following endorsement:

> "The court sentenced the accused, in part, as follows: 'To be publicly stripped of the insignia of his rank.' This office is of the opinion that the foregoing portion of the sentence is irregular and unusual, and it is therefore recommended that so much of the sentence as relates to publicly stripping the accused of the insignia of his rank be remitted.
>
> [P. 2] "Subject to the foregoing, it is recommended that the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Paul Beck, Pay Corps, U. S. Naval Reserve Force, be approved, and that the naval prison, Navy Yard, Portsmouth, N. H., be designated as the place for the execution of so much of the sentence as relates to imprisonment."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On July 2, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence as amended by the Judge Advocate General's endorsement thereon.

[C. M. O. 222—1919]

ACTION OF THE SECRETARY OF THE NAVY

On July 7, 1919, the Secretary of the Navy disapproved that part of the recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, relative to the remission of so much of the sentence as relates to publicly stripping the accused of the insignia of his rank, approved the proceedings, findings, and sentence, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On July 11, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Ensign Paul Beck, Pay Corps, U. S. Navy.

C. M. O. 222—1919

[P. 1] Chief Boatswain Lloyd C. Casey, U. S. Naval Reserve Force, was tried by general court martial on May 26, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and found guilty of the following charge, proved by plea:

Charge.—Scandalous conduct tending to the destruction of good morals (seventeen specifications).

SENTENCE

The court therefore sentences him, Chief Boatswain Lloyd C. Casey, U. S. Naval Reserve Force, to be publicly stripped of the insignia of his rank; to be dismissed from the United States naval service, and then to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of twelve (12) years."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 29, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment, with the following endorsement:

> "It appears from the record that certain documents as to previous good character were introduced by the defense in evidence, but that no witness took the stand to identify these documents, and the method of their introduction did not follow that laid down in Naval Courts and Boards. It does not appear, however, that the interests of the accused were prejudiced thereby, but rather the contrary, and the irregularity is not considered of an invalidating character.
>
> "The court sentenced the accused as follows: * * * 'to be publicly stripped of the insignia of his rank; to be dismissed from the United States naval service, and then to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of twelve (12) years.'
>
> "The part of the sentence 'to be publicly stripped of the insignia of his rank' is irregular and unusual. It is recommended [P. 2] for this reason that the words 'to be publicly stripped of the insignia of his rank' be remitted.
>
> "Subject to the foregoing, it is recommended that the proceedings, findings, and sentence of the general court martial in the foregoing case of Chief Boatswain Lloyd C. Casey, U. S. Naval Reserve Force, be approved, and that the naval prison, Navy Yard, Portsmouth, N. H., be designated as the place for the execution of so much of the sentence as relates to imprisonment."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On July 3, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence as amended by the Judge Advocate General's endorsement thereon.

[C. M. O. 224—1919]

ACTION OF THE SECRETARY OF THE NAVY

On July 12, 1919, the Secretary of the Navy disapproved that part of the recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, relative to the remission of so much of the sentence as relates to publicly stripping the accused of the insignia of his rank, approved the proceedings, findings, and sentence, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On July 14, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Chief Boatswain Lloyd C. Casey, U. S. Naval Reserve Force.

C. M. O. 224—1919

[P. 1] Captain Benjamin T. Cripps, U. S. Marine Corps, was tried by general court martial on May 17, 1919, at the Marine Barracks, Naval Station, St. Thomas, Virgin Islands of the United States, and most fully and honorably acquitted of the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (one specification).

ACTION OF THE CONVENING AUTHORITY

Subject to the following remarks, the convening authority, on May 24, 1919, approved the proceedings, findings, and acquittal in the foregoing case of Captain Benjamin T. Cripps, U. S. Marine Corps, and directed that he be released from arrest and restored to duty:

> "In reviewing the record the following remarks are deemed pertinent: The record of proceedings has been prepared with a lack of care, being replete with many irregularities, which, though they do not in themselves invalidate the proceedings, would fully warrant a rewriting of the record were competent stenographic assistance available. Among these errors, for which the members of the court as well as the judge advocate are responsible, the most flagrant are the following: Incorrect method of numbering pages; improper arraignment, in that the branch of the service has been omitted after the name of the accused and the questions put on arraignment have been numbered, though not required; numerous deviations from phraseology prescribed in Naval Courts and Boards; failure to warn witnesses before leaving the courtroom; questions asked witnesses not numbered consecutively; and insertions of lengthy entries in pen and ink.
>
> "The judge advocate failed to cross-examine the accused when on the witness stand in his own defense, and also to cross-examine character witnesses (C. M. O. 39, 1915). No evidence [P. 2] was offered in rebuttal of the testimony adduced by the defense, although it is clear that occasion for so doing presented itself. The accused upon leaving the witness stand was followed by a witness for the defense, and upon completion of the testimony of the latter counsel for the accused offered to call further witnesses to the fact that there was a drinking party in progress in the Grand Hotel, St. Thomas, preceding the alleged incident in question, at which the accused and the prosecution's sole witness were present. This offer was met by the judge advocate with the suggestion that such testimony was cumulative. Such suggestion was highly improper, inasmuch as the offer embodied testimony similar to that given by the accused, and amounted to a partial trying of the case on the mere offer of testimony. The suggestion, however, was modified by the court to include the testimony of the one witness who followed the accused, and omitted the reference to the accused's testimony. The ruling of the court upon this offer of testimony was also irregular. The convening authority does

not consider that the evidence offered was cumulative, as it tended toward proof of the corpus delicti, and consequently it was the duty of the court to receive it, and it was also the duty of the judge advocate upon its receipt to subject it to the usual tests of cross-examination.

"The court in this case 'most fully and honorably' acquitted the accused. This form of acquittal should be used only in extreme cases, in which not only have the requirements of a 'full' and 'honorable' acquittal been fulfilled, but in which the court wishes to place the highest stamp of approval upon the actions of the accused in connection with matters covered by the specification of the charge (sec. 323, Naval Courts and Boards). The specification in this case alleges a lascivious act on the part of the accused in the Grand Hotel, St. Thomas, on or about December 24, 1918. The evidence shows, both from the testimony of the prosecution's witness and that given by the accused himself, that intoxicating liquor was then and there being indulged in by officers of the naval service immediately preceding the commission of the act alleged against the accused, and to such an extent, while the accused was present, that at least one of [P. 3] the officers became intoxicated and was returned to his ship. In view thereof to so place the stamp of approval upon his actions in taking part in such an orgy immediately preceding the time when the act was alleged to have been committed by the accused is, in the opinion of the convening authority, unmerited."

C. M. O. 225—1919

[P. 1] Lieutenant Commander Robert H. Allen, U. S. Naval Reserve Force, was tried by general court martial on March 31, 1919, at U. S. Naval Base Seven, by order of the Commander U. S. Naval Forces in France, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (one specification).

Charge II.—Conduct unbecoming an officer and a gentleman (two specifications).

Charge III.—Neglect of duty (one specification).

Findings

The court found the specification of the first charge "proved in part" and the accused of the first charge "guilty in a less degree than charged," guilty of "knowingly and willfully misappropriating subsistence stores of the United States intended for the military services thereof"; the specifications of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of the second charge; the specification of the third charge "not proved," the accused "not guilty" of the third charge, and acquitted the accused of the third charge.

Sentence

"The court therefore sentences him, Lieutenant Commander Robert H. Allen, U. S. Naval Reserve Force, to lose fifty dollars ($50) per month of his pay for a period of six (6) months, and to be publicly reprimanded."

Returned for Revision

On April 11, 1919, the convening authority, not considering that the findings on the second and third charges and the specifications thereunder were in accord with the evidence which [P. 2] was brought before the court, and being of opinion that the sentence adjudged was inadequate to the offense found proved, returned the record of proceedings to the court, directing the court to reconvene for the purpose of reconsidering its findings on the second and third charges and the specifications thereunder, and the sentence, inviting the attention of the court to the provisions of Naval Digest, 1916, page 500, under the heading "Public reprimand," paragraphs 5, 6, 12, and 21, and section 344, Naval Courts and Boards, 1917.

[C. M. O. 225—1919]

ACTION IN REVISION

The court decided "respectfully to adhere to its former findings and sentence."

ACTION OF THE CONVENING AUTHORITY

On April 18, 1919, the convening authority placed an endorsement on the record as follows:

"In reviewing the foregoing case the convening authority is forced to the conclusion that, though the testimony as it appears in the record apparently supports the specifications of the second and third charges, the court was governed in arriving at its findings by a lack of credibility on the part of the witnesses which is not apparent in the written form.

"The attention of the court was invited to portions of Naval Courts and Boards, 1917, and the Naval Digest, 1916, showing beyond question that the department considers sentences of public reprimand, especially where joined to other substantial punishment, as undesirable. That a court composed of officers of rank and experience, as was the court in this case, should totally disregard a clearly established policy of the department after having its attention explicitly directed thereto is difficult to comprehend.

"The law imposed upon the court the necessity of adjudging a sentence adequate to the offense found proved. The court is not permitted to afford leniency. It may not even recommend clemency as a body, but such recommendations as are privileged to be spread upon the record are made as by individuals. That [P. 3] so lenient a sentence could be adequate to the offense of 'Knowingly and willfully misappropriating subsistence stores of the United States intended for the military services thereof,' involving as it does moral turpitude, cannot be admitted. It is regretted that the court should hold so lightly the standard of honor among commissioned officers of the Navy.

"Subject to the above remarks, and in order that the accused in this case may not escape punishment, the proceedings, findings, and sentence in the foregoing case of Lieutenant Commander Robert H. Allen, U. S. Naval Reserve Force, are approved, but, in view of its incompatibility with department policy, that portion of the sentence which involves a public reprimand is remitted.

"Lieutenant Commander Robert H. Allen, U. S. Naval Reserve Force, will be released from arrest and restored to duty."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 27, 1919, the Judge Advocate General referred the record in the foregoing case to the Chief of the Bureau of Navigation for comment, with the following endorsement:

"The first charge preferred against the accused is 'Scandalous conduct tending to the destruction of good morals.' The court in the findings concluded that the accused was 'guilty in a less degree than charged, guilty of knowingly and willfully misappropriating subsistence stores of the United States intended for the military service thereof.'

"A consideration of paragraph 8 of article 14, Articles for the Government of the Navy, discloses that Congress has expressly provided—

"'Fine and imprisonment, or such other punishment as a court martial may adjudge, shall be inflicted upon any person in the naval service of the United States—

"'(8) Who * * * knowingly and willfully misappropriates * * * subsistence stores * * * of the United States * * * intended for the military * * * service thereof.'

"In section 67, Naval Courts and Boards, 1917, it is stated:

"'When an offense is a neglect or disorder "not specially provided for, it shall be charged as 'Scandalous conduct tending [P. 4] to the destruction of good morals' or 'conduct to the prejudice of good order and discipline.' But when the offense is one specially provided for it is properly chargeable under the specific charge, and not under a general charge.'"

[C. M. O. 227—1919]

"From the foregoing quotations and an examination of the substantial averments of the specification to charge I, it appears that error was committed by charging the accused in the case with 'Scandalous conduct tending to the destruction of good morals,' instead of the offense specially provided by paragraph 8, article 14, Articles for the Government of the Navy, viz, 'Knowingly and willfully misappropriating subsistence stores,' etc.; and further, the court erred in finding such charge and the specification thereunder in due form and technically correct.

"It is true that when the charge is one of the specific designated offenses made punishable by the Articles for the Government of the Navy other than the general charges also therein provided, and the evidence fails fully to sustain the charge as laid, but fixes upon the accused a neglect or disorder as involved in the acts alleged in the specification, the court may properly find him guilty of the specification (with such exceptions, etc., as may be required) and not guilty of the charge, but guilty of a general charge such as 'Conduct to the prejudice,' or 'scandalous conduct,' etc. This procedure is based upon the legal theory that it is a finding of a lesser included offense, every specific offense being viewed as including either a neglect of duty or a disorder in breach of discipline; and this form is resorted to in order to prevent a failure of justice which would, in general, be incurred were it not availed of. (See 1 Winthrop 583.)

"But further than as above indicated the authority to employ this procedure does not extend. Thus the reverse of the aforementioned finding—that is to say, 'a finding of guilty of a specific offense under a charge of "Conduct to the prejudice of good order and military discipline"—is not sanctioned, and, if made, would be disapproved as a gross irregularity.' (See 1 Winthrop's Military Law and Precedents 584.)

"In view of the foregoing I am of the opinion that the action of the court in finding the accused guilty, under the general charge [P. 5] of 'Scandalous conduct,' etc., of an offense specifically provided for by the Articles for the Government of the Navy (par. 8, art. 14), was grossly irregular, and it is recommended that the findings on charge I be disapproved.

"Subject to the above, the proceedings, and the findings and acquittals on the second and third charges, of the general court martial in the foregoing case of Lieutenant Commander Robert H. Allen, U. S. Naval Reserve Force, are legal."

Concurrence of the Bureau of Navigation

On June 25, 1919, the Bureau of Navigation concurred in the endorsement of the Judge Advocate General.

Action of the Secretary of the Navy

On July 7, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Robert H. Allen, U. S. Naval Reserve Force. The recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, that the findings on charge I be not approved, was disapproved.

C. M. O. 227—1919

[P. 1] Lieutenant Commander Oscar G. Ericsson, U. S. Naval Reserve Force, was tried by general court martial on April 3, 1919, on board the U. S. S. *Lake Clear*, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charges, proved by plea:

Charge I.—Drunkenness on duty (four specifications).

Charge II.—Drunkenness (one specification).

Charge III.—Conduct to the prejudice and good order and discipline (two specifications).

Charge IV.—Scandalous conduct tending to the destruction of good morals (one specification).

[C. M. O. 227—1919]

SENTENCE

"The court therefore sentences him, Lieutenant Commander Oscar G. Ericsson, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of five (5) years."

ACTION OF THE CONVENING AUTHORITY

On April 23, 1919, the convening authority approved the proceedings, findings, and sentence, but in view of the short term during which accused has been enrolled in the U. S. Naval Reserve Force, reduced the period of confinement to two (2) years, and in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 23, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment, with the following endorsement:

"The following irregularities are noted:

"(*a*) The copy of precept attached bears no date.

[P. 2] "(*b*) It is noted that the location of the ship is not specified in any of the specifications.

"In my opinion these regularities are not sufficiently serious to invalidate.

"The accused is charged under charge IV with 'Scandalous conduct tending to the destruction of good morals,' the specification alleging that the accused 'did, at or about 1:45 a. m., March 12, 1919, bring on board ship a certain woman, name unknown, and did permit the aforesaid woman to remain in his cabin on said ship until at or about 8:30 a. m., March 12, 1919, the United States then being in a state of war.'

"I am of the opinion that this specification is not sufficient to allege an offense, in that it is not alleged that this act was committed unlawfully or for some wrongful purpose. I therefore recommend that charge IV and the specification thereunder be disapproved.

"Subject to the foregoing remarks, in my opinion the proceedings, the findings on charges I, II, III, and the specifications thereunder, and the sentence in the foregoing general-court-martial case of Lieutenant Commander Oscar G. Ericsson, U. S. Naval Reserve Force, are legal; but in view of the previous good record of the accused in the merchant service, and considering his short service and inexperience in the Navy, I recommend that that part of the sentence involving imprisonment be remitted."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On June 10, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence, concurring in the remarks contained in the endorsement of the Judge Advocate General.

The bureau further recommended that in view of the previous good records of the accused while in the merchant service and his short service in the naval service, that that part of the sentence involving imprisonment be remitted.

ACTION OF THE SECRETARY OF THE NAVY

On June 28, 1919, the Secretary of the Navy approved the remarks and recommendations of the Judge Advocate General [P. 3] relative to charge IV and the specification thereunder, reduced the period of imprisonment to one (1) year, designated the naval prison, Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to imprisonment, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence as mitigated be confirmed.

[C. M. O. 230—1919]

ACTION OF THE PRESIDENT

On July 11, 1919, the President of the United States confirmed the sentence as mitigated of the general court martial in the foregoing case of Lieutenant Commander Oscar G. Ericsson, U. S. Naval Reserve Force.

C. M. O. 230—1919

[P. 1] Lieutenant (Junior Grade) Robert W. Dempsey, U. S. Naval Reserve Force, was tried by general court martial on April 22, 1919, at the U. S. Submarine Base, New London, Conn., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Drunkenness (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) Robert W. Dempsey, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RETURNED FOR REVISION

On May 1, 1919, the department returned the record in the foregoing case and directed that the court reconvene for the purpose of recording whether or not certain alterations were authorized.

It was noted by the department that an alteration had been made in the specification of this case, namely, by inserting after the word "lieutenant" the letters "j. g." and initials "A. R. H." No mention of this alteration or by what authority it was made appears in the record. The attention of the court was also directed to sections 55 and 56, Naval Courts and Boards, 1917.

ACTION IN REVISION

On May 8, 1919, the court reconvened and complied with the directions of the department.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On July 3, 1919, the Judge Advocate General recommended that the record be returned to the court for a reconsideration of its findings and sentence and that the court entirely exclude [P. 2] from its consideration the hearsay evidence mentioned in the following remarks:

> "It is noted that the court erroneously admitted in evidence over objection by counsel for accused the answer of Lieutenant B. W. Chippendale, U. S. Navy, to question 4, contained on page 2 of the record. The court should have sustained this objection, in so much as the answer of the witness is incompetent as hearsay.
>
> "It also appears that the prosecution submitted to the accused and the court a statement under seal and an extract on the medical journal of the U. S. naval hospital at the submarine base, New London, Conn., and offered the same in evidence, which were so received over the objection of the accused's counsel, and certified copies were then appended to the record marked 'Exhibits numbers one' and 'two.' The court erred in not sustaining the objection to the introduction of ex parte statements of this sort in evidence as incompetent, irregular, and for the reason that they were objectionable as hearsay evidence, since the real witness was not testifying in the court under the sanction of an oath, and the opposite party had no opportunity to be confronted with a witness against him or to exercise his right to cross-examination. (See reference, p. 280, par. 4, Naval Digest.)"

CONCURRENCE OF THE BUREAU OF NAVIGATION

On July 9, 1919, the Bureau of Navigation concurred in the recommendation made by the Judge Advocate General in his endorsement.

[C. M. O. 235—1919]

ACTION OF THE SECRETARY OF THE NAVY

On July 10, 1919, the Secretary of the Navy, being of the opinion that there was ample evidence adduced to warrant upholding the finding and sentence of the court, disapproved the above recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, approved the proceedings, findings, and sentence, and in conformity with article 53 of the Articles for the Government of the Navy (section [P. 3] 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On July 14, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) Robert W. Dempsey, U. S. Naval Reserve Force.

C. M. O. 235—1919

[P. 1] Lieutenant Hiram P. Tudor, Pay Corps, U. S. Navy, was tried by general court martial on February 4, 1919, at the Navy Yard, Mare Island, Calif., by order of the Secretary of the Navy and found guilty of the following charge, proved by plea:

Charge.—Embezzlement (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Hiram P. Tudor, Pay Corps, U. S. Navy, to be dismissed from the United States naval service."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On February 13, 1919, the Judge Advocate General, referring the record to the Chief of the Bureau of Navigation for comment, placed the following endorsement upon the record:

"The accused in this case was charged with embezzlement, the specification alleging that during the period from March 31, 1917, to May 15, 1917, he failed to safely keep and account for a certain sum of money. The accused pleaded guilty to the charge and the specification of the charge at the trial had February 4, 1919. It is noted that on June 29, 1917, the Chief of the Bureau of Supplies and Accounts recommended to the Chief of the Bureau of Navigation that the accused be forthwith tried by general court martial for the neglect and irregularities alleged in the specification of this case. It has come to the attention of the Department that during the month of January 1918, the accused received a commission as passed assistant paymaster and held such rank as of August 31, 1918. It is thus apparent that some months prior to his promotion this dereliction of duty was brought to the attention of the Department and recommendation for this trial made.

"The Department, following the opinion of the Attorney General (6 Op. Atty. Gen. 123; 8 Op. Atty. Gen. 237), has held that promotion under the conditions and circumstances hereinbefore set forth operates as a constructive pardon. It is generally held that when the fact of pardon is called to the attention of the appellate court such fact will be acted upon, and that no [P. 2] special plea is necessary. (See *Commonwealth* v. *Lockwood*, 109 Mass. 323; *State* v. *White*, 26 Oregon 605.)

"In view of the above, it is recommended that the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Hiram P. Tudor (PC), U. S. Navy, be disapproved, and that he be released from arrest and restored to duty."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On February 19, 1919, the Bureau of Navigation, in view of the Department's ruling, as expressed in the endorsement of the Judge Advocate General, recommended disapproval of the proceedings, findings, and sentence.

[C. M. O. 237—1919]

SUPPLEMENTAL OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On June 25, 1919, the Judge Advocate General, upon a reconsideration of the foregoing case, placed the following endorsement upon the record:

"The record of the proceedings of the general court martial in the case of Lieutenant Hiram P. Tudor, Pay Corps, U. S. Navy, is respectfully resubmitted, with the information that, in the opinion of this office, the proceedings, findings, and sentence are legal.

"After this case was reviewed in this office and submitted February 13, 1919, the Attorney General, in an opinion dated April 4, 1919 (File No. 26251–18107: 4), held that there is no such thing known to the law as a constructive pardon or pardon by implication, thereby expressly overruling the earlier opinions of the Attorney General cited in the memorandum of this office, dated February 13, 1919, attached to this case. My opinion and recommendation contained in said memorandum of February 13, 1919, are accordingly withdrawn.

"Referred to the Chief of the Bureau of Navigation for comment as to disciplinary features."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On July 7, 1919, the Bureau of Navigation, concurring with the opinion of the Judge Advocate General of June 25, 1919, recommended approval of the proceedings, findings, and sentence.

[P. 3] ACTION OF THE SECRETARY OF THE NAVY

On July 8, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence of the general court martial in the foregoing case, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On July 14, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant Hiram P. Tudor, Pay Corps, U. S. Navy.

C. M. O. 237—1919

[P. 12] ACCOMPLICE: LEGAL COMPETENCY OF UNCORROBORATED TESTIMONY OF.

The legal competency of an admitted accomplice, and the credibility of testimony so given, as indicated by the weight of authorities, supported by decisions rendered in numerous cases in the United States Circuit Court, is that such evidence is to be received with great caution, and, as a general rule, will be rejected unless corroborated, as to material facts stated by such accomplice, by credible witnesses (27 Fed. Cas. No. 16322). Nevertheless the contrary has also been held in the United States Courts of Appeals; and furthermore, the ruling is that it is the exclusive province of the jury to pass on the question of the credit to be accorded witnesses. In the case of *Caminetti* v. *United States* (242 U. S. 495), the court stated "there is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them."

Attention is also invited to the following citations:

Although the uncorroborated testimony of an accomplice should be received with caution yet there is no rule of law forbidding a conviction upon his evidence alone" (*Steinham* v. *United States*, Fed. Cas. No. 13355).

"A conviction founded on the uncorroborated testimony of an accomplice is legal, though it is almost universal practice, sanctioned by long usage and deliberate judicial approbation, to instruct juries to be cautious in convicting upon such testimony" (*United States* v. *Neverson*, 1 Mackey 152).

"The jury may convict on the testimony of an accomplice alone; but his testimony should be corroborated in some parts, at least, by other evidence" (*United States* v. *Kessler*, Fed. Cas. No. 15528).

"The evidence of an accomplice, when submitted to the jury with proper cautions as to its credibility, is for the jury to weigh; and they, if they please, may act upon it without corroborative testimony" (*State* v. *Stebbins*, 29 Conn. 463; 79 Am. Dec. 223; File 16870–47: 289, J. A. G., July 24, 1919).

[C. M. O. 237—1919]

[P. 13] BANDITRY: ACCUSED IRREGULARLY CHARGED WITH.

An accused, in a recent trial before a military commission, was charged with "Banditry," the specification in support of said charge averring that the accused "did * * * unlawfully aid and assist a group of bandits in armed resistance to the said military government, by joining said group and remaining therewith until about * * *."

As bearing upon the improper wording of a charge the following citations are quoted:

"The failure to state the correct legal appellation of a crime in the charging part of an indictment has been held to be a defect of form which if subject to objection should have been taken advantage of by a special demurrer and the defendant not having done so it is decided that he cannot raise the objection by a motion in arrest of judgment where the facts stated constitute a public offense" (Joyce on Indictments, p. 315).

"However inartificial a plea may be it will be properly held sufficient as a legal basis for trial and sentence provided that the charge and specification taken together amount to a statement of a military offense, either under a specific article or under a general article". (McClure's, par. 695).

"Banditry" is not an offense specifically known to naval law, nor does the term as such seem to have been defined and prescribed by the laws of war or orders of the military authorities as a specific offense. The charge and specification taken together, however, state with sufficient definiteness an offense constituting an interference with the exercise of military authority of which the military commission could take cognizance, and the irregularity in the naming of the charge should therefore be considered as having been waived by the accused (File 16870–47: 289, J. A. G., July 24, 1919).

EVIDENCE: COPY OF STATEMENT OF A WITNESS AS.

In a recent trial before a military commission the judge advocate took the stand and testified that he was the legal custodian of the papers in the case and that among such papers was a copy of a statement signed by a witness which copy was then submitted to the accused and the court, and by the judge advocate offered in evidence. There being no objection it was thus received. The author of the statement was then called, and in reply to the question whether he had made a statement in reference to the murder in question testified that he had made such a statement; that he could not read or write; but if the same were read to him he could identify it. Upon its being read to him by the interpreter the witness stated that he identified it as the statement made by him; that it was a voluntary and correct statement made by him to the interpreter.

[P. 14] The impropriety of the course pursued by the judge advocate in introducing in evidence a copy of the statement purporting to have been made by the witness who was present at the trial is self-evident. The oral testimony of the witness was the best evidence as to the subject matter which could have been procured from him, and the only evidence coming from said witness which, under the circumstances, legally could have been introduced and used against the accused. The matter contained in the copy of the statement could have been testified to by the witness in response to questions by the judge advocate, thus placing such matter in evidence and affording the accused an opportunity to cross-examine the witness thereon, but the admission of the copy of a written statement cannot be considered as evidence touching upon the facts related therein. The copy of the statement in question, therefore, should not have been admitted in evidence (File 16870–47: 289, J. A. G., July 24, 1919).

JUDGE ADVOCATE: ERRONEOUS REBUKE TO, ADMINISTERED BY COURT.

The record of the proceedings of a military commission in a recent case disclosed the following entries:

"The court was cleared.

"The judge advocate was recalled and told that the court was tired of conducting the prosecution; that the judge advocate would refrain from showing signs of temper when directed to ask questions in a certain manner.

"The court was opened, all parties to the trial entered."

[C. M. O. 237—1919]

As to this particular incident the record is incomplete in that it does not contain the proceedings which prompted the court's statement that it was "tired of conducting the prosecution," as it does not appear that the court had asked a single question of the witness up to this time, or that it had directed the judge advocate to ask any question in a certain manner as a result of which he showed "signs of temper." Such proceedings should have been made a part of the record, so that the convening and reviewing authorities could form an intelligent judgment as to the propriety thereof. The action of the court in calling the judge advocate before the closed court for the purpose indicated was also irregular, improper, and contrary to precedent. (See Naval Courts and Boards, 1917, p. 191, sec. 258; Naval Digest, 1916, p. 311, sec. 105.) Furthermore, the duties of the judge advocate during the trial, and his relations to the court, are set forth in Naval Courts and Boards, 1917, page 190, section 254; for the proper discharge of such duties he is responsible to the convening authority (Id., sec. 250). In view of the foregoing the court erred in administering the rebuke to the judge advocate, being wholly without power to do so. While the above constitute grave irregularities they do not necessarily render the proceedings invalid (File 16870–47:279, J. A. G., Aug. 4, 1919).

[P. 15] MURDER (CHARGE OF): SPECIFICATION NOT IN DUE FORM AND TECHNICALLY CORRECT; TRIAL BY MILITARY COMMISSION.

In reviewing the proceedings of a military commission it was noted that the specification in support of the charge of "murder" was drawn as follows:

In that A, an inhabitant of the Dominican Republic, did, on or about April 30, 1918, at or near Salcedo, Province of Espaillat, Dominican Republic, while the Dominican Republic was under the administration and protection of the military government of the United States in the Dominican Republic, while a member of a group of bandits, in armed resistance to the said military government, and while armed with a revolver, willfully and without justifiable cause, and with malice aforethought, attack and kill by shooting B, an inhabitant of the Dominican Republic.

The foregoing specification is not in due form and technically correct in that it does not conform to the sample specification set forth in Naval Courts and Boards, 1917, page 113, which should be used as a guide in such cases. The above specification in order to conform to said sample should allege the felonious infliction of a mortal wound, of which said mortal wound the said B died. However, as now drawn, it is correct in substance and alleges with sufficient definiteness facts which, if proven, would show that the homicide was felonious (File 16870–47:289, J. A. G., July 24, 1919).

PROVOST COURT (SUPERIOR): ERRORS IN PROCEEDINGS OF.

Upon review and consideration of the record and trial of a citizen of the United States, resident in the Dominican Republic, before a superior provost court sitting at Santo Domingo City, Dominican Republic, the department observed with concern many conditions attendant upon and incident to such trial which might readily go far toward bringing into discredit the administration of United States military government in the Dominican Republic, and therefore, directed attention to the following errors, which were deemed sufficient to warrant the setting aside of the proceedings, findings, and sentence of said court, and remitting the accused to his status prior to trial:

The accused in this case was arraigned and tried on the following specification, viz:

> "In that ------ ------, a resident of Santo Domingo City, Dominican Republic, did, on the 25th day of September 1918, have unlawfully in his possession seventy-two (72) pairs of light wool socks, value about thirteen dollars and sixty-eight cents ($13.68), the property of the United States Government."

The above specification states no cause of action against the accused whatsoever. It is true there is contained in the specification an allegation that the accused had unlawfully in his possession certain [P. 16] Government prop-

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erty; it is not alleged that this property was knowingly in his possession, nor is it suggested by reason of what facts and circumstances the alleged possession is unlawful. It is not sufficient to allege in an indictment or specification that an action is unlawful, such a statement being but a conclusion of law (*State* v. *Concord R. R.*, 59 N. H. 75; *Commonwealth* v. *Byrnes*, 126 Mass. 248; *In re Coleman*, 6 Fed. Cas., p. 49). All the facts and circumstances must be set down which constitute the unlawfulness. Moreover, it does not appear from anything known to the department that the possession of the property referred to in the record, under the conditions set forth, constitutes an offense. Such possession under the conditions indicated is not forbidden by any law, regulation, or order with which the department is familiar. If it is forbidden by a special regulation or order of the military government, the specification should show on its face that the facts constitute a violation of the same (C. M. O. 33, 1914, 6–7; Naval Courts and Boards, 1917, par. 63).

The accused, who was without counsel, made an oral statement, which appears of record and which is totally inconsistent with his plea of guilty (Rec., p. 1). The accused should have been advised in these circumstances to substitute a plea of "not guilty," and upon his failure so to do the court should have proceeded as if such a plea had been entered, and the prosecution should have been put to the proof of all the material matters charged against the accused (Naval Courts and Boards, 1917, par. 310).

The sentence of the court required the accused to pay a fine of $3,000 and to suffer imprisonment at hard labor for a period of three years. Assuming the accused to have been subject to the terms of the following enactment (which he was not, under the conditions existing), the most unfavorable charge which could have been laid against him under the circumstances—namely, violation of the act of October 23, 1918, by receiving "in pledge, from any person any * * * clothing * * * furnished by the United States * * * to any soldier * * * having knowledge or reason to believe that the property has been taken from the possession of the United States * * *"—would have been punishable, upon conviction, by a maximum of two years' imprisonment and $500 fine. This law of the United States, as such, does not extend to the Dominican Republic; if it did the accused was not adequately charged in the instant case with having the necessary "knowledge or reason to believe," which the law establishes as an essential element of the crime. If this law were applicable and the accused had been properly charged, the sentence greatly exceeds that authorized by law. Under any purview of the situation it must be apparent that a sentence involving a fine of $3,000 and three years at hard labor is grossly out of proportion to the offense of even knowingly receiving stolen property of the United States valued at $13.68.

[P. 17] It is alleged that the accused was denied bail, though bail in any amount desired was offered. It is said instead of being admitted to bail on a distinctly bailable offense, he was haled to a common jail (affidavit of accused, p. 3). If true, and considering all the circumstances present in this case, such action constituted a very flagrant and ill-considered violation of the entire spirit and genius of Anglo-Saxon institutions, and more especially of American institutions.

It is further suggested in behalf of accused that no receipt was given him for the fine of $3,000 which was exacted of him (affidavit of accused, pp. 4–5). It true, such procedure manifestly opens the door to suspicions and accusations calculated gravely to imperil the belief of those governed in the correctness of the military government in the conduct of its fiscal affairs. In the circumstances it is not enough to avoid wrongdoing; all possible appearance of wrongdoing should be sedulously obviated.

The department contemplates with regret the fact that two-thirds of the personnel of a court, considered by the convening authority to be of sufficient importance to warrant its authorization to impose a fine of $3,000 and imprisonment at hard labor for five years (Precept of Sept. 25, 1918), should, particularly when convened for the purpose of trying one not in the military service under conditions involving possible delicate questions and situations, have been composed of members, one of whom was a second lieutenant (temporary captain) of less than two years' commissioned service at the time, whereas the other was a second lieutenant of less than two months' commissioned service. The prosecuting officer had been an officer in the service less than two months (File 16870–47:252, Sec. Nav., July 14, 1919).

[C. M. O. 237—1919]

[P. 18] CIVIL AUTHORITIES: AUTHORITY TO MAKE ARREST ON AND DIVERT FROM ITS COURSE A GOVERNMENT VESSEL.

Certain marines accused of having participated in a disturbance on shore between enlisted men of the Marine Corps and police officers, while returning to the station were pursued upon the ferryboat by the police officers. After the boat had left the landing the pilot was ordered by the police officers to return to the landing, where the marines in question were taken off by the police officers. On the question presented for consideration by the foregoing statement of facts—viz, "Whether or not the civil authorities were within their legal rights in interfering with the movements of the Government ferry and making arrests on board?"—the views of the department are expressed in the following quoted opinion:

"For the purpose of this case it is not deemed necessary to enter into a minute discussion of the specific terms under which the naval authorities exercise jurisdiction over the Government ferry and landing at Newport. It will be sufficient to state the general principles heretofore announced by the Federal and State courts and the Attorneys General as bearing upon the general issue.

"Article I, section 8, clause 17, of the Constitution of the United States provides:

"'The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.'

"When the title is acquired by purchase by consent of the legislatures of the States the Federal jurisdiction is exclusive of all State authorities. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the District of Columbia; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has [P. 19] been the uniform opinion of Federal and State tribunals and of the Attorneys General (*Fort Leavenworth Railway Co.* v. *Lowe*, 114 U. S. 525; *United States* v. *Cornell*, 25 Fed. Cas. No. 14867; *Commonwealth* v. *Clary*, 8 Mass., 72; *United States* v. *Meagher*, 37 Fed. Rep. 875; *United States* v. *Penn.*, 48 id. 669; *United States* v. *San Francisco Bridge Co.*, 68 id. 891).

"The consent of the legislatures of the States in such cases is usually accompanied by a reservation that civil and criminal process of the State courts may be served in the places purchased. Speaking generally of this reservation, it may be said that it is not to be considered as interfering in any respect with the supremacy of the United States over such lands, but it is permitted in order to prevent such lands from becoming an asylum for fugitives from justice. (See cases above cited; also *United States* v. *Travers*, 28 Fed. Cas. No. 16537; *United States* v. *Davis*, 25 Fed. Cas No. 14930; *United States* v. *Carter*, 84 Fed. Rep. 622; *United States* v. *Tucker*, 122 Fed. Rep. 518; *Western Union Telegraph Co.* v. *Chiles*, 214 U. S. 274; 6 Op. Atty. Gen. 413; id. 577; 7 id. 628; 20 id. 611; 23 id. 254.)

"In 1857 the Secretary of the Treasury transmitted to the Attorney General a legislative act of the State of Iowa purporting to cede to the United States jurisdiction over and upon all lands purchased by the United States for certain purposes in said State, and requested an opinion as to the sufficiency of the said act. Mr. Cushing said, among other things (8 Op. Atty. Gen. 418):

"'It provides that "nothing in this act shall be so construed as to prevent, on such lands, * * * the courts of this State from exercising jurisdiction of crimes committed thereon." This reservation is distinctly incompatible with the provisions of the penal acts of Congress and would obstruct, if not defeat, the execution of those acts. Moreover it is inconsistent with any possible construction of that "exclusive" jurisdiction which, according to the letter and the intent of the Constitution, are in such cases to be vested in the United States. It is not sufficient that per-

sons and property on such ceded sites shall be exempt from the legislative authority of the State, in the matter of civil acts performed within or upon such sites. It is still more necessary that acts performed thereon, and alleged to be criminal, shall be saved from the criminal authority of the State.

"'I have advised in all these cases, that the United States shall admit that the process of the State, civil or criminal, may be served within such sites, in reference to rights acquired, obligations incurred, or crimes committed, outside of any such cession, but within the territorial limits and under the appropriate constitutional authority of the particular State. It is impossible to go beyond this point and give to the courts of the State, as proposed in this act, jurisdiction of crimes committed on such sites, to the exclusion of, or even in concurrence with the proper jurisdiction of the United States.'

[P. 20] "There is, however, an important qualification upon the rights of States over lands and structures of the United States which is found in the principle of law that no State has a right to interfere with the instrumentalities of the Federal Government. In the foregoing case of *Fort Leavenworth Railway Co.* v. *Lowe*, speaking of the acquisition of lands by the United States in certain cases, the court said:

"'Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers.'

"This principle was reiterated, and the foregoing was referred to with approval in the case of the *Chicago, Rock Island & Pacific Railway Co.* v. *McGlinn* (114 U. S. 542), and it is also one that has been recognized from the earliest days of our Government, and is substantially embodied in the cases of *McCullough* v. *Maryland* (4 Wheat. 316); *Osborn* v. *The Bank* (9 Wheat. 738); *Dobbins* v. *Erie County* (16 Pet. 434); and numerous others.

"Therefore in serving such process in a navy yard or other Federal reservation, as the State may have the right to do, such right is impliedly qualified by the above principle that the instrumentalities of the United States must not be interfered with or obstructed. To the end that the above principle should not be violated it was heretofore considered by the department that before such process is served it is proper and necessary that the civil officer, or some one for him, communicate with the commanding officer or commandant, as the case may be, and obtain the sanction of that officer to serve process in his hands. It was not the intention, however, that there should be any friction between the civil and naval authorities in this matter, and therefore the necessary procedure was amply set forth in this department's General Order No. 121, of September 17, 1914.

"In the instant case the police officer clearly violated the above principle in boarding the Government ferryboat for the purpose of making arrest thereon without first obtaining the consent of the proper naval authorities, and also in directing the return of the ferryboat to the Government landing after it had proceeded on its trip across the channel. In order that there may be no misunderstanding in this respect in the future, you are advised to inform the local civil authorities that the Navy Department has no desire to [P. 21] obstruct the operation of the State laws by preventing the punishment of persons in the Navy for a violation thereof, and that upon the presentation of lawful process in proper hands the person wanted will, after communication with the department in accordance with the provisions of General Order 121, invariably be delivered to the civil officer, or such officer will be allowed to serve the process himself, whichever course appears the more advisable, provided the case is not one in which, by reason of any Federal interest involved, the United States should intervene. (File 26283–2642, Sec. Nav., July 12, 1919).

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CITIZENSHIP: INDIANS AND MONGOLIANS NOT ELIGIBLE TO, UNDER THE PROVISIONS OF THE ACT OF JUNE 29, 1906, AS AMENDED BY THE ACT OF MAY 9, 1918.

A South American Indian and a Japanese recently petitioned the United States District Court for the Southern District of New York to be admitted to citizenship by reason of service in the naval forces of the United States during the present war.

The court sustained the contention of the Government that "naturalization is under any circumstances restricted to free white persons, persons of African descent, native-born Filipinos and Porto Ricans," and denied the applications of the petitioners (Citations: sec. 2169, R. S.; act May 6, 1882; act June 29, 1906; sec. 2166, R. S.; act May 9, 1918; *In re Camillo*, 6 Fed. 256; *Fong Yue Ting* v. *U. S.*, 149 U. S. 698; *In re Alverta*, 198 Fed. 688; *Bessho* v. *U. S.*, 178 Fed. 245; *In re Buntaro Kumagai*, 163 Fed. 922; *In re Knight*, 171 Fed. 299).

FORMER JEOPARDY: TRIAL OF A PERSON IN THE NAVAL SERVICE BY FEDERAL CIVIL AUTHORITIES FOR AN OFFENSE AGAINST THE UNITED STATES CONSTITUTES.

Upon consideration of the proceedings of a board of inquest in the case of A, who was killed within the limits of a navy yard by B, it was ordered that B be tried by general court martial. Later, in view of the lack of jurisdiction on the part of naval authorities to try B for murder, he was delivered to the Federal civil authorities, by whom he was tried and acquitted, and then remanded to the naval authorities.

On the question of whether or not B should now be brought to trial by the naval authorities, the department held that as the offense was committed within Federal jurisdiction, it was an offense against the United States, being prohibited both by naval law and the civil law of the Federal Government, and one over which the naval authorities and the Federal civil authorities had concurrent jurisdiction. B's trial by the Federal civil authorities for said offense is, therefore, a bar to his trial for the same offense by the naval authorities on the ground of former jeopardy. (See *Grafton* v. *United* [P. 22] *States*, 206 U. S. 333.) Accordingly, the Department revoked its former order that B be tried by general court martial, and directed that he be released from arrest and restored to duty (File 7657–871:4, Sec. Nav., July 12, 1919).

JURISDICTION: OF NAVAL GENERAL COURT MARTIAL TO TRY AND PUNISH PERSONS DISCHARGED FROM THE NAVAL SERVICE FOR OFFENSES COMMITTED PRIOR TO DISCHARGE.

An officer of the U. S. Naval Reserve Force, on active duty with the U. S. Navy, was accused of having improper relations with a married yeoman (female) who was on duty in his office. Assuming the report against the officer to be true, he was guilty of grave violations of the laws and regulations for the government of the Navy and he might have been brought to trial before a general court martial and punished for "Scandalous conduct tending to the destruction of good morals" or "Conduct unbecoming an officer and a gentleman." A report was made against the officer while he was still in the naval service to his commanding officer, and the latter recommended to the Navy Department that the said officer be relieved from active duty with the Navy and discharged from the Naval Reserve Force. The department disapproved the recommendation, and ordered that the accused officer be brought to trial before a general court martial. Through some misunderstanding, conflicting orders were issued from the Navy Department with the result that the officer was not brought to trial before a general court martial but was discharged from the naval service (File 28550–951:3). To determine whether or not the Navy has jurisdiction to apprehend said officer and bring him to trial before a naval general court martial for his alleged offenses, the following question was submitted to the Attorney General for opinion:

"Whether a person in the U. S. Navy or in the U. S. Naval Reserve Force, and subject to the laws and regulations for the government of the Navy,

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who commits an offense against such laws and regulations, can be brought to trial before a naval general court martial, or otherwise punished for the offense, after he has been discharged from the Navy, or released from active duty therein, but within two years after the date of the commission of such offense."

On July 10, 1919, the Attorney General, after reviewing the authorities, came to the conclusion that his duty did not permit him to state an opinion otherwise than that a person discharged from the naval service before proceedings are instituted against him for violations of the Articles for the Government of the Navy, excepting article 14, cannot thereafter be brought to trial before a court martial for such violations, though committed while he was in the service.

In view, however, of the unsatisfactory state of the authorities, and of the grave objections on principle to the foregoing conclusion, the Attorney General could see no reason why this department [P. 23] should not assert the jurisdiction in a proper case in order to obtain, if possible, an authoritative judicial determination of the question.

LEGAL ASSISTANCE: DEPARTMENT AFFORDS, IN CERTAIN CASES.

A request was recently made upon this department that steps be taken to insure proper defense in the case of a marine about to be put upon trial, before the criminal courts of a State, on the charge of rape.

Held: In a proper case the department takes action through the Department of Justice to protect persons in the naval service from the consequences which may ensue from the performance by them of official duties. But where, as in this case, the offense is not one resulting from the performance of official duties, the department must decline to take steps to afford legal assistance at the expense of the United States (File 26524–780, Sec. Nav., July 17, 1919).

LINE OF DUTY: DEATH IN, DUE TO FAULT, NEGLIGENCE, AND INEFFICIENCY OF ANOTHER.

Privates A and B were both on sentry duty, their posts being adjacent. Prior to the shooting A had loaded his pistol preparatory to investigating a disturbance in the neighborhood of his post. Afterward, he neglected to unload his pistol before leaving his post, thereby violating his orders. B was at his post at the time of the shooting, which, according to his ante-mortem statement, occurred as follows:

"We were in bldg. 352 about 5:40 this morning and A and I were fooling. We both pulled out our pistols and were snapping them at each other. I pulled mine out first and snapped at him, but when he went to snap at me, it went off and I was hit in the head. I was about twenty feet away from him with my back partly turned. It was not the kid's fault, as we were both fooling and we had had no trouble of any kind. We had kidded each other this way before."

A's testimony, after explaining how he happened to load his pistol and the circumstances under which he afterwards entered Building No. 352, which was within B's post, continues as follows:

"B just made a kidding remark to me to get out of this building and he drew his pistol and as we passed each other he snapped it two or three times at me. I paid no attention, but went on and carelessly drew my pistol and swung around along my side and pulled the trigger. The pistol exploded and I looked around just as B was falling."

Private B died, later in the day, from the effects of the wound thus received. The court of inquiry in this case was of the opinion that the death of B was caused through the fault, negligence, and inefficiency of A; [P. 24] that the death of B was not in line of duty, but was not caused by an act of his own misconduct for the reason given on page 290, Naval Courts and Boards, 1917, viz:

"Again, it has uniformly been held that an enlisted man is not in line of duty while engaged in scuffling or squabbling with his companions, or volun-

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tarily engaged in what is commonly known as 'horseplay,' although at the time on board the ship to which he was attached."

On the foregoing statement of facts the Judge Advocate General rendered an opinion substantially as follows:

"The court, in its opinion, quoted correctly from page 290 of Naval Courts and Boards. However, on the following page of said publication it is stated:

"'As was stated by the Attorney General, in an opinion rendered July 22, 1881, with respect to the question of what constitutes disability incurred in line of duty, "it is impossible to lay down a general rule which will be applicable to cases of this kind, or to the different aspects which the * * * claim might present, as the facts shall be developed by the evidence."'

"In the present case the evidence clearly established that B was on duty at his post at the time of the shooting; and the facts warrant the statement in the recommendations above quoted, that his death was due to the 'fault, negligence, and inefficiency' of A. The fault, negligence, and inefficiency of others in the service constitute a part of the dangers of the service to which an enlisted man may be exposed while in the line of duty. In this case it is true that B departed from the rules of proper conduct in snapping his weapon at A but such departure was slight as compared to the serious results and was not reasonably calculated to lead to violence, dangerous to himself, nor was his death the natural and reasonable consequence of such conduct.

"In the Attorney General's opinion of July 22, 1881 (17 Op. Atty. Gen. 172), the question was considered of line of duty in the case of an officer who, while traveling under orders and engaged in expediting the checking of his baggage, was struck by the baggagemaster on the head with a hatchet, from the results of which he was seriously disabled. In the course of his opinion the Attorney General said:

"'Mr. Wetmore's assumption of the duties of his office caused him to be subject to orders; the orders caused him to come in contact with the baggagemaster. If there did not intervene between this contact and the injury *an adequate and sufficient cause* for which Mr. Wetmore was responsible, he is entitled to his pension. * * * It cannot be said, on the one hand, that a soldier is entitled to a pension unless the provocation he gave was such as to acquit the assailant in a court of law, nor, on the other, that the slightest departure from the rules of proper conduct, followed by an injury, shall preclude allowance of his claim. Between the two are an infinite variety of supposable cases involving different degrees of provocation. [P. 25] which cannot be measured so as to determine as a matter of law their adequacy to produce the result * * * all circumstances (are) to be considered in determining what, in my judgment, is the real question, whether Wetmore's conduct in the baggage room was reasonably calculated *to lead to violence dangerous to himself.* * * * You are to determine whether the assault was the *natural and reasonable consequence* of Wetmore's actions or language.' * * *

"In the present case the action of B in snapping his unloaded weapon at A was misconduct which might have subjected him to disciplinary action, but, in my judgment, such misconduct was not reasonably and logically calculated to cause his death, but the killing was due, as stated by the court, to the 'fault, negligence, and inefficiency' of A. Had B's weapon been loaded when he pointed it at A and had it been accidently discharged in the course of 'scuffling' with the latter for the possession of the weapon, thereby causing B's death, it might have been properly held within the rule quoted by the court from Naval Courts and Boards and have characterized the death as not in line of duty and even as a result of his own misconduct. But the weapon of B was not discharged, nor was it loaded, and his death was caused not by his act in pointing the weapon at A, but by the latter's action in discharging a loaded weapon at him. If the killing was the reasonable and natural consequence of B's action in snapping his weapon at A, then the death of B was due to his own misconduct, for, as above stated, his action in snapping his weapon at A was misconduct. However, the court has said that the death of B was not due to his own misconduct, which is equivalent to a finding by the court that the death was not due to the

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action of B in snapping his weapon at A. If not due to the misconduct of B—that is, to his action in snapping his weapon at A—then the death must have occurred in line of duty, resulting from the fault, negligence, and inefficiency of another person in the service, which, as above stated, constitute a part of the dangers to which enlisted men are exposed while in the line of duty.

"In view of the foregoing it is my opinion that in this case it may properly be held that the death of B occurred in the line of duty and was not the result of his own misconduct" (File 26250–2145, J. A. G., July 16, 1919).

NEW TRIAL: REFUSED.

A warrant officer, recently convicted by general court martial of the charges preferred against him, was sentenced to be dismissed from the naval service, which sentence was confirmed by the President of the United States. Later a communication in his behalf was received by the department which enclosed a notice of appeal and a request for a new trial of the charges upon which said warrant officer had been convicted, based upon the ground of newly discovered evidence.

The Judge Advocate General was of opinion that where the sentence of a legally constituted court martial in a case within its jurisdiction [P. 26] has been approved by the reviewing authority and carried into execution, it cannot afterward, under present laws, be revised and set aside. The proceedings are then at an end and the action thus had upon the sentence is, in contemplation of law, final. (See *Dynes* v. *Hoover*, 20 Howe 65; *Ex parte Reed*, 100 U. S. 13; 17 Op. Atty. Gen. 297.) After such approval and execution, the only relief which may be granted must result from the exercise of the pardoning power or from clemency in mitigating the sentence. Therefore, this request for a new trial may not legally be granted (File 26262–6218: 7–8, J. A. G., July 11, 1919).

PROMOTION AND RETIREMENT: LAWS IN RELATION THERETO, AS AFFECTING CAPTAINS OF THE LINE WOUNDED IN LINE OF DUTY.

The pertinent provisions of law applicable to the subject matter of this opinion are set forth in the order of their passage, as follows:

"No officer shall be promoted to a higher grade on the active list of the Navy, except in the case provided in the next section, until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea" (sec. 1493, R. S.).

"The provisions of the preceding section shall not exclude from the promotion to which he would otherwise be regularly entitled any officer in whose case such medical board may report that his physical disqualification was occasioned by wounds received in the line of his duty, and that such wounds do not incapacitate him for other duty in the grade to which he shall be promoted" (sec. 1494, R. S.).

"Hereafter, if any officer of the United States Navy shall fail in his physical examination for promotion and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted" (act Mar. 4, 1911).

The provisions of the act of August 29, 1916, regarding the promotion of captains of the line of the permanent Navy are, in substance, as follows:

1. The promotions of captains to the grade of rear admiral shall be by selection only from the next lower respective grades upon the recommendation of a board of naval officers.

2. That no captain who has had less than four years' service in such grade shall be eligible for consideration.

3. That on and after June 30, 1920, no captain shall be promoted unless he has had not less than two years' actual sea service on seagoing ships in the grade in which serving, or who is more than 56 years of age.

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4. That captains who become ineligible for promotion on account of age shall be retired on a percentage of pay equal to two and one-half percent of their shore pay for each year of service.

[P. 27] "That the provisions of the act of August 29, 1916, regarding the promotions of captains of the line of the permanent Navy shall not restrict the promotion of such captains as may have been wounded in line of duty and who are now on the active list, and such captains shall be entitled to the benefits of the provisions of section 1494, Revised Statutes of the United States, and also to the benefits of the act of March 4, 1911" (act July 11, 1919, Pub., No. 8).

The above-quoted provision of the act of July 11, 1919, not mentioning any particular officer by name, appears to be a general provision applicable to any captain who has been wounded in line of duty and who is now on the active list. It provides with relation to such captains—first, that the provisions of the act of August 29, 1916, regarding promotions of captains of the line of the permanent Navy, shall not restrict their promotion; second, that such captains shall be entitled to the benefits of the provisions of section 1494 of the Revised Statutes; and, third, that such captains shall also be entitled to the benefits of the act of March 4, 1911. The pertinent provisions of the act of August 29, 1916, above mentioned, referring specifically to captains, are those which "shall not restrict the promotion of such captains," etc. In other words, all of these provisions are waived for such an officer as described in the above-quoted provision of the act of July 11, 1919, and need not be observed in this case. The result is that such a captain need not be selected for promotion and need not fulfill the other requirements of the act of August 29, 1916, set forth above; therefore, any captain of the line of the permanent Navy who has been wounded in the line of duty and who is now on the active list may, under the foregoing provisions of the act of July 11, 1919, be ordered before a naval examining board, and if the board find that his physical disqualification was occasioned by wounds received in the line of duty and that such wounds do not incapacitate him for duties other than sea duty in the grade of rear admiral, he may, if otherwise qualified, be promoted to the rank of rear admiral.

The act of August 29, 1916, provides with relation to officers who, having been selected for promotion, fail physically, that "should any such officer fail to pass the required physical examination, he shall not be considered, in the event of retirement, entitled to the next higher grade." This provision is not, strictly speaking, a "restriction" on the promotion of captains, but rather a restriction on retirement. It does not, however, apply to the case of "captains who have been wounded in line of duty and who are now on the active list," for such captains, if found physically incapacitated for service by reason of physical disability contracted in line of duty, are to be given the benefit of the act of March 4, 1919, and retired "with the rank to which his seniority entitled him to be promoted." It follows that if any captain described by the above-quoted provision of the act of July 11, 1919, be ordered before a board of naval surgeons for examination for promotion to the grade of rear admiral.

[P. 28] and fail by reason of physical disability contracted in line of duty, and the board finds that he is not physically qualified for shore duty as a rear admiral, "he shall be retired with the rank to which his seniority entitled him to be promoted"—viz, with the rank of rear admiral (File 26251–351, Sec. Nav., July 31, 1919).

RANK AND PRECEDENCE: TEMPORARY AND PERMANENT COMMISSIONS.

Where an officer was given a temporary commission as commander, dated August 31, 1917, and a permanent commission as commander, dated July 1, 1918, and later given a temporary commission as captain, *Held:* Such officer no longer takes rank and precedence under either commission he received in the grade of commander, but takes rank and precedence only according to his temporary commission as captain.

In the case of an officer, while serving in the grade in which he held two commissions, one temporary and one permanent—as long as the temporary appoint-

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ment remained in force and was not expressly revoked or terminated by operation of law—such an officer would take rank from the date of the temporary commission and would not fall behind officers who later attained such rank. This must not be understood as meaning that his permanent commission should be given the same date as his temporary commission, as such permanent commission could not be given a date earlier than that on which the permanent vacancy occurred (File 11130–47:1, Sec. Nav., July 18, 1919).

RETIREMENT: OFFICERS HOLDING TEMPORARY APPOINTMENTS, PHYSICALLY DISABLED IN LINE OF DUTY.

An officer with permanent rank of ensign and temporary rank of lieutenant at the time he was examined for retirement was found incapacitated for active service by reason of physical disability incurred in line of duty, said finding being approved by the President of the United States. This officer's temporary appointment as lieutenant was revoked (by direction of the President) by letter of the Secretary of the Navy, delivery of such letter of revocation being delayed by authority of the department several days after the President's approval of the findings of the retiring board in this case. The department notified the said officer that he had been placed on the retired list with the rank of lieutenant (junior grade), being the rank for which he was due for permanent promotion.

On the question being presented whether this officer was entitled to the rank of lieutenant on the retired list instead of the rank of lieutenant (junior grade), the Judge Advocate General rendered an opinion substantially as follows:

[P. 29] The law (sec. 1457, R. S.) provides that "officers retired from active service shall be placed on the retired list of officers of the grades to which they belong respectively at the time of their retirement. The act of May 22, 1917 (40 Stat. 86, sec. 8), authorizes the President to revoke temporary appointments or advancements; but this authority can not be exercised so as to defeat other provisions of law which definitely fix the grade and pay of officers in the Navy. Upon the President's approval of the retiring board in this case, the right of this officer to retirement in the grade of lieutenant became vested, and his appointment as lieutenant, theretofore temporary, became permanent.

In an opinion of this office, May 22, 1919 (File 26253–624), concerning the similar case of a marine officer, it was held that an officer holding both a permanent grade in the Navy or Marine Corps and a higher temporary grade therein, if retired for physical disability incurred in the line of duty, is entitled by law to retirement in the higher grade temporarily held by him at the time of the retiring board's proceedings. The act of May 22, 1917, specifically provided that officers temporarily advanced thereunder, if retired for causes other than physical disability incurred in line of duty, shall be placed on the retired list with the grade permanently held by them in the Navy or Marine Corps at date of retirement, thus requiring in such cases that the officer be retired in a lower grade than that to which he would otherwise be entitled. In the absence of such specific enactment, the retirement of an officer in a lower grade is unauthorized and the general provisions of law apply entitling officers on retirement to the grade on the retired list corresponding to that in which they were serving at the time of retirement.

A somewhat similar question to that involved in this case was presented to the Attorney General by the Secretary of the Navy and was published in 28 Op. Atty. Gen. 325. There the officer concerned was a warrant officer and the law provided that the appointment of an enlisted man as a warrant officer "shall not discharge him from his enlistment." Accordingly the officer occupied a dual status—namely, that of an enlisted man and a warrant officer—and the question presented was the authority of the President to revoke the officer's warrant, thereby causing him to revert to his status as an enlisted man and then discharge him from the service as an enlisted man. The Attorney General recognized the desirability of some such action being taken in the case presented where the officer had been convicted of an offense and sentenced to imprisonment by a civil court. Nevertheless, he was constrained to the opinion that there was no power in the President to revoke the warrant of said officer and

discharge him from the Navy in view of the law prohibiting the dismissal of warrant officers in time of peace without the sentence of court martial, the Attorney General stating that such action would be "contrary to the spirit if it is not to the very letter of the law."

[P. 30] The same principle applies to the present case. Without revocation of the temporary appointment of the officer under consideration, there could be no doubt that the President would not be authorized to place him on the retired list in a lower grade than that of lieutenant. Under such circumstances the revocation of his appointment as lieutenant, after his right to retirement had become vested under the law, such revocation being for the sole purpose of accomplishing this officer's retirement in a lower grade, would be attempting to do indirectly what the law prohibited being done directly.

The attempted revocation of this officer's appointment under the circumstances set forth was null and void, and therefore without legal effect. His rights under the law will not be at all affected by the refusal of the Navy Department to recognize the illegality of such attempted revocation of appointment, as he will nevertheless be entitled to receive the pay of the grade which he held at the time the President approved the retiring board's finding. He is, under the law, entitled to be recognized by the Navy Department as an officer on the retired list in the grade of lieutenant, and the Navy records should therefore be corrected to conform to the law and the facts of the case, as otherwise the records in this case would not be true (File 26253-600:1, J. A. G., July 1, 1919).

NOTE.—The above opinion of the Judge Advocate General was approved by the Secretary of the Navy, who directed that the necessary action be taken to correct the records in the case of Lieut. _____ "and similar cases" in accordance with said opinion.

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[P. 1] Lieutenant Thomas J. Cunningham, U. S. Naval Reserve Force, was tried by general court martial on March 4, 1919, on board the U. S. S. *Denver*, by order of the Commander in Chief, U. S. Pacific Fleet, on the following charges:

Charge I.—Disrespectful in language and deportment to his superior officer while in the execution of his office (one specification).

Charge II.—Assault (one specification).

FINDINGS

The court found the specification of the first charge "proved," and the accused "guilty" of the first charge; the specification of the second charge "not proved," the accused "not guilty" of the second charge, and acquitted the accused of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Thomas J. Cunningham, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On April 2, 1919, the convening authority approved the proceedings, findings, and sentence of the general court martial, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President, with the following remarks and recommendations:

> "The offense of which the accused has been found guilty is, by the standards of discipline of the Regular Navy, a most serious one, and the sentence adjudged by the court is not unduly severe. However, the accused has been brought up in the merchant service. In that service the standards of personal conduct are hardly such as to make the vulgarity of his remarks worthy of special derogation. Further, in that service the chief [P. 2] engineer of the ship is not subordinate to the first officer, and these remarks which, addressed by the senior engineer officer of a naval ship to his executive officer, are insubordinate, would not, if

[C. M. O. 245—1919]

addressed by the chief engineer of a merchant ship to the first mate, have an insubordinate character. At the time of this offense Lieutenant Cunningham had been but a short time in the naval service. It is hardly to be expected that the habits of thought developed during many years in the merchant service can be quickly modified during a few months in the Navy, none of them spent on board a regular naval vessel, and it is not surprising that in resenting real or fancied ill treatment he should speak and act according to his merchant service habits rather than according to the standards of the Regular Navy which he had not yet learned.

"In view of the possibility that there existed on board the *Keresan* a state of discipline so low as to constitute a certain measure of extenuation for the offense of which Lieutenant Cunningham has been found guilty, it is recommended that final action on this case be suspended awaiting the result of the investigation of this, which has been recommended by the commander in chief's sixth endorsement, No. 3568, of March 15, 1919, to the Bureau of Navigation.

"It is recommended that in any case the sentence be commuted to a punishment not involving dismissal."

Recommendation of the Judge Advocate General

On May 14, 1919, the Judge Advocate General, in referring the record to the Chief of the Bureau of Navigation for comment as to disciplinary features, invited attention to the action of the convening authority recommending that final action on the case be suspended awaiting the result of investigation recommended by the commander in chief of the Pacific Fleet, and that in any case the sentence be commuted to a punishment not involving dismissal.

Concurrence and Recommendation of the Bureau of Navigation

On May 22, 1919, the Bureau of Navigation concurred in the action taken by the convening authority, and further recommended [P. 3] that, in view of the circumstances, the sentence of dismissal in the case of Lieutenant Cunningham be mitigated to loss of fifty dollars ($50) of his pay for a period of six (6) months and that final action be suspended awaiting the result of the investigation into conditions on board the U. S. S. *Keresan*, calling attention to the fact that the Bureau on May 20, 1919, forwarded the papers in the case to the commandant, third naval district, requesting that a board of investigation be ordered.

On July 15, 1919, the Bureau of Navigation, after considering all the facts brought out in the investigation of conditions on board the U. S. S. *Keresan*, to which ship accused was attached, and the evidence brought out in the trial of this officer, recommended approval of the proceedings, findings, and sentence, but in view of all the circumstances connected with this case and conditions on the U. S. S. *Keresan*, that the sentence be remitted.

Action of the Secretary of the Navy

On July 18, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Thomas J. Cunningham, U. S. Naval Reserve Force, but, in view of the recommendation of the Bureau of Navigation, remitted the sentence and directed that he be released from arrest and restored to duty.

C. M. O. 243—1919

[P. 1] First Lieutenant Edward F. Bailey, U. S. Marine Corps, was tried by general court martial on July 2, 1919, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Manslaughter (one specification).

Sentence

"The court therefore sentences him, First Lieutenant Edward F. Bailey, U. S. Marine Corps, to be dismissed from the U. S. Marine Corps and from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year."

[C. M. O. 245—1919]

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his previous excellent record and marked efficiency as an officer, as shown by the testimony, we recommend First Lieutenant Edward F. Bailey, U. S. Marine Corps, to the clemency of the reviewing authority."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On July 15, 1919, the Judge Advocate General referred the record to the Major General Commandant, U. S. Marine Corps, for comment, with the following remarks:

"The accused was charged with manslaughter and found guilty thereof. The specification supporting the charge alleges that the accused failed to handle a pistol which he was cleaning with due care and circumspection, and that through such neglect caused the death of another member of the service.

"The evidence adduced shows that the accused, in company with several other members of his organization, were in the company office engaged in cleaning their equipment in preparation [P. 2] for a parade. The accused was standing with the pistol in his hand, the weapon just prior to the unfortunate event pointing toward the wall, muzzle down at an angle of about forty-five degrees (R. 17). None of the occupants of the room were looking at the accused at the time the pistol was discharged; however, just prior to the discharge the accused was in the act of pulling back the slide of the automatic (R. 16). Immediately thereafter the discharge of the weapon resulting in the death alleged occurred. The deceased, who, from the evidence, was the only person present who was in a position to observe the actions of the accused, in a declaration immediately prior to his death stated 'he was sitting about six or eight feet away from where Lieutenant Bailey was standing cleaning his revolver, when it accidently went off, and he felt a pain in his side and knew he was shot' (R. 4).

"The record of the accused both as an enlisted man and an officer is exceptional. Officers associated with the accused testify that he was cool and careful in the performance of duty and showed great interest in his profession and in the welfare of his command.

"The only question involved is the degree of negligence involved in the conduct of the accused. 'The degree of care and caution to avoid mischief required to save from criminal responsibility one who accidentally kills another is that which a man of ordinary prudence would have exercised under like circumstances; mere slight negligence, with no intent to do harm, under such circumstances that it could not reasonably be supposed that injury would result, does not furnish a foundation for criminal responsibility for a resulting death' (3 LRA (NS) 1163). The degree of negligence necessary to support criminal liability must be gross and culpable (21 Cyc., 765, *Fitzgerald* v. *State*, 112 Ala. 34, 20 So. 966).

"The accused was in his office, engaged in a lawful act, that of cleaning his pistol. Immediately prior to the unfortunate discharge of the weapon it was pointing toward the wall, muzzle down, at an angle of about forty-five degrees, and not toward the deceased.

"It is further noted that the pistol that the accused was cleaning was loaded. The question then is, Was the fact that the pistol was loaded an indication of initial negligence on the [P. 3] part of the accused? It is shown by the evidence that it was the custom of the officers of the military police detachment, of which the accused was a member, to carry loaded pistols. Under these circumstances the fact that the pistol was loaded does not of itself constitute an act of negligence on the part of the accused. As the possession of the loaded pistol does not under the foregoing circumstances impute negligence on the part of the accused, but in fact was a matter of routine, there is nothing in the conduct of the accused up to this point that can be considered as gross or culpable negligence. The mere act of cleaning a pistol in an office, when it is shown that just prior

[C. M. O. 247—1919]

to the unfortunate discharge thereof that the weapon was not pointed toward any occupant of the room, but toward the wall, is not in itself negligence. If immediately thereafter, due to some unforeseen circumstance, which from the evidence is both possible and probable, the muzzle was deflected and the weapon accidentally discharged, it is my opinion that this fact alone is not sufficient to establish beyond a reasonable doubt that the accused was chargeable with either gross or culpable negligence, and that this case is one of 'homicide by misadventure' rather than manslaughter.

"In view of the foregoing it is recommended that the findings and sentence of the general court martial in the foregoing case of First Lieutenant Edward F. Bailey, U. S. Marine Corps, be disapproved and that he be released from arrest and restored to duty."

CONCURRENCE OF THE MAJOR GENERAL COMMANDANT, U. S. MARINE CORPS

On July 18, 1919, the Major General Commandant, U. S. Marine Corps, being of opinion that the evidence does not show either gross or culpable negligence on the part of the accused, concurred in the recommendation of the Judge Advocate General that the findings and sentence in this case be disapproved, and that accused be released from arrest and restored to duty.

ACTION OF THE SECRETARY OF THE NAVY

On July 21, 1919, the Secretary of the Navy, approving the foregoing recommendations of the Judge Advocate General, concurred [P. 4] in by the Major General Commandant, U. S. Marine Corps, disapproved the findings and sentence in the foregoing case of First Lieutenant Edward F. Bailey, U. S. Marine Corps, and directed that this officer be released from arrest and restored to duty.

C. M. O. 247—1919

[P. 1] Pay Clerk William A. McKnight, U. S. Marine Corps, was tried by general court martial on June 9, 1919, at the marine barracks, St. Thomas, Virgin Islands of the United States, by order of the Commandant, Naval Station, St. Thomas, Virgin Islands of the United States, and found guilty of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (two specifications).

SENTENCE

"The court therefore sentences him, Pay Clerk William A. McKnight, U. S. Marine Corps, to be dismissed from the U. S. Marine Corps, and from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his previous good record, we recommend William A. McKnight, Pay Clerk, U. S. Marine Corps, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY.

On June 18, 1919, the convening authority endorsed the record as follows:

"The charges of which this accused was found guilty involve drunkenness, breaking and entering a bakery in which employees were engaged in breadmaking, and creating a disturbance therein.

"It is clearly shown beyond any reasonable doubt that the accused was under the influence of intoxicating liquor. The breaking and entering,

[C. M. O. 247—1919]

though in the night season, was done in the presence of men and women who were making bread, and testimony regarding the accused's entry was given by those employees. Shortly after creating the disturbance alleged under the second charge, the accused, while in the bakery, was rendered unconscious by a severe blow delivered on his skull, which [P. 2] tore the membranes of his brain. The medical officer who saw him in the operating room of the hospital on the morning of the incident testified it was very unlikely that the injury was caused by a fall. The several employees of the bakery, who testified to the accused's actions in the bakery on the occasion in question, were unable to account for the manner in which the blow was received by the accused. These same witnesses were later arrested and an investigation, held according to the Danish laws which are still in effect in the Virgin Islands, disclosed the fact of an alleged concealment of evidence tending to disclose how the accused was injured. The court, however, having the witnesses before it and being in a better position to judge as to the weight to be accorded their testimony, both from their appearance and manner while on the stand, did not consider that the case of the accused was prejudiced by any alleged concealment, and on such testimony found the accused guilty of the second charge.

"The members of the court were unanimous in recommending the accused to the clemency of the convening authority, which recommendation was joined in by the judge advocate of the court. The basis of the recommendation was the previous good record of the accused.

"Under article 54, of the Articles for the Government of the Navy, the convening authority has power to remit, but not to commute, the sentence. As the sentence is that of dismissal, it cannot be remitted without allowing the accused to escape all the consequences of his offenses. This the convening authority is unwilling to do, despite his belief that, in view of the great suffering the accused has already undergone from the injuries received from unpunished hands, mercy may justly be shown the accused. However, in referring the record to higher authority, who has the power to mitigate in whole or in part, the convening authority adds to the unanimous recommendation of the court his own recomendation to clemency.

"In view of the foregoing, the proceedings, findings, and sentence of the general court martial in the foregoing case of Pay Clerk William A. McKnight, U. S. Marine Corps, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

[P. 3] RECOMMENDATION OF THE MAJOR GENERAL COMMANDANT

"This office has given full consideration to the unanimous recommendation for clemency, also the recommendation for clemency of the convening authority, and were there any extenuating circumstances in the case, developed by the record, this office would be inclined to also recommend clemency in this case. In view of the fact, however, that this officer has been found guilty of drunkenness and of scandalous conduct tending to the destruction of good morals, while serving at the Virgin Islands of the United States, it is recommended that the sentence be confirmed."

ACTION OF THE SECRETARY OF THE NAVY

On July 25, 1919, the Secretary of the Navy approved the foregoing recommendation of the Major General Commandant, U. S. Marine Corps, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On July 31, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Pay Clerk William A. McKnight, U. S. Marine Corps.

C. M. O. 253—1919

[P. 1] Commander Ernest L. Paugh, Chaplain Corps, U. S. Naval Reserve Force, was tried by general court martial on April 28, 1919, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy, and acquitted of the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (three specifications).

Charge II.—Sodomy (one specification).

Opinion and Recommendation of the Judge Advocate General

On July 15, 1919, the Judge Advocate General placed the following endorsement upon the record:

"The record in this case has been carefully examined, and a number of irregularities noted, attention to which is hereinafter invited.

"Walter E. Darr, seaman second class, U. S. Naval Reserve Force, was duly sworn and proceeded to testify. While responding to the thirty-fifth question propounded to him, the judge advocate requested that the court inform the witness as to his right to decline to answer any question which would tend to incriminate or degrade him. The court thereupon cautioned the witness accordingly. The witness continued his testimony, which was incriminating and highly damaging to the accused as well, being in support of the first charge and specification, when apparently without objection being made to said testimony, and in the absence of any pending question, the record shows that the court was cleared on motion of a member.

"When the court was reopened the witness was questioned as follows:

"'By the court: to the witness:

"'Darr, the court gathers from the last sentence of your testimony that you may be about to make a confession, which might be brought about in two or three ways. I would like to know whether there was any threat of punishment or force of any kind that might have influenced you in making this statement?

"'A. No, sir.

"'Q. Was any promise of immunity or hope of reward offered?

"'A. No, sir.

"'Q. Then you make this confession voluntarily and of your own free will?

[P. 2] "'A. Yes, sir.

'Q. Do you adhere to your last answer? One was as to whether or not there had been any threat or whether any promise of reward was offered, or whether you made your statement voluntarily, and you answered "no." Is that what you wish to have recorded?

'A. I made the statement voluntarily.

"The judge-advocate continued the direct examination.

'36. Q. Go ahead.

'A. I wish to withdraw the answer to the last question.

'37. Q. Do you mean by that that you stand on your constitutional rights not to answer any question which would tend to incriminate you?

'A. If I answer the question it would incriminate me.

'38. Q. Then you stand on your rights not to answer any more questions which would tend to incriminate you?

'A. Yes, sir.

'By the court to the witness:

'Q. You mean to say then that you stand on your constitutional rights and decline to answer these questions because they would tend to incriminate you?

'A. Yes, sir.

'Q. You do?

'A. Yes, sir.

"By the court to the judge advocate:

"The court would like to know from the judge advocate if the judge advocate has any proof in his possession to show that the testimony of the witness would not incriminate him.

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"By the judge advocate:
'I have not.
"By the court:
'The court sustains the witness and directs that he be not required to answer the question.'

"The judge advocate continued the direct examination on the second and third specifications of the first charge and upon the witness declining to answer on the ground that it would incriminate him, he was sustained by the court.

"It is well settled that the privilege of declining to answer on the ground of incrimination or self-degradation is a purely personal one and can be claimed only by the witness himself, and not by the accused, his counsel, or any other person. In proper cases, however, the court may, in its discretion, inform [P. 3] the witness of his rights. The accused cannot object to such testimony, and the witness may waive his privilege and testify in spite of any objection coming from the accused, his counsel, or any other person. (See sec. 163, Naval Courts and Boards, 1917.) The witness may waive the privilege by failing to make timely objection. For still stronger reasons the privilege is waived if no objection whatever is made (3 Jones on Evidence, p. 893). The privilege being for the protection of the witness, he may waive it, but once having elected to do so he is not permitted to stop, but must go on and make a full disclosure (Dudley, p. 290; see also C. M. O. 17, 1910, 15).

"In the instant case the witness, Darr, had been duly cautioned as to his constitutional rights; he thereupon continued his testimony without objection; he should consequently have been considered to have waived his privilege and his testimony should have been admitted. The highly irregular manner in which the testimony was stopped by the clearing of the court on motion of a member, without the privilege of declining to answer having been claimed by the witness, and the unfortunate method pursued in the subsequent examination of the latter, may readily lay the court open to the unpleasant imputation in the minds of the service at large, however unjustifiable such imputation may in fact be, that the procedure was preinduced by a desire to close the mouth of the witness then testifying. Unhappily, all the circumstances render such an imputation difficult for the department to refute; arising in relation to the alleged misconduct and moral perversion of a clergyman and officer of high rank in the Chaplain Corps of the Naval Reserve Force, as testified to by an enlisted witness who was the object of the accused's alleged salacious advances, the resultant situation becomes doubly unfortunate.

"Referring to the second charge and specification, the judge advocate produced one Raymond Wein, the victim, as a witness. Counsel for the accused objected to 'this child, Raymond Wein, seven years of age, testifying on the ground that he is of such tender years that he is unable to realize the sanctity of an oath.' The court was cleared and reopened. The record then contains the following statement by the court, viz: 'After an examination of the mentality of the child by the court *in open court*, the objection of counsel for the accused is unanimously sustained.' Here the record is incomplete in that it contains no suggestions of the modus or the proceedings of the examination *in open court* [P. 4] whereby it was ascertained that this witness was incompetent to testify. Under the general rule intelligence is the proper test and a child may be a competent witness, although he is very young, where he has sufficient intelligence to receive just impressions as to the facts of which he is to testify, and to relate them correctly, the question of competency resting in the discretion of the court (40 Cyc., 2209). The preliminary examination of this witness should therefore have been made a part of the record so that the reviewing authority could form an intelligent judgment as to the propriety of his exclusion as a witness. In fact, the elimination of such examination from the record, under all the circumstances of this case, opens the door to a doubt as to the correctness of the court's decision in the premises, and again having in mind that the witness on the stand was an alleged victim of the accused's alleged perversion, gives a regrettable support to the possible imputation hereinbefore adverted to.

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"Considering the whole record in this case, it is my opinion that the action of the court in acquitting the accused under the foregoing circumstances has resulted in a miscarriage of justice, and I have therefore to recommend that the proceedings, findings, and acquittal be disapproved.

"Respectfully referred to the Chief of the Bureau of Navigation for comment."

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On July 28, 1919, the Bureau of Navigation, concurring in the above remarks of the Judge Advocate General, recommended disapproval of the proceedings, findings, and acquittal, and further recommended that the irregularities above noted be pointed out to the members of the court for their information.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On August 7, 1919, the Acting Secretary of the Navy approved the foregoing remarks and recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and directed that Commander Ernest L. Paugh, Chaplain Corps, U. S. Naval Reserve Force, be released from arrest.

C. M. O. 255—1919

[P. 1] Ensign Charles E. Cadmus, U. S. Naval Reserve Force, was tried by general court martial on April 29, 1919, at the Navy Yard, Mare Island, Calif., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Conduct unbecoming an officer and a gentleman (five specifications).

Charge III.—Scandalous conduct tending to the destruction of good morals (three specifications).

Additional charge.—Scandalous conduct tending to the destruction of good morals (one specification).

SENTENCE

"The court therefore sentences him, Charles E. Cadmus, ensign, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On June 6, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment, with the following remarks:

"The prosecution in the foregoing trial introduced in evidence certain depositions. These depositions entered into the proof of the third charge and the additional charge, the first and second charges being proved by other evidence independently of the depositions.

"In view of the serious nature of the first and second charges, of which the accused was convicted, of all the circumstances under which the offenses transpired, and of the fact that the depositions which were used in this case did not enter into the proof of the above charges, this office is of opinion that even were the Department inclined to reaffirm the policy outlined in C. M. O. 11, 1916 (Navy Digest. 1916, Depositions 12), this case would not fall within its terms.

[P. 2] "It is therefore recommended that the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Charles E. Cadmus, U. S. Naval Reserve Force, be appproved, and that the naval prison at the Navy Yard, Mare Island, Calif., be designated as the place for the execution of so much of the sentence as relates to imprisonment."

[C. M. O. 256—1919]

CONCURRENCE AND RECOMMENDATIONS OF THE BUREAU OF NAVIGATION

On July 18, 1919, the Bureau of Navigation, concurring in the remarks of the Judge Advocate General, recommended approval of the proceedings, findings, and sentence, but, in view of all of the circumstances, further recommended that that part of the sentence involving imprisonment be remitted.

ACTION OF THE SECRETARY OF THE NAVY

On July 22, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence, and recommendations of the Judge Advocate General, but disapproved the recommendation of the Chief of the Bureau of Navigation that that part of the sentence which involves imprisonment be remitted; designated the naval prison at the Navy Yard, Mare Island, Calif., as the place for the execution of so much of the sentence as relates to imprisonment; and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On July 31, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Ensign Charles E. Cadmus, U. S. Naval Reserve Force.

C. M. O. 256—1919

[P. 1] Ensign Charles E. Cadmus, U. S. Naval Reserve Force, was tried by general court martial on May 22, 1919, at the Navy Yard, Mare Island, Calif., by order of the Secretary of the Navy, and found guilty of the following charges, proved by plea:

Charge I.—Absence from station and duty without leave (one specification).

Charge II.—Breaking arrest (one specification).

SENTENCE

"The court therefore sentences him, Charles E. Cadmus, ensign, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

OPINION OF THE JUDGE ADVOCATE GENERAL

On August 1, 1919, the Judge Advocate General, in referring the record to the Chief of the Bureau of Navigation for comment, invited attention to the fact that Cadmus had been previously convicted by general court martial and sentenced to be dismissed from the United States naval service and to be imprisoned for a period of one year, which sentence was approved by the department on July 22, 1919, and confirmed by the President of the United States on July 31, 1919 (see G. C. M. Rec. No. 44303, C. M. O. 255, 1919), thus making the execution of the sentence in this case impossible, the accused having already been dismissed from the United States naval service.

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On August 7, 1919, the Bureau of Navigation, concurring in the remarks of the Judge Advocate General, recommended approval of the proceedings, findings, and sentence.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On August 11, 1919, the Acting Secretary of the Navy approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign Charles E. Cadmus, [P. 2] U. S. Naval Reserve Force, and the recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation.

C. M. O. 258—1919

[P. 1] Lieutenant (Junior Grade) J. M. Marks, U. S. Naval Reserve Force, was tried by general court martial on June 27, 1919, in general court-martial room, Steneck Building, Hoboken, N. J., by order of the Commander, Cruiser Force, United States Fleet, on the following charge:

Charge.—Using abusive and profane language toward his superior officer (one specification).

Findings

The court found the specification of the charge proved, except as to certain words, and the accused guilty in the less degree than charged, guilty of using profane language toward his superior officer.

Sentence

"The court therefore sentences him, Lieutenant (Junior Grade) John M. Marks, U. S. Naval Reserve Force, to lose twenty-five dollars ($25) per month of his pay for a period of four (4) months."

Action of the Convening Authority

On July 1, 1919, the convening authority approved the proceedings, findings, and sentence, and directed that accused be released from arrest and restored to duty.

Opinion and Recommendation of the Judge Advocate General

On August 6, 1919, the Judge Advocate General referred the foregoing record to the Chief of the Bureau of Navigation for comment, with the following opinion and recommendation:

> "In this case the accused, Lieutenant (J. G.) J. M. Marks, U. S. Naval Reserve Force, was charged with 'Using abusive and profane language toward his superior officer,' the specification alleging that he uttered the statement, 'Hey, Chief, why in the hell did you report me to the commanding officer about the alcohol?'
>
> [P. 2] "The court found the specification in due form and technically correct, and in its findings found the alleged language proved, but the accused guilty in a less degree, guilty of 'Using profane language toward his superior officer.'
>
> "In my opinion the specification does not support the charge, as the language is not profane within the legal meaning of that term. It might be construed as abusive in the sense of reproachful.
>
> "The word 'profane' is defined as 'Exercising or manifesting irreverence, disrespect, or undue familiarity toward the Deity or religious things; blasphemous; sacrilegious; irreligious; impious.'
>
> "The word 'hell' does not, in my judgment, come under the same definition.
>
> "From the facts of the case the proper charge would have been 'Disrespectful in language and deportment to his superior officer while in the execution of the duties of his office.'
>
> "In view of the foregoing, it is recommended that the proceedings, findings, and sentence of the court in the foregoing case be disapproved."

Concurrence and Recommendation of the Bureau of Navigation

On August 9, 1919, the Bureau of Navigation, concurring in the remarks of the Judge Advocate General, recommended that the proceedings, findings, and sentence be disapproved.

Action of the Secretary of the Navy

On August 15, 1919, the Acting Secretary of the Navy approved the recommendation of the Judge Advocate General, concurred in by the Chief of the

[C. M. O. 259—1919]

Bureau of Navigation, in the foregoing case of Lieutenant (Junior Grade) John M. Marks, U. S. Naval Reserve Force.

C. M. O. 259—1919

[P. 1] Lieutenant (Junior Grade) James Pigot, U. S. Naval Reserve Force, was tried by general court martial on June 24, 1919, at U. S. Naval Base No. 29, by order of the Base Commander, on the following charges:

Charge I.—Drunkenness (two specifications).

Charge II.—Assaulting and striking an officer of the law while in the execution of the duties of his office (one specification).

Charge III.—Assaulting and striking a civilian (one specification).

Charge IV.—Scandalous conduct tending to the destruction of good morals (three specifications).

Findings

The court found the specifications of the first charge proved by plea, and the accused guilty of the first charge; the specification of the second charge not proved, the accused not guilty of the second charge, and acquitted the accused of the second charge; the specification of the third charge not proved, the accused not guilty of the third charge, and acquitted the accused of the third charge; the specifications of the fourth charge not proved, the accused not guilty of the fourth charge, and acquitted the accused of the fourth charge.

Sentence

"The court therefore sentences him, Lieutenant (Junior Grade) James Pigot, U. S. Naval Reserve Force, to lose fifty dollars ($50) per month of his pay for a period of four months."

Returned for Revision

On June 29, 1919, the convening authority, being of opinion that the findings were not in accord with the evidence adduced, returned the record to the court, directing that the court reconvene for the purpose of reconsidering the findings on charges [P. 2] II, III, and IV, and the sentence, and, in connection therewith, expressed the following views:

> "The court, it is true, is the best judge of the credibility of the witnesses which appear before it, and the weight to be accorded to the testimony of each. However, the facts adduced under specification three of charge IV, covering 'scandalous conduct tending to the destruction of good morals,' clearly show that the accused was on the night in question engaged in a brawl, and was thereupon publicly arrested by city constables and conveyed to and confined in the police station.
>
> "It is not within the province of the court to exercise clemency. Its findings should be based on the evidence adduced, and if, in the course of a trial, circumstances tending to lessen the gravity of the acts the accused is charged with are brought forward, it is then the function of the court, upon its own initiative, to embody such extenuating circumstances in a recommendation to clemency."

The convening authority further invited the court's attention to the effect upon the whole case of the findings under charge I, particularly as the findings on that charge were based on the plea of the accused thereto, and in spite of the accused's inconsistent testimony while on the stand, with reference to said charge. "In this particular the court erred in not advising the accused to change his plea on the charge of drunkenness, and by the commission of this error, and in its subsequent findings, the court possibly has inadvertently laid the foundation of permitting the accused to escape all punishment for such breaches of discipline as for which he may be liable."

[C. M. O. 260—1919]

ACTION IN REVISION

The court decided, respectfully, to adhere to its former findings and sentence, on the following grounds:

"The plea of 'guilty' by the accused to charge I, 'Drunkenness,' is accepted by the court on the legal ground that the indulgence by a person in one or more alcoholic drinks constitutes technical drunkenness, even though the degree of drunkenness may be slight, and would therefore render the subject unfit for duty. (See Naval Digest, 1916, p. 194, pars. 26 and 27.) In this matter the accused had the benefit of competent advice.

"In the opinion of the court the acceptance of this plea on the first charge does not vitiate its findings on the specifications [P. 3] of the second, third, and fourth charges, for reasons which follow:

"The case of this officer resolves itself into two separate and distinct phases, viz: (1) The act of becoming technically drunk before entering the Griffin Hotel on the evening of June 17, 1919; and (2) a series of events in which the accused became involved after his entrance into the premises of the Griffin Hotel. In the second phase the court accepts the testimony of the accused that he suffered a mental derangement due to a vicious blow on the head (the evidence of which was visible to the court), and thereafter his actions and words, while reprehensible, were subconscious and involuntary; therefore the court believes that he was not legally responsible for his acts while in such mental state.

"The testimony brought before the court, particularly by the prosecution, was of a conflicting nature, and a reasonable doubt was thus created, for which the accused is given the just and proper benefit."

ACTION OF THE CONVENING AUTHORITY

Subject to the following remarks the convening authority, on July 1, 1919, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (Junior Grade) James Pigot, U. S. Naval Reserve Force, and directed that he be released from arrest and restored to duty:

"The court originally erred in not requiring the accused to change his plea on the charge of drunkenness, as already indicated in the convening authority's letter of revision. If this had been done, the degree of intoxication might have been adduced and the possibility of more exact justice effected.

"From the proceedings in revision, the court shows that it considered the accused only technically drunk, and evidently bases the findings upon the remaining charges, on the assumption that the accused was in no degree responsible for the argument and ensuant brawl that he later became engaged in."

C. M. O. 260—1919

[P. 1] Lieutenant Percy E. Meredith, U. S. Naval Reserve Force, was tried by general court martial on June 27, 1919, in the general court-martial room, Steneck Building, Hoboken, N. J., by order of the Commander, Cruiser Force, United States Fleet, and found guilty of the following charges, proved by plea:

Charge I.—Conduct to the prejudice of good order and discipline (one specification).

Charge II.—Violation of a lawful regulation issued by the Secretary of the Navy (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant Percy E. Meredith, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On July 1, 1919, the convening authority approved the proceedings, findings, and sentence, and referred the record to the Secretary of the Navy for trans-

mission to the President, in conformity with article 53 of the Articles for the Government of the Navy.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On August 1, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment as to disciplinary features, with the following opinion and recommendation:

"The specification of charge I, 'Conduct to the prejudice of good order and discipline,' alleges in part that the accused 'Did * * * contribute to a fund, then and there being collected for the purchase of intoxicating liquor, said liquor to be introduced and used on board said ship for drinking purposes * * *.'

"The introduction of liquor for drinking purposes on board ships of the Navy is prohibited (arts. R–2922 and I–827, Nav. Regs.). However, the mere contribution to a fund for the purchase of intoxicating liquor is neither malum in se nor malum [P. 2] prohibitum, and unless at the time of the contribution it was known that the liquor was to be purchased for an unlawful purpose, no culpability attaches to the party so contributing. The knowledge of the unlawful purpose, being the gravamen of the offense, it is essential that such knowledge be alleged (*U. S.* v. *Adler*, 49 Fed. 736), otherwise the specification is fatally defective. The specification set out in part above does not allege knowledge on the part of the accused, as to the unlawful use to be made of the liquor purchased with the fund to which he was a contributor. It is therefore my opinion that the specification is defective in that it does not allege an offense, and it is recommended that charge I, and the specification thereunder, and the findings thereon, be disapproved.

"Subject to the foregoing, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Percy E. Meredith, U. S. Naval Reserve Force, are legal.

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On August 6, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence as modified by the Judge Advocate General's remarks, in which the Bureau concurred.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On August 8, 1919, the Acting Secretary of the Navy approved the recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On August 15, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant Percy E. Meredith, U. S. Naval Reserve Force.

C. M. O. 263—1919

[P. 1] Lieutenant Charles L. Nordsiek, U. S. Naval Reserve Force, was tried by general court martial on June 26, 1919, at the Naval Station, New Orleans, La., by order of the Commandant, Eighth Naval District, on the following charges:

Charge I.—Culpable inefficiency in the performance of duty (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (three specifications).

[C. M. O. 264—1919]

MOTION TO STRIKE SUSTAINED

A preliminary motion by counsel for accused to strike out charge II and the specifications thereunder, on the ground that the offenses were cumulative and vague as to time, was sustained by the court. The court, however, held that the charges and specifications as drawn were in accord with directions contained in article 65, page 78, Naval Courts and Boards, 1917. Notwithstanding that the convening authority did not consider it necessary or desirable to change the original specifications as delivered to the court and the accused, and, further, that he directed that the trial proceed under the original charges and specifications, the court adhered to its decision in sustaining the said motion to strike out charge II and the specifications thereunder.

FINDINGS

The court found the specification of the first charge "not proved," the accused "not guilty" of the first charge, and fully acquitted the accused of the first charge.

ACTION OF THE CONVENING AUTHORITY

On July 15, 1919, the convening authority approved the proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant Charles L. Nordsiek, U. S. Naval Reserve Force, as to charge I and the specifications there- [P. 2] under; but disapproved the proceedings on charge II, and the specifications thereunder, for the following reasons:

> "It appears that the court sustained the motion of the counsel for the accused to strike out the specifications of the second charge and the second charge on the grounds of the offenses being accumulative, and being vague as to time; and that the court held, however, that the charge and specifications were drawn up in accordance with article 65, page 78, of Naval Courts and Boards. The convening authority considers that the court, having duly declared in open court that the charges and specifications were in due form and technically correct, subsequent to a statement by the accused that he had no objection to the form and technicality of the charges and specifications, did err and reverse itself in entertaining a motion to strike out because of vagueness as to time, which error has been clearly defined by court-martial procedure and Naval Courts and Boards to be a technical error only.
>
> "In regard to that part of the motion to strike out based on the plea that the offenses charged were accumulative, the convening authority repeats his statement made in his 3d endorsement of July 1, 1919, to the court as follows: 'If the court has found that charges were allowed to accumulate against the accused without notice to him or without opportunity for his reply to the same, the convening authority can make no suggestion to the court relative to its finding of facts on this point.' The convening authority assumes the finding to have been in accordance with sections 34, 35, 38, and 39, Naval Courts and Boards. It is assumed that the court ruled that the question of accumulation of charges was in violation of Naval Courts and Boards, paragraph 41.
>
> "In its adherence to its decision to sustain the motion of the accused through his counsel, the court failed to state whether the decision was upholding the claim as to indefiniteness of time, or as to accumulation of charges."

The convening authority directed that the accused be released from arrest and restored to duty.

C. M. O. 264—1919

[P. 1] Lieutenant Commander Granville D. Rice, U. S. Naval Reserve Force, was tried by general court martial on June 25, 1919, in general court-martial room, Steneck Building, Hoboken, N. J., by order of the Commander Cruiser Force, United States Fleet, and found guilty of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (two specifications).

[C. M. O. 264—1919]

Charge II.—Violation of a lawful regulation issued by the Secretary of the Navy (three specifications).

SENTENCE

"The court therefore sentences him, Lieutenant Commander Granville D. Rice, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On July 1, 1919, the convening authority approved the proceedings, findings, and sentence, and referred the record to the Secretary of the Navy for transmission to the President, in conformity with article 53 of the Articles for the Government of the Navy.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On August 12, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment as to disciplinary features, with the following opinion and recommendation:

> "The second specification of charge I, 'Conduct to the prejudice of good order and discipline,' alleges in part that the accused 'did * * * contribute to a fund, then and there being collected for the purchase of intoxicating liquor, said liquor to be [P. 2] introduced and used on board said ship for drinking purposes * * *.'
>
> "The introduction of liquor for drinking purposes on board ships of the Navy is prohibited (Navy Regulations, Arts. R–2922 and I–827). However, the mere contribution to a fund for the purchase of intoxicating liquor is neither malum in se nor malum prohibitum, and unless at the time of the contribution it was known that the liquor was to be purchased for an unlawful purpose, no culpability attaches to the party so contributing. The knowledge of the unlawful purpose being the gravamen of the offense, it is essential that such knowledge be alleged (*U. S.* v. *Adler*, 49 Fed. 736), otherwise the specification is fatally defective. The specification set out in part above does not allege knowledge on the part of the accused as to the unlawful use to be made of the liquor purchased with the fund to which he was a contributor. It is therefore my opinion that the specification is defective in that it does not allege an offense, and it is recommended that specification 2 of charge I, and the findings thereon, be disapproved.
>
> "Subject to the foregoing the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Granville D. Rice, U. S. Naval Reserve Force, are legal."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On August 14, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence, as amended by the remarks of the Judge Advocate General thereon.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On August 19, 1919, the Acting Secretary of the Navy approved the foregoing recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

[P. 3] ACTION OF THE PRESIDENT

On August 21, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant Commander Granville D. Rice, U. S. Naval Reserve Force.

[C. M. O. 267—1919]

C. M. O. 266—1919

[P. 1] Lieutenant Henry S. Beardsley, U. S. Naval Reserve Force, was tried by general court martial on July 9, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (one specification).

Nolle Prosequi Recommended and Authorized

In view of the failure on the part of the prosecution to procure attendance of witnesses with specific knowledge concerning the offense alleged, and believing that further efforts to secure such witnesses would be without result, owing to the fact that approximately two years had elapsed since the alleged offense was committed, the judge advocate requested permission of the court to communicate with the convening authority recommending that a nolle prosequi be entered in this case, which request was granted.

On July 30, 1919, the Secretary of the Navy authorized and directed the judge advocate to enter a nolle prosequi in the case of the above-named officer on the charge and specification preferred against him.

Proceedings in Nolle Prosequi

On August 7, 1919, after the customary preliminary proceedings of the court, the judge advocate read the letter from the convening authority directing him to enter a nolle prosequi in the case of the accused, and a nolle prosequi was so entered.

Recommendation of the Judge Advocate General

On August 16, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment, with the recommendation that the proceedings of the general court martial in nolle prosequi be approved.

[P. 2] recommendation of the bureau of navigation

On August 20, 1919, the Bureau of Navigation recommended approval of the proceedings in nolle prosequi.

Action of the Acting Secretary of the Navy

On August 23, 1919, the Acting Secretary of the Navy approved the foregoing recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, re the proceedings of the general court martial in nolle prosequi in the foregoing case of Lieutenant Henry S. Beardsley, U. S. Naval Reserve Force, and directed that this officer be released from arrest and restored to duty.

C. M. O. 267—1919

[P. 1] Lieutenant Joseph P. Boulian, U. S. Naval Reserve Force, was tried by general court martial on June 30, 1919, at U. S. Naval Base No. 29, Cardiff, Wales, by order of the Base Commander, and found guilty of the following charge:

Charge.—Embezzlement (one specification).

Sentence

"The court therefore sentences him, Lieutenant Joseph P. Boulian, U. S. Naval Reserve Force, to be dismissed from the United States naval service.

Action of the Convening Authority

On July 1, 1919, the convening authority approved the proceedings, findings, and sentence, and referred the record to the Secretary of the Navy for trans-

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mission to the President, in conformity with article 53 of the Articles for the Government of the Navy.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On August 6, 1919, the Judge Advocate General placed the following endorsement on the record:

"In reviewing the proceedings of the general court martial in this case it is noted that the accused, Lieutenant Joseph P. Boulian, U. S. Naval Reserve Force, was tried on the charge of 'Embezzlement,' the specification alleging—

"'In that Lieutenant Joseph P. Boulian, U. S. Naval Reserve Force, having, while serving as executive officer on board the U. S. S. *Lake St. Regis*, on board said ship, received into his possession and under his control, in the execution and under the color of his office as aforesaid, ten (10) one hundred (100) pound sacks of flour, of aggregate value of about fifty (50) dollars, consigned to the American Food Commission, Danzig, Germany; the United States then being in a state of war.'

"Embezzlement is a statutory offense, and as such must be construed strictly. In the Articles for the Government of the Navy the crime of embezzlement is provided for only in article 14, in the following terms:

[P. 2] "'Fine and imprisonment, or such other punishment as a court martial may adjudge shall be inflicted upon any person in the naval service of the United States * * *.

"'8. Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use and benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipment, ammunitions, clothing, subsistence stores, money, or other property of the United States, furnished or intended for the military or naval service thereof; * * *.'

"The word 'embezzles' is not specifically defined therein and therefore recourse must be had to sections 87–92 of the act of March 4, 1909 (35 Stat. 1088), which define embezzlement by public officers of the United States. A careful analysis of these sections discloses that the ownership of the funds under consideration must not only be in another than the accused, but they must be the public funds of the United States, and that said accused must have obtained possession lawfully and retained it unlawfully against the interest of the rightful owner.

"It is a well-recognized rule of pleading that the essential elements of an offense must be affirmatively and specifically set forth in the pleading, and a court is not warranted in taking judicial notice of the existence of any essential elements unless they are so affirmatively and specifically set forth. This rule is fully supported by the case of *Pettibone* v. *United States* (148 U. S. 202), as follows:

"'The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital.'

"The specification in this case in order to support the charge of embezzlement must therefore not only show that the accused did not have a better legal title to the goods in question than the party alleged to have been defrauded, but it must affirmatively set forth that the said goods alleged to have been embezzled by the accused were the property of the United States, furnished or intended for the military or naval service thereof. (See sample specification in Naval Courts and Boards, 1917, p. 100.) The specification in question alleges that the goods were consigned to the American Food Commission, Danzig, Germany, [P. 3] but it fails to allege the ownership thereof and therefore is fatally defective and not sufficient to support the charge under which it appears.

"In view of the above it is the opinion of this office that the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Joseph P. Boulian, U. S. Naval Reserve Force, are illegal, and it is recommended that the same be set aside, and that the accused be released from arrest and restored to duty.

"Referred to the Chief of the Bureau of Navigation for comment."

[C. M. O. 268—1919]

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On August 9, 1919, the Chief of the Bureau of Navigation, concurring in the remarks of the Judge Advocate General, recommended disapproval of the proceedings, findings, and sentence.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On August 25, 1919, the Acting Secretary of the Navy approved the foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, that the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Joseph P. Boulian, U. S. Naval Reserve Force, be disapproved, and directed that this officer be released from arrest and restored to duty.

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[P. 10] ARREST: MEMBERS OF NAVAL PERSONNEL UNDER, AWAITING TRIAL; APPLICATION THERETO OF PROVISIONS OF MANUAL FOR THE GOVERNMENT OF NAVAL PRISONS.

In a recent letter to a commandant of a navy yard the views of the department with respect to the status of members of the naval personnel under arrest awaiting trial were set forth as follows:

> "It is not the intention of the department that the provisions of the Manual for the Government of the United States Naval Prisons should be applied generally to members of the naval personnel held under arrest awaiting trial. These individuals are not in the status of men who have been regularly tried, convicted, and sentenced by a duly constituted court martial, but are presumed to be innocent of the offense charged until found guilty by such a tribunal. They are placed under arrest either to insure their presence at the trial or to give them a reasonable opportunity to prepare their defense, and, in general, they should not be placed under arrest until immediately prior to the trial, except in those cases where it is advisable to take extraordinary precautions against their escape, to relieve them from all other duties, so that they may have ample opportunity for preparing their defense, or, owing to the nature of the crime of which they are accused and the character or the condition of the individual under arrest, confinement is necessary in the interests of good order and discipline. It is apparent that each individual case must be judged on its merits, and the confinement should be no more rigorous than the circumstances require.
>
> "Communications between an accused under arrest awaiting trial and his counsel are privileged and not subject to any interference on the part of those in charge of his detention.
>
> "The restrictions contained in articles 63, 64, and 172, Manual for the Government of United States Naval Prisons are not to be considered as applying to an individual awaiting trial except insofar as may be necessary to prevent him from obtaining such articles as may be prohibited to those under arrest."

In accordance with the above views, the Secretary of the Navy directed that a member of the naval personnel held awaiting trial by general court martial be given every opportunity consistent with his safe detention to communicate with his counsel and to prepare his defense (File 26251–20990: 4, Sec. Nav., Aug. 25, 1919).

[P. 11] BOARD OF MEDICAL EXAMINERS: TO DETERMINE PRESENT MENTAL AND PHYSICAL CAPABILITY OF OFFICER TO UNDERGO TRIAL BY GENERAL COURT MARTIAL.

A board of investigation to inquire into the conduct of a supply officer's office recommended that the physical and mental status of such supply officer be determined to ascertain whether or not it is desirable to retain him in the

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position he now holds. It appears from the record of proceedings of said board that said supply officer, on February 28, 1919, was found on the streets of a city in a dazed condition, which condition was diagnosed by the attending physician as amnesia. Said physician also reported that a subsequent examination indicated that said supply officer was suffering with aphasia.

It thus appears that this officer's affliction is one which occasioned complete loss of consciousness, memory, and speech, and is recurrent in its nature. While these diagnoses may or may not be accurate, depending upon this particular physician's ability and his opportunity for observation, the department considers them sufficient to warrant a thorough examination of the mental and physical condition of the officer in question, and a complete report submitted before bringing him to trial.

The board of medical examiners convened in pursuance of the recommendation of the board of investigation reported that "each member of the board then made a careful mental examination of the candidate and found that he does not present any active mental disease. He is clearly cognizant of the difference between right and wrong, and must, therefore, be considered responsible."

The department was of opinion that the present question is not whether said supply officer can distinguish between right and wrong, "for if he claims insanity as his defense it would be necessary for him to prove insanity" existing at the time of the alleged offenses. From the report of the commanding officer of the naval hospital this supply officer was at the time not physically able to attend the board of investigation; his mental status was "questionable"; and he was "suffering from loss of memory and confusion"; and, further, "it is not considered that he will be sufficiently recovered to represent himself or to look after his own interests for at least one month, or perhaps longer." The question which should be determined now is whether or not this supply officer is at the present time mentally and physically competent to conduct his defense if brought to trial before a general court martial. If his condition is such that he has lost all recollection of the events which occurred prior to February 27, 1919, it is obvious that he would be utterly unable to properly conduct his defense, and the effect would be practically to deny him a day in court.

It was accordingly directed that the present physical and mental condition of said supply officer be again inquired into by a board of medical officers, with a view to determining [P. 12] whether he is at the present time physically and mentally capable of undergoing trial by general court martial, and that a report of said board be submitted to the department (File 26283–2496, Sec. Nav., Aug. 4, 1919).

CIVIL RESPONSIBILITY: NAVAL OFFICERS SUBJECT TO THE MANDATES OF THE CIVIL LAW IN MATTER OF LEASE FOR RENTAL OF QUARTERS.

Information being requested as to whether a naval officer is permitted to break his lease for rental of quarters upon his change of station or assignment to duty, and whether in the event that a judgment is obtained against him in the civil courts, the same may be made the basis of a levy on such officer's salary, the department expressed the view that the matter of holding a naval officer to a lease under such circumstances is one primarily for the consideration of the civil authorities; and, further, that aside from the protection afforded by the Soldiers' and Sailors' Relief Act of March 8, 1918, a naval officer is subject to the mandates of civil law in all respects the same as a civilian, and the usual recourse is available for the enforcement of an order of the court against him, the same as if he were not in the naval service (File 16670–59, Sec. Nav., Aug. 29, 1919).

DESERTERS: APPREHENSION OF; PROCEDURE.

In answer to a request for information whether a warrant is necessary to arrest a deserter in one State and bring him to another State for delivery to the naval authorities, the Judge Advocate General expressed the following views:

> "By the inclosed indorsement you request such information as will enable you to make reply to the accompanying request of the Federal Detective

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Bureau, Paterson, N. J., for a ruling from the naval authorities as to whether a warrant is necessary to arrest a deserter in one State and bring him to another State for delivery to the naval authorities.

"Section 15 of the act of February 16, 1909 (35 Stat. 622), authorizes the arrest of deserters from the Navy by 'any civil officer having authority under the laws of the United States, or of any State, Territory, or district to arrest offenders.' Outside of this jurisdiction a civil officer has no authority to make arrests, but becomes a mere private citizen, and is not, outside of his jurisdiction, a civil officer within the meaning of the above act. This office has, accordingly, held that the authority of civil officers to arrest deserters must be coextensive with their authority to arrest other offenders; that the one cannot exist without the other; and that when a civil officer leaves his [P. 13] jurisdiction and loses his power to arrest offenders against the civil laws he at the same time loses his power to arrest deserters from the naval service (File 26516–218, J. A. G., August 24, 1916).

"It necessarily follows from the above that inasmuch as a civil officer has no legal authority to transport an offender against the civil laws from the State in which such offender is arrested to another State for trial without first procuring a warrant of rendition, he, as a civil officer, acquires no greater authority under the above act of February 16, 1909, with regard to the transportation of deserters to a State other than that in which such deserter is is arrested.

"The proper procedure to be pursued by a civil officer after he arrests a deserter is to deliver him to the proper naval authorities within the State of his jurisdiction, and the naval authorities will then take the necessary steps to transfer the deserter to the place where he is wanted" (File 26516–317, J. A. G., August 11, 1919).

DESERTION: ABSENCE FROM UNITED STATES AS AFFECTING STATUTE OF LIMITATION; PARDON.

Article 62, Articles for the Government of the Navy, provides as follows:

"No person shall be tried by court martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States or by reason of some other manifest impediment shall not have been amenable to justice within that period, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was enlisted in the service."

With regard to a person who deserted from the United States naval service in July 1915, and who enlisted in the Canadian Army in 1916, served three years abroad, and has just been discharged, the department holds that such person is in the status of a deserter at large, and is still subject to apprehension and trial by general court martial, as under the above-quoted article the time of his absence from the United States is excluded in computing the period of limitation during which he may be tried. Further, that under the rules of the Department of Justice, as approved by the President, no application for pardon in any given case of desertion will be considered until the offender has been convicted thereof, and that it is also not the policy of this department to recommend the pardon of a deserter at large (File 26516–307:1, Sec. Nav., August 6, 1919).

[P. 14] ENLISTMENTS: EXTENSION OF.

"A" reenlisted in the Marine Corps on March 8, 1914, for a term of four years; appointed quartermaster clerk (temporary) on December 15, 1917. He now requests that upon the revocation of his temporary appointment as a quartermaster clerk he be allowed to extend his enlistment under the terms of the act of August 22, 1912, notwithstanding the fact that, except for his appointment as a temporary warrant officer, under the provisions of the act of May 22, 1917, his four-year term of enlistment would have expired on March 7, 1918.

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In an opinion rendered June 21, 1917 (File 7657–445), the Judge Advocate General held that the appointment of an enlisted man as a commissioned or warrant officer under the act of May 22, 1917, did not terminate his service as an enlisted man but that his enlisted status remained dormant until the termination of his temporary commission or warrant, at which time he should revert to his former status, unless in the meantime he had become entitled to promotion to a higher grade or rank in accordance with existing law. The reversion, it was pointed out, was not for further service as an enlisted man, if his enlistment had expired during his service as an officer, but was for the purpose of discharge and to secure to him all the "rights, benefits, privileges, and gratuities" (except pay) that would have accrued to him except for his appointment as an officer (act of May 22, 1917).

One of the rights or benefits to which an enlisted man is entitled is that of extending his enlistment for a period of one, two, three, or four years from the date of expiration of his term of enlistment, and to receive the same pay and allowances in all respects as though regularly discharged and reenlisted immediately upon expiration of his term of enlistment (act of Aug. 22, 1912).

A four-year term of enlistment does not necessarily expire at the end of four years from the date is was entered into. It may become indeterminate by detention of an enlisted man beyond the four-year period where authorized by law. It is commonly called a four-year period of enlistment, because it is entered into for a period of four years, and to distinguish it from an enlistment for minority. The enlistment contract itself makes the period indeterminate under certain conditions by incorporating section 1422 of the Revised Statutes of the United States. The Comptroller has held that where a man is detained under section 1422 after the expiration of the four-year period he may extend his enlistment from a date later than that on which he would have been discharged, except for such retention (20 Comp. Dec. 377). In such cases the "four-year term of enlistment" does not expire until the man becomes legally entitled to a discharge therefrom.

By reason of "A's" appointment as a quartermaster clerk, he was not discharged on March 7, 1918, in accordance with the term of his enlistment contract, nor was he entitled to discharge [P. 15] as of that date under the department's construction of the act of May 22, 1917, but was retained in his enlisted status by operation of law, consequently he could not extend his enlistment from the date of the expiration of the four-year period. The department cannot legally antedate his discharge (Op. J. A. G., Dec. 15, 1909, File 7657–65).

"A" will become entitled to a discharge from the service until the expiration of his temporary appointment as a warrant officer, at which time he will revert to his enlisted status, unless in the meantime he shall have become entitled to a higher rank or grade, and upon so reverting he will be entitled to his discharge from the service or may extend his enlistment under the terms of the act of August 22, 1912, for one, two, three, or four years from the date that he reverts to his enlisted status, which will be the date on which he is entitled to his discharge by reason of the expiration of the "four-year term of enlistment" (File 26254–2881:13, J. A. G., Aug. 11, 1919).

NAVAL RESERVE FORCE: ORDERING OFFICERS OF, BEFORE RETIRING BOARDS.

An opinion being requested by the Bureau of Navigation as to the method of procedure necessary to bring before naval retiring boards certain officers of the Naval Reserve Force who have incurred disability in line of duty, and who have (1) been placed on the inactive list, and (2) been honorably discharged from the Naval Reserve Force, the Judge Advocate General expressed the following views, which were approved by the Acting Secretary of the Navy:

> "The act of July 1, 1918, Public, No. 182, contains the provision, 'That no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty.' In an opinion dated October 19, 1918 (File 27231–115:1), the Judge Advocate General held that the effect of this provision is to affirmatively authorize the retirement of officers of the Naval Reserve Force for physical disability incurred in line of duty.

[C. M. O. 268—1919]

"The act of July 1, 1918, does not specify that members of the Naval Reserve Force on active duty shall not be eligible for retirement other than for physical disability incurred in line of duty, but makes no distinction between members on active duty and those on the inactive list. It must, however, be held to refer only to physical disability incurred in line of duty while on active duty with the Navy in response to the call of the President, for the intent of the legislature in this respect is made manifest by reading the provision in connection with the other provisions of law and the whole general scheme of organization relating to the Naval Reserve Force.

[P. 16] "Assuming that some officers have been relieved from active duty and others have been honorably discharged from the Naval Reserve Force who had become physically disabled while on active duty, your questions are—

"(1) How can those who have been relieved from active duty be now brought before a naval retiring board for the purpose of determining their right to retirement?

"(2) How can those who have been honorably discharged from the Naval Reserve Force be brought before a naval retiring board for the same purpose?

"An officer of the Naval Reserve Force on the inactive list is a 'member of the Naval Reserve Force,' and as such is entitled to retirement for physical disability incurred in line of duty. The only obstacle in the way of ordering him before a naval retiring board is that while not on active duty he is not subject to the laws and regulations for the government of the Navy. Orders to appear before a naval retiring board would be tantamount to recall to active duty, and such recall is now prohibited by law (act of July 11, 1919, Public, No. 8). It is suggested, therefore, that such officers be not ordered, but be permitted to appear before a naval retiring board. It is my opinion that those officers who have been released from active duty while suffering from physical disability incurred in the line of duty should be permitted to appear before a naval retiring board in order that their disabilities and the causes thereof may be inquired into.

"If the officers mentioned in the next preceding paragraph are found by a naval retiring board to be incapacitated for active service by reason of physical disability incurred in the line of duty, they should, in my opinion, be retired with the rate of pay prescribed by section 1588 of the Revised Statutes of the United States, as amended by the act of May 30, 1908, 35 Stat. 501—i. e., 75 per centum of the shore pay provided for the rank which they hold, respectively, at the time of their retirement.

"With respect to those former officers of the Naval Reserve Force who incurred physical disability in line of duty and who have been honorably discharged from the Naval Reserve Force without having been ordered before naval retiring boards and their right to retirement determined in the manner prescribed by law, I have to inform you that in my opinion such persons, being now civilians and not officers of the Navy or of the Naval Reserve Force, cannot be ordered before naval retiring boards and cannot be placed on the retired list of the Navy.

"Only officers of the Navy and the Naval Reserve Force are entitled to the benefits of the retirement laws relating to the naval service. (See 14 Op. Atty. Gen. 506; 29 Op. Atty. Gen. 249; 19 Op. Atty. Gen. 203.) The former officers of the Naval Reserve Force who have been discharged from the service are not now officers of the naval service, but are civilians, and as [P. 17] such are not entitled to retirement under the laws relating to retirement in the naval service.

"Furthermore, they cannot be reappointed as officers in the Naval Reserve Force unless they are found physically qualified by a board of medical officers to perform the duties required in time of war, nor can they be appointed directly to the retired list because such appointments are not authorized by law" (File 28550–1155, J. A. G., Aug. 11, 1919).

[C. M. O. 268—1919]

NAVAL RESERVE FORCE: RELATIVE TO CONFIRMATION OF OFFICERS OF.

The Bureau of Navigation, submitting a proposed circular letter with reference to the physical examination necessary for confirmation of officers of the Naval Reserve Force, requested an opinion as to whether the requirements of paragraph 10 of such proposed circular letter, especially the last sentence thereof, are within the requirements of the law.

The Judge Advocate General rendered the following opinion, which was approved by the Acting Secretary of the Navy:

"Paragraph 10 of the proposed circular letter above referred to provides:

"'All officers, line and staff, on active duty eligible for confirmation shall first be examined and found physically qualified for the duties of their rank and grade before being confirmed. If found not qualified physically, they will not be confirmed. The physical requirements are as prescribed for the regular Navy and no waivers will be granted. For officers on inactive duty the physical examination given them when released from active duty will be taken as the required examination.'

"It is noted from the title of the above proposed circular letter that its provisions are intended to apply to confirmation of officers 'of all classes of the Naval Reserve Force, line and staff,' and other provisions of said letter also seem to convey the impression that the procedure therein outlined is intended to be applied and followed in the confirmation of officers in the Fleet Naval Reserve in the rank and grade in which they were originally enrolled (par. 3). If the procedure outlined in paragraph 10, as above quoted, is intended to be followed at this time with a view to giving confirmed rank to officers of the Fleet Naval Reserve in the rank in which they were originally enrolled, I have no hesitancy in saying that, in my opinion, such a procedure would not come within the requirements of the law for the reason, as heretofore stated in the opinions of this office to your bureau, that the act of August 29, 1916, does not authorize the conferring upon members of the Fleet Naval Reserve on first enrollment a rank other than confirmed rank.

"With regard to the rank and physical examination to be given members of the Fleet Naval Reserve on first enrollment, [P. 18] you were advised by opinion of this office dated March 24, 1919, that—

"'From the wording of the act of August 29, 1916, it appears that former officers and midshipmen, after having been found physically qualified by a board of medical officers, may be appointed in the grade and rank, etc. By a comparison of the two statutes it appears that by the terms of section 1493 of the Revised Statutes a board of naval surgeons must examine the applicant and pronounce him physically qualified to perform all his duties at sea, whereas in the Naval Reserve act it is provided that the board of medical officers shall find the applicant physically qualified to perform the duties required in time of war, the diversity thus presented by the two acts being that the word "examined" in the old act clearly means that the board must personally examine the applicants, while in the Reserve Force act the language is broad enough to sanction a finding that the officer "has been found physically qualified," such finding being based on the inspection by such board of medical officers of the report of the medical officer who personally examined the applicant and reported him physically qualified.

"'This office is of opinion that a personal physical examination of the officer in question by a "board of medical officers" or by a board of medical examiners was not and is not an absolute prerequisite to his being confirmed in the grade and rank last held by him in the Navy as of date of his acceptance of office, for the reason that the language of the act of August 29, 1916, is broad enough to permit a physical examination by a properly authorized medical officer, on whose report a "board of medical officers" or a board of medical examiners may base a finding as to the physical qualifications of the candidate to perform the duties required in time of war.

"'The provisions of the act of August 29, 1916 (39 Stat. 587), specifically exempt members of the Fleet Naval Reserve from the requirement that they be given a provisional grade, rank, or rating upon first enrollment, and no affirmative authority appears to have been conferred on the department to give to members of the Fleet Naval Reserve on first enrollment other than confirmed rank (File 28550–123:7).'

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"And in the opinion of this office dated March 27, 1919, upon the same subject matter, after setting forth and analyzing the pertinent provisions of the act of August 29, 1916, you were further advised as follows:

" 'On the assumption that the above premises are correct, and taking into consideration that no affirmative authority appears to have been conferred upon the department to give to members of the Fleet Naval Reserve, on first enrollment, other than confirmed rank, this office is unable to concur with your bureau's interpretation as indicated in paragraph 2 of reference (*a*), that whether members of the Naval Reserve Force, [P. 19] when first enrolled, should be given provisional or confirmed rank in the Fleet Naval Reserve, was within the discretion of the department.

" 'Not denying the right of the department to make suitable regulations as to how the medical examination should be conducted, this office is of opinion that a personal physical examination of the officers in question by a "board of medical officers" is not a prerequisite to their being commissioned in the grade and rank last held by them in the Navy as of date of their acceptance of office in the Fleet Naval Reserve, for the reason that the language of the act of August 29, 1916, is broad enough to permit a physical examination by a properly authorized medical officer, on whose report a "board of medical officers" may base a finding as to the physical qualifications of these officers. As the officers in question have already been examined physically by a duly qualified medical officer, an inspection of such reports by a "board of medical officers" may be used by such a board to base findings that such officers were physically qualified to perform the duties required in time of war,' thus satisfying the terms of the act of August 29, 1916, in this regard.

"In other words, * * * this office is of the opinion that those officers who 'upon original enrollment subsequent' to a certain date were 'given a provisional assignment' in the Fleet Naval Reserve 'simply upon a physical examination by one medical officer' should not be considered by the department as having been properly appointed in the Fleet Naval Reserve in the rank last held by them as of date of their original enrollment, and upon the required finding 'by a board of medical officers' their so far delayed commissions should issue (File 28550–123:5 and 6).

"And in its opinion of April 14, 1919, this office advised you that certain regulations which appear to have been provided by your bureau with a view to administering those provisions of the act of Augut 29, 1916, relating to the Naval Reserve Force, have no legal bearing on the question of whether officers in the Fleet Naval Reserve are entitled to the confirmed rank and grade last held by them in the Regular Navy (File 28550–123:8).

"Therefore, taking up your specific question, I am of opinion that the procedure outlined in paragraph 10 of the proposed circular letter above quoted cannot be legally required at this date as a basis for the confirmation of officers of the Fleet Naval Reserve in the rank and grade in which they were originally enrolled; that the report of the physical examination given at the time of original enrollment may be used by a 'board of medical officers' as a basis for findings as to the physical qualifications of such officers; and that upon such finding by a 'board of medical officers' commissions in confirmed rank should be issued as of date of original enrollment.

[P. 20] "As to those members of the Fleet Naval Reserve whom it is desired to confirm in the higher provisional assignments of rank given them, and as to those members of the other classes of the Naval Reserve Force holding provisional assignments of rank it is, of course, assumed that the procedure as to examinations and findings outlined in paragraph 10 of the proposed circular letter, above quoted, will be conducted in accordance with the provisions of the act of August 29, 1916, as follows:

" 'No person shall be appointed or commissioned as an officer in any rank or class of the Naval Reserve Force, or promoted to a higher rank therein, unless he shall have been examined and recommended for such appointment, commission, or promotion by a board of three naval officers not below the rank of lieutenant commander, nor until he shall have been found physically qualified by a board of medical officers to perform the duties required in time of war, * * *.'

[C. M. O. 268—1919]

"In accordance with the above, in order for any officer coming within the designation of this paragraph to be appointed or commissioned to a confirmed rank, it is contemplated that he be examined (professionally) and recommended for such appointment or commission by a board of three naval officers not below the rank of lieutenant commander; and he must also be found physically qualified by a board of medical officers. In case such officer is on inactive duty, the physical examination given him when he was released from active duty may be used by a 'board of medical officers' as a basis for its findings as to the physical qualifications of such officers" (File 28550–123:11, J. A. G., Aug. 29, 1919).

NAVY REGULATIONS: CHANGE IN ARTICLE R–3669 RECOMMENDED.

Article R–3669, Navy Regulations, provides for paying each member of the crew bimonthly, "except such as may be in confinement as punishment, serving sentence, or awaiting trial."

Considering that members of the crew awaiting trial are in a pay status and are not prisoners in the sense that they should be subjected to all the rules and regulations governing naval prisoners who have been duly convicted of crime by a regular court martial and sentenced to confinement; that the withholding of pay from a member of a crew awaiting trial is undesirable in that it might render the preparation of his defense more difficult if not impossible; and that, inasmuch as the former punishment of "loss of pay now due or which may become due" has been discontinued, there appears to be no further reason for continuing to withhold the pay of those awaiting trial, the Judge Advocate General recommended that article R–3669, Navy Regulations, be amended by adding the following:

[P. 21] "Each member of the crew awaiting trial shall, upon the approval of his commanding officer, be allowed to draw such money as may be due him on the pay rolls" (File 26251–20990:4, J. A. G., Aug. 25, 1919).

NICARAGUAN CAMPAIGN BADGE: ISSUANCE OF, LIMITED TO CERTAIN OFFICERS AND MEN OF THE NAVY AND MARINE CORPS.

A former official of the Diplomatic Service of the United States recently made a request that he be awarded the Nicaraguan campaign badge for services with the United States naval forces from July to November 1912, as an officer is said Diplomatic Service, accredited to Nicaragua during said period. This request was based upon the facts that he was an officer in the Diplomatic Service of the United States, holding a commission from the President, by and with the advice and consent of the Senate; that he took the same oath of office as officers of the Army and Navy; that, like such officers, he was subject to the orders of the President during the period in question; and that, by authority of the President, he officially participated in the landing of United States armed forces in the country to which he was accredited.

The provisions of law, Executive order, and order of the Secretary of the Navy authorizing the granting of a Nicaraguan campaign badge are as follows:

"For badges and ribbons to be distributed by the Secretary of the Navy to officers and men of the Navy and Marine Corps who have participated in engagements and campaigns deemed worthy of such commemoration, three thousand five hundred dollars" (35 Stat. 132).

"I very cheerfully comply with your suggestion that campaign badges similar to those issued to participants in the Cuban, Philippine, and China-Boxer campaigns be authorized as part of the uniforms for those officers and men of the Navy and Marine Corps who participated in the Nicaraguan campaign, August to November, 1912" (Executive order of September 22, 1913).

"Nicaraguan campaign badges will be issued to all officers and men of the Navy and Marine Corps who performed service ashore in Nicaragua under the command of Rear Admiral W. H. H. Southerland, U. S. N., or on board the *California*, *Colorado*, *Denver*, *Annapolis*, *Cleveland*, or *Glacier*,

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between the dates of August 28, 1912, to November 2, 1912, inclusive" (Secretary's order, June 25, 1914).

In view of the law and orders quoted, and considering the facts stated, the Judge Advocate General was of the opinion that the services rendered by the applicant while an officer of the United States Diplomatic Service at Nicaragua during the disturbances existing therein from August to November 1912, not [P. 22] having been performed as an officer or enlisted man in either the Navy or Marine Corps, do not bring him within the terms of the provisions hereinbefore quoted, and consequently the department is not authorized to make the award requested. The provision of law which authorizes the appropriation for such campaign badges and ribbons limits their award to "officers and men of the Navy and Marine Corps who have participated in engagements and campaigns deemed worthy of such commemoration," and without further statutory authority this department may not lawfully grant the right to wear campaign badges to one who has not served in either the Navy or Marine Corps (File 19245–77, J. A. G., Aug. 25, 1919).

C. M. O.'s 269–270—1919

[P. 1] Benjamin S. Davis, assistant surgeon, U. S. Navy, was tried by general court martial on July 29, 1918, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (five specifications).

Findings

The court found the first and second specifications of the charge proved; the third, fourth, and fifth specifications of the charge not proved; and the accused guilty of the charge.

Sentence

"The court therefore sentences him, Benjamin S. Davis, assistant surgeon, U. S. Navy, to be dismissed from the United States naval service."

Returned for Revision

The Department returned the record of proceedings to the court, directing the court to reconvene for the purpose of reconsidering its sentence, which, in the opinion of the Department, was entirely inadequate.

Sentence in Revision

"The court therefore sentences him, Benjamin S. Davis, assistant surgeon, U. S. Navy, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the Secretary of the Navy may designate for a period of three years, and to perform hard labor during said imprisonment."

[P. 2] Recommendation to Clemency, in Revision

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of the fact that the accused is the only support of his wife and a newly born child, we recommend Assistant Surgeon Benjamin S. Davis, U. S. Navy, to the clemency of the reviewing authority."

Recommendation of the Judge Advocate General

The Judge Advocate General recommended approval of the proceedings, findings, and sentence.

[C. M. O. 275—1919]

CONCURRENCE OF THE BUREAU OF NAVIGATION

The Bureau of Navigation concurred in the recommendation of the Judge Advocate General that the sentence in this case be approved.

SECOND TRIAL

On April 8, 1919, while in confinement awaiting action on his prior trial, Lieutenant Davis was again placed on trial, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and found guilty of the following charge, proved by plea:

Charge.—Scandalous conduct tending to the destruction of good morals (ten specifications.

SENTENCE

"The court therefore sentences him, Lieutenant Benjamin S. Davis, Medical Corps, U. S. Navy, to be publicly stripped of the insignia of his rank and corps; then to be dismissed from the United States naval service; then to be imprisoned at hard labor in such prison or penitentiary as the Secretary of the Navy may designate for a period of fifteen (15) years."

RECOMMENDATIONS OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General recommended the approval of the proceedings, findings, and sentence, and that the naval prison [P. 3] at the Navy Yard, Portsmouth, N. H., be designated as the place for the execution of so much of the sentence as relates to imprisonment. Owing to the material assistance furnished by the accused in the prosecution of other offenders, and in consideration of his complete confession, the Judge Advocate General recommended that the total period of confinement adjudged in both cases be reduced to twelve (12) years.

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

The Bureau of Navigation recommended approval of the proceedings, findings, and sentence, and further concurred in the recommendation of the Judge Advocate General that the total period of imprisonment be reduced to twelve (12) years.

ACTION OF THE SECRETARY OF THE NAVY

The Secretary of the Navy approved the proceedings, findings, and sentences in both trials of Lieutenant Davis, herein adverted to, but in view of the fact that accused made a complete confession of his illegal transactions and furnished the Department with evidence which has been of material assistance to the Department in bringing to justice other offenders, recommended to the President that the total period of imprisonment be reduced to twelve (12) years.

ACTION OF THE PRESIDENT

The sentences in both of the foregoing cases of Lieutenant Benjamin S. Davis, Medical Corps, U. S. Navy, were confirmed by the President, final action having been taken by him on August 21, 1919, but the total period of imprisonment adjudged in both cases was reduced to twelve (12) years.

C. M. O. 275—1919

[P. 1] Lieutenant Commander Robert McD. Moser, U. S. Naval Reserve Force, was tried by general court martial on January 15, 1919, at Naval Station New London, Conn., by order of the Secretary of the Navy, on the following charges:

Charge I.—Knowingly and willfully misappropriating and applying to his own use and benefit property of the United States intended for the naval service thereof (one specification).

Charge II.—Wrongfully and knowingly disposing of property of the United States furnished and intended for the naval service thereof (one specification).

[C. M. O. 275—1919]

FINDINGS

The court found the specification of the first charge "proved in part, proved except the word 'June,' which word is not proved, and for which the court substitutes the word 'May,' which word is proved," and the accused guilty of the first charge; the specification of the second charged "proved in part, proved except the word 'June,' which word is not proved, and for which the court substitutes the word 'May,' which word is proved," and the accused guilty of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Commander Robert McD. Moser, U. S. Naval Reserve Force, to be dismissed from the U. S. Naval Reserve Force and from the United States naval service."

PETITION FOR NEW TRIAL

On March 12, 1919, the accused, by counsel, filed a petition with the Secretary of the Navy praying that a new trial be granted him on the charges upon which he was tried, and in support of such petition alleged hostility on the part of a member of the court; bias on the part of a witness; that the verdict was against the weight of the evidence; that criminal intent was not shown; that he was not proven guilty beyond a reasonable doubt; that hearsay evidence was improperly admitted; that he was prevented by counsel from taking the stand as a [P. 2] witness in his own behalf; that he was improperly defended by counsel, who did not understand the rules of evidence and the rules governing the admission of evidence in a trial; and, further, that he has newly discovered evidence which he desires presented; and that he has several witnesses who did not appear in his trial who will materially assist him in proving his innocence. (See File 26251–18465: 1, J. A. G., March 12, 1919.)

ACTION OF THE ACTING SECRETARY OF THE NAVY

On March, 27, 1919, the Acting Secretary of the Navy granted the petition of accused for a new trial (see file 26251–18465: 9), and accordingly disapproved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Robert McD. Moser, U. S. Naval Reserve Force.

NEW TRIAL

Lieutenant Commander Robert McD. Moser, U. S. Naval Reserve Force, was again tried by general court martial on May 14, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and acquitted of the following charges:

Charge I.—Knowingly and willfully misappropriating and applying to his own use and benefit property of the United States intended for the naval service thereof (one specification).

Charge II.—Wrongfully and knowingly disposing of property of the United States furnished and intended for the naval service thereof (one specification).

Charge III.—Drunkenness (one specification).

Charge IV.—Disobeying the lawful order of his superior officer (one specification).

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On May 28, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and acquittal of the general court martial in the foregoing case.

ACTION OF THE SECRETARY OF THE NAVY

On June 11, 1919, the Secretary of the Navy approved the proceedings, findings, and acquittal of the general court martial [P. 3] in the foregoing case of Lieutenant Commander Robert McD. Moser, U. S. Naval Reserve Force, and directed that he be released from arrest and restored to duty.

C. M. O. 279—1919

[P. 1] Boatswain (T) John T. Haughn, U. S. Navy, was tried by general court martial on May 19, 1919, on board the U. S. S. *Supply*, by order of the Commander, Train, U. S. Atlantic Fleet, on the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (one specification).

Charge II.—Drunkenness (one specification).

Charge III.—Scandalous conduct tending to the destruction of good morals (one specification).

Findings

The court found the specification of the first charge not proved, the accused not guilty of the first charge, and acquitted the accused of the first charge; the specification of the second charge proved by plea, and the accused guilty of the second charge; the specification of the third charge proved, and the accused guilty of the third charge.

Sentence

"The court therefore sentences him, Boatswain (T) John T. Haughn, U. S. Navy, to be reduced to the rating of seaman second class, to be confined for a period of five (5) years, then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence as prescribed by section 349, Naval Courts and Boards."

Action of the Convening Authority

On June 7, 1919, the convening authority approved the proceedings, findings, and sentence, but reduced that portion of the sentence which relates to confinement to three years. It was noted by the convening authority that by the testimony of a certain witness it appears that other witnesses were in the room who might have testified to a matter in dispute. While believing that the court erred in not calling these witnesses, the convening authority did not deem this a fatal error.

[P. 2] In conformity with article 53 of the Articles for the Government of the Navy, the convening authority referred the record to the Secretary of the Navy for transmission to the President.

Opinion and Recommendation of the Judge Advocate General

On June 13, 1919, the Judge Advocate General, in reviewing the record of proceedings in this case, noted the following irregularities:

> "(*a*) The precept is dated May 15, 1919, and the letter transmitting the charges and specifications is dated May 14, 1919. While this mode of procedure is clearly irregular, it has been held by the Department that it is not sufficiently so to invalidate.
>
> "(*b*) The copies of precept and modifications thereof prefixed to the record have not been certified by the Judge Advocate to be true copies.
>
> "(*c*) The sentence in this case is not, in my opinion, one that may be adjudged for offenses of which this officer was found guilty. Article 9, Articles for the Government of the Navy, provides that any officer who absents himself from his command without leave may, by the sentence of the general court martial, be reduced to the rate of an ordinary seaman. For further information as to the Department's action in similar cases, your attention is invited to Naval Digest, 1916, 'Reduction in rating' 26; C. M. O. 34, 1918; 31, 1919."

In view of the above the Judge Advocate General suggested to the convening authority that he return the record to the court for reconsideration of the sentence.

Returned for Revision

On June 18, 1919, the convening authority returned the record of proceedings to the court and directed that the court reconvene for the purpose of recon-

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sidering its sentence, inviting attention to the irregularities noted in the opinion of the Judge Advocate General.

SENTENCE IN REVISION

"The court therefore sentences him, Boatswain (T) John T. Haughn, U. S. Navy, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may direct for a period of five (5) years."

[P. 3] ACTION OF THE CONVENING AUTHORITY

On June 30, 1919, the convening authority approved the proceedings in revision and the revised sentence, but reduced that portion of the sentence which relates to confinement to three (3) years, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On July 17, 1919, the Judge Advocate General, in referring the record to the Chief of the Bureau of Navigation for comment as to disciplinary features, recommended that the naval prison at Parris Island, S. C., be designated as the place for the execution of so much of the sentence as relates to confinement.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On July 21, 1919, the Bureau of Navigation recommended approval of the proceedings in revision and of the findings and sentence.

ACTION OF THE SECRETARY OF THE NAVY

On July 25, 1919, the Secretary of the Navy approved the foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence in revision be confirmed.

ACTION OF THE PRESIDENT

On July 31, 1919, the President of the United States confirmed the sentence in revision of the general court martial in the foregoing case of Boatswain (T) John T. Haughn, U. S. Navy.

C. M. O. 280—1919

[P. 10] CHARGES AND SPECIFICATIONS: USE OF THE WORD "UNLAWFUL" IN SPECIFICATIONS.

An accused was charged with "Conduct to the prejudice of good order and discipline," the specification alleged in support of such charge being as follows:

> "In that ------ ------, * * *, did, * * * unlawfully fire several shots from a pistol * * * in the rear of the aforesaid headquarters, * * *."

The Judge Advocate General was of opinion that the above specification states no cause of action against the accused. The specification alleges that the accused did unlawfully fire several shots from a pistol in a certain locality but that, by itself, does not sufficiently state a cause of action. It is not sufficient to allege in a specification that an act is unlawful, such a statement being but a conclusion of law. Sufficient facts and circumstances must be set down to show that the act alleged was unlawful. In this specification there are no allegations which show that the accused's act was unlawful; in fact it is not unreasonable to believe that under certain circumstances the firing of

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a revolver in this locality might be lawful and even necessary. If the firing of the revolver was done without cause or provocation, in a careless and wanton manner such as to jeopardize lives and property, it should be so alleged; if the firing was in violation of a local law or ordinance or a regulation from a proper superior officer, then it should be so alleged. By the setting forth of these attendant circumstances in the specification the facts as alleged sufficiently show the unlawfulness of the accused's act, but the mere statement that an act is unlawful, which otherwise does not appear so, is insufficient and renders the specification fatally defective.

For the foregoing reasons it was recommended that the finding on the above charge and specification thereunder be disapproved (File 26262–6747, J. A. G., Sept. 23, 1919).

DESERTION: IN TIME OF WAR; ENLISTED MAN CONVICTED OF, MAY NOT LEGALLY BE RETAINED IN THE NAVAL SERVICE.

In a recent fleet court-martial case an enlisted man, being convicted of desertion in time of war, was sentenced to dishonorable discharge, confinement, and accessories. The convening authority, [P. 11] after approving the proceedings, findings, and sentence, mitigated that portion of the sentence involving confinement to restriction to his ship for a period of two months, remitted the dishonorable discharge on condition that accused during a short probationary period maintain a record satisfactory to his commanding officer. The Judge Advocate General, being of opinion that as the desertion of said enlisted man was committed in time of war, the penalties provided in sections 1996 and 1998, Revised Statutes, and the act of August 22, 1912, viz, the loss of citizenship, and the right to hold any office of trust or profit under the United States Government, are effective, and therefore this man may not legally be retained in the service and draw pay, recommended to the Secretary of the Navy that he be immediately discharged as undesirable (File 26262–6799, J. A. G., Sept. 23, 1919).

[P. 12] CITIZENSHIP: LOSS OF, BY CONVICTION OF DESERTION; METHOD OF PROCEDURE TO BRING ABOUT RESTORATION TO RIGHTS OF CITIZENSHIP.

A former enlisted man of the Navy who was convicted of desertion in 1904 and sentenced to confinement and dishonorable discharge, recently requested to be advised how to proceed to have his rights of citizenship restored. The applicant was informed that the act of August 22, 1912 (37 Stat. 356), amending section 1998 of the Revised Statutes so as to provide that loss of citizenship shall be incurred only when the conviction is for desertion in time of war, contains the provision "that the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests." One method to bring about the restoration of the rights of citizenship in such case is to file an application with this department, supported by affidavits of citizens of the applicant's town, preferably his employers, showing that his character and conduct subsequent to his discharge from the Navy have been exemplary. Such application, if submitted, will be forwarded to the Department of Justice with the recommendation of this department regarding the exercise of Executive clemency (File 26282–369, Sec. Nav., Sept. 4, 1919).

CIVIL RIGHTS: OF OFFICERS, ENLISTED MEN, AND CIVILIAN EMPLOYEES OF THE U. S. NAVY TO TAKE PART IN ELECTIONS AND HOLD OFFICE.

Naval authorities of a foreign nation being interested in the rights of officers, enlisted men, and civilian employees of the U. S. Navy to take part in political activities and elections, and desiring information in regard thereto, forwarded through proper channels the following questions:

"1. Whether or not officers, active and retired, enlisted men, and civil employees of the U. S. Navy have the right to vote and to be elected?

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[P. 13] "2. Whether there is a difference in this regard between the election of the President, United States Congress, and State legislative bodies?

"3. What kind of restrictions in regard to voting are provided for officers and men dishonorably discharged and court martialed for having committed crime?

"4. Whether or not the elections take place on board the ships and in the navy yards?

"5. In case an officer or enlisted man should be elected to a public office or legislative body, what would be his status in the Navy?"

Inviting attention to the fact that the subject under consideration is one which it is difficult to handle in a general way, and that the laws are difficult to apply even when specific cases arise, the Judge Advocate General submitted the following views, with the caution that too much dependence should not be placed on general statements contained therein:

"One phase of the general inquiry may be eliminated at once by the statement that civil employees of the Navy Department are in the same position exactly as other civilians who are citizens of the United States with reference to their right to take part in elections and to hold offices to which they may be elected. Civil employees being eliminated from the question the specific inquiries will be answered in the order in which they occur above; and the answers should be construed as applying only to officers and enlisted men of the U. S. Navy.

"Officers and enlisted men, both active and retired, have the right to vote if they qualify as electors under the laws of the State in which they reside. The qualifications of electors in the United States are prescribed by the legislatures of the various States. The Constitution of the United States provides that, 'the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature' (art. I, sec. 2, clause 1, Constitution of the United States).

"Retired officers and enlisted men of the Navy can be elected or appointed to office in the States of the United States or to a Federal office, except in the Territories, and if so elected or appointed can occupy such office subject to the right of the Federal Government to call them to active duty in time of war or national emergency.

"There is no difference between the rights of officers and of enlisted men of the Navy to vote for President and Members of Congress and to vote for members of the State legislatures, the qualifications of electors for President and Members of Congress being those prescribed by the legislatures of the various States as requisite for electors for the most numerous branch of the State legislature.

"The only loss of civil rights prescribed by law for officers and men dishonorably discharged and court martialed for having committed crime are contained in the act of August 22, 1912 (37 Stat. 356), which provides that persons convicted of desertion in time of war [P. 14] shall forfeit their rights of citizenship as well as their right to become citizens. 'And such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizenship thereof.' (See sec. 1996 of the Revised Statutes.)

"There is no statute or regulation prescribing rules for holding elections on board public vessels or in the navy yards of the United States. Some of the States of the Union have recently enacted laws designed to obtain the vote of qualified voters of the States who are members of the naval service on active duty, but the Federal Government has not by law or regulation prescribed any means of holding such elections. Where the State authorities have requested a poll to be taken on board vessels of the United States the department has complied with such request and permitted the poll to be taken in the manner prescribed by the State laws or election officials.

"Generally speaking, it might be said that officers and enlisted men on active duty are ineligible for election or appointment to public office for the reason that such civil office would ordinarily be inconsistent and incompatible with their duties as naval officers and enlisted men. An officer or man on the retired list, however, could hold a public office, if legally elected

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thereto, in any State of the Union, or any Federal office, except in the Territories (sec. 1860, Rev. Stat.).

"To summarize, it might be stated as a general proposition that officers and enlisted men can vote when qualified under State laws and can hold civil office, except where such civil office is inconsistent and incompatible with their paramount duties as officers and enlisted men of the Navy, or where such employment or office is prohibited by Federal statute. The statutes restricting the right of officers to hold civil offices are referred to in the following paragraphs.

"Sections 1763, 1764, and 1765 of the Revised Statutes prohibit the payment of additional compensation to retired officers of the Navy for the performance of duty which they might properly be ordered to perform by the Secretary of the Navy. These sections, however, do not forbid the payment of additional compensation for the performance of services having no connection with the officer's official duty and which he could not be ordered by superior authority to perform; or for services rendered under an appointment to a new and distinct office or position, provided that the duties of the two offices or employment are not incompatible. If incompatible, he is not entitled to the compensation of both but is entitled to the larger of the two. The act of July 31, 1894, modifies the above-mentioned sections of the Revised Statutes and provides that any person who holds an office under the United States at a salary of $2,500 or over per annum shall not hold any other office under the United States to which compensation is attached. It has been held, however, that this provision does not apply to retired officers when elected to public office or when appointed to office by the President by and with the advice and consent of the Senate, or when the additional [P. 15] employment does not constitute an 'office' in the constitutional meaning or legal sense. Under section 1440 of the Revised Statutes if a retired officer accepts an appointment in the diplomatic or Consular Service of the Government he shall be considered as having resigned his place in the Navy, and under section 1860 of the Revised Statutes a retired officer is prohibited from holding any civil office to which he might be elected or appointed in any Territory.

"The act of July 10, 1896, prohibits retired officers from holding employment with any person or company furnishing naval supplies or war material to the Government. This law does not authorize exceptions on any ground" (File 9212–109, J. A. G., Sept. 6, 1919).

EXTENSION OF ENLISTMENTS: MEN TRANSFERRED FROM THE NAVAL RESERVE FORCE TO THE REGULAR NAVY.

The Chief of the Bureau of Navigation recently requested opinion on the question as to the legality of permitting men transferred from the Naval Reserve Force to the Regular Navy under the provisions of the act of July 11, 1919, to extend their enlistments.

In reply the Judge Advocate General considered there was no doubt as to the right of men transferred from the Naval Reserve Force to the Regular Navy to extend their enlistments under the provisions of the act of August 22, 1912 (37 Stat. 331), for a period of either one, two, three, or four full years from the date of the expiration of their now existing term of enrollment.

The act of July 11, 1919, provides—

> "That enrolled men so transferred shall be entitled to and receive the same pay, rights, privileges, and allowances in all respects as now provided by existing law for men regularly discharged and reenlisted immediately upon expiration of their full four-year enlistment in the Regular Navy or Marine Corps."

There is no specific mention of the right of such men to extend their enlistments, but the act of August 22, 1912, above referred to, is broad enough in its terms to include all enlisted men of the Navy, and the men so transferred are enlisted men of the Navy. The foregoing provision indicates an intention on the part of Congress to allow such transferred men the same rights, privileges, and gratuities, in all respects, as other enlisted men.

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The act of August 22, 1912, provides that—

> "The term of enlistment of any enlisted man in the Navy may, by his voluntary written agreement, under such regulations as may be prescribed by the Secretary of the Navy with the approval of the President, be extended for a period of either one, two, three, or four full years from the date of expiration of the then existing four-year term of enlistment. * * *."

The former members of the Naval Reserve Force transferred under the act of July 11, 1919, originally enrolled for four years and were transferred to serve out the unexpired portion of their enrollments. [P. 16] Their term of enrollment corresponds exactly to the four-year term of enlistment referred to in the foregoing provision of the act of August 22, 1912. In this respect they are clearly in the same position as any other enlisted men of the Navy and are as much included in the provision of the act of August 22, 1912, relating to the extensions of enlistments as are any other enlisted men of the Navy (File 26254–2881: 21, Sept. 9, 1919).

LONGEVITY: PROPRIETY OF COMPUTING SERVICE PERFORMED IN MEDICAL RESERVE CORPS IN DETERMINING; INACTIVE DUTY AS AFFECTING LONGEVITY PAY.

Dr. N was commissioned an assistant surgeon with the rank of lieutenant (junior grade) in the Medical Reserve Corps from June 4, 1914; accepted appointment and executed oath of office June 29, 1914; on July 11, 1914, he was ordered to the Pacific Reserve Fleet for assignment; reported for duty on July 18, 1914; on April 23, 1915, he was detached from duty; on September 4, 1916, reported for duty at Marine Barracks, Port Royal, S. C., and has been continuously on active duty ever since. On August 15, 1917, he was commissioned an assistant surgeon in the Navy with the rank of lieutenant (junior grade) to rank from July 7, 1917.

On the above statement of facts an opinion was recently requested as to the propriety of computing service performed by Lieutenant N in the Medical Reserve Corps in determining longevity, and, further, whether the time spent by this officer on inactive duty as a member of the Medical Reserve Corps will be considered in computing his service for longevity pay.

The Naval Appropriation Act of July 1, 1918 (39 Stat. 709), provides that—

> "The time served by dental officers on active duty as acting assistant dental surgeons and assistant dental surgeons under provisions of law existing prior to the passage of this act shall be reckoned in computing the increased service pay and service for precedence and promotion of dental officers herein authorized or heretofore appointed."

The Judge Advocate General was of opinion that the foregoing provision of law clearly authorizes the inclusion of time served on active duty in the Medical Reserve Corps in computing service for longevity pay; that it does not authorize the inclusion of time spent in the Medical Reserve Corps in an inactive status. The time actually served by Lieutenant N on active duty while a member of the Medical Reserve Corps should be counted in computing his service for longevity pay. The result is that Lieutenant N is entitled to compute his service from July 11, 1914, until April 23, 1915, and from September 4, 1916, to the present date in determining service for increased pay (File 26254–2593: 118, J. A. G., Sept. 18, 1919).

[P. 17] MANUAL FOR THE GOVERNMENT OF U. S. NAVAL PRISONS: CHANGE IN.

The following change in articles 81 and 84, Manual for the Government of U. S. Naval Prisons, has been approved by the Acting Secretary of the Navy:

> "The first sentence of article 81, Manual for the Government of U. S. Naval Prisons, shall be stricken out and the following substituted therefor: "'Upon discharge, prisoners shall be furnished a suit of civilian clothing not to exceed twenty dollars ($20) in value. If discharged between the dates of October 15 and the following March 31, prisoners shall, in addition,

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be furnished a civilian overcoat not to exceed ten dollars ($10) in value. The above items will be charged to the appropriation "Pay Miscellaneous." '

"The last sentence of article 84 shall be stricken out" (File 26267–262 : 1; Sec. Nav., Oct. 13, 1919).

NAVAL RESERVE FORCE: AFFILIATION OF AN OFFICER OF, WITH THE AMERICAN FEDERATION OF LABOR.

The act of July 1, 1918, provides that members of the Naval Reserve Force in an inactive duty status are not subject to the laws, regulations, and orders for the government of the Regular Navy except while wearing the uniform of their respective ranks, grades, or ratings. This provision does not apply to members of the Fleet Naval Reserve who, under the act of August 29, 1916, are subject to the laws, regulations, and orders for the government of the Regular Navy at all times. The department has it within its power to disenroll members of the Naval Reserve Force other than members of the Fleet Naval Reserve at any time.

In view of the foregoing, it is apparent that there is no law or regulation which prohibits an officer of the Naval Reserve Force in an inactive duty status from becoming a member of a labor organization affiliated with the American Federation of Labor (File 3973–215 : 10, Sec. Nav., Sept. 30, 1919).

NAVAL RESERVE FORCE: STATUS OF NAVAL RESERVISTS RELEASED FROM ACTIVE DUTY WITH REGARD TO PREFERENCE IN APPOINTMENTS (ACT JULY 11, 1919, PUBLIC, NO. 5).

Within the meaning of the provisions of the law (act July 11, 1919, Public, No. 5) granting preferences in appointments, reservists relieved from active duty can not be regarded as "honorably discharged" from the Naval Reserve Force. The distinction between [P. 18] the two is well marked, not only in fact but by the law itself. Thus the act of February 24, 1919, (40 Stat. 1151), providing for the payment of $60 to persons "discharged under honorable conditions" from the military or naval forces, specifically adds "or, in the case of reservists, been placed on inactive duty." So also the act of February 28, 1919 (40 Stat. 1203), providing mileage for men "honorably discharged from the Army, Navy, or Marine Corps," provides "that naval reservists duly enrolled who have been honorably released from active service since November eleventh, nineteen hundred and eighteen, or may hereafter be honorably released from active service, shall be entitled likewise to receive mileage as aforesaid." The discharge of reservists on inactive duty will accomplish the purpose of securing their preferment for civil service appointments (File 4032–207 : 1, J. A. G., Aug. 25, 1919).

NAVAL RESERVE FORCE: STATUS OF OFFICERS ON INACTIVE DUTY; WRITING FOR PUBLICATION.

An officer of the Naval Reserve Force (inactive) requests to be informed concerning the extent to which officers in his status are under the rules and regulations of the Navy Department, and more especially requesting information whether such officers may write for publication and comment on naval subjects without submitting their manuscripts to the Navy Department.

In answer to the above request, the Judge Advocate General made reply substantially as follows:

Enrolled members of the Naval Reserve Force on inactive duty are subject to the laws, regulations, and orders for the government of the Regular Navy only while wearing the uniform of their respective ranks, grades, or ratings, which uniform may be worn at such times and places as the Secretary of the Navy may permit. However, if an enrolled member of the Naval Reserve Force should wear the uniform on an occasion other than one designated by the Secretary of the Navy, he would be not only subject to court martial for wearing the uniform at that time, but also for any act which he might commit while in uniform.

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An enrolled member of the Naval Reserve Force on inactive duty may write for publication and comment upon any topic whatever without being subject to the laws, regulations, and orders for the government of the Regular Navy—but, of course, the department would be authorized to disenroll him from the Reserve Force as undesirable at any time, should his publication appear to be in any wise detrimental to the interests of the naval service.

Transferred members of the Fleet Naval Reserve are at all times subject to the laws, regulations, and orders for the government of the Regular Navy, and must necessarily, therefore, submit to the Navy Department any manuscript which they may desire to have published (File 3973–215:9, J. A. G., Sept. 26, 1919).

[P. 19] PRECEDENCE: OFFICERS OF THE LINE AND STAFF; DATE OF COMMISSION GOVERNS.

Lieutenant A was commissioned a lieutenant (junior grade) in the Construction Corps July 1, 1917, and lieutenant (temporary) February 1, 1918.

Lieutenant B was commissioned an ensign in the line July 1, 1917, and a lieutenant (temporary) July 1, 1918.

On the above state of facts decision was requested on the question of precedence between the two officers interested.

In an opinion rendered by the Judge Advocate General April 24, 1919 (File No. 22724–40), it was held that—

> "Section 1485, Revised Statutes, insofar as it provided that officers of the Staff Corps should take precedence with officers of the line and other Staff Corps by length of service, is absolutely and irreconcilably repugnant to the provision in the act of August 29, 1916, that officers shall take precedence in each Staff Corps according to date of commission. Both laws cannot stand. If staff officers are to take precedence with each other in the same corps according to date of commission, they cannot take precedence with the line and other Staff Corps according to length of service. If, on the other hand, the length-of-service rule is to be retained and applied in determining the precedence of staff officers with officers of the line and other Staff Corps, then the date-of-commission rule for determining precedence of officers in each Staff Corps must give way and the act of August 29, 1916, is rendered nugatory. In a case of this kind, where it is impossible to harmonize the provisions of two statutes, the rule is settled that the later statute operates of necessity as an implied repeal of the earlier.
>
> "It is, therefore, my conclusion that the act of August 29, 1916, hereinbefore quoted, repeals by necessary implication section 1485 of the Revised Statutes, and that officers of the Staff Corps must now take precedence in each Staff Corps, and with officers of the line and other Staff Corps, as well as with officers of the Army and Marine Corps, according to date of commission and in no case by length of service."

Applying the foregoing opinion to the above state of facts, the Judge Advocate General was of opinion that Lieutenant A takes precedence over Lieutenant B (File 11130–63, J. A. G., Sept. 23, 1919).

PROMOTIONS: PRECEDENCE OF OFFICERS PROMOTED UNDER THE PROVISIONS OF THE ACT OF JULY 11, 1919, AFTER SELECTION BY THE SELECTION BOARD.

The pertinent provisions of the act of July 11, 1919, are as follows:

> "That officers of the permanent Navy who have served satisfactorily during the war with the German Government in a temporary [P. 20] grade or rank shall be eligible under the provision of existing law for selection for promotion and for promotion to the same permanent grade or rank until July 1, 1920, without regard to statutory requirements other than professional and physical examinations: *Provided*, That the age and grade requirement prescribed by the act approved August 29, 1916, in the rank of commander, is hereby extended from June 30, 1920, to June 30, 1921."

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In giving effect to the foregoing provisions of law, the Bureau of Navigation recently requested advice as to how to proceed to determine the precedence of officers selected under the following conditions:

"(*a*) If the selection board to meet in October 1919, should recommend for permanent promotion to captain officers who are serving as temporary captains and who have had more than four years' service as commanders and also officers serving only as permanent commanders, would such officers, upon promotion, take precedence in accordance with their standing as permanent commanders?

"(*b*) If the board should select for permanent promotion to captain officers who are eligible for such promotion only by reason of their service as temporary captains, would such officers upon promotion, take precedence with one another in accordance with their precedence as permanent commanders or in accordance with precedence as temporary captains?"

The following opinion by the Judge Advocate General was approved by the Secretary of the Navy:

"The above-quoted provision of the act of July 11, 1919, states that officers of the permanent Navy who have served satisfactorily during the war with the German Government in a temporary grade or rank 'shall be eligible under the provision of existing law for selection for promotion and for promotion to the same permanent grade or rank,' etc., and waives all statutory requirements other than professional and physical examinations. Since the selection is to be under the provisions of existing law relating to selections for promotion in the permanent Navy, we must first look to such law for the rule prescribed to determine the precedence of officers so promoted. This rule is prescribed in the act of August 29, 1916 (39 Stat. 579), which provides that the officers so selected by the board 'if promoted shall take rank with one another in accordance with their seniority in the grade from which promoted.' This provision of the act of August 29, 1916, is not changed by the act of July 11, 1919, nor is any other rule prescribed therein for determining the precedence of officers selected for permanent appointment in the rank or grade which they now hold temporarily.

"It is my opinion that the 'grade from which promoted' should be construed as the permanent grade from which promoted. The promotions provided for by the act of July 11, 1919, are permanent promotions of officers of the permanent Navy. If such an officer [P. 21] is a permanent commander and temporary captain, he is not promoted from temporary captain to permanent captain, for such a change of status does not amount to a promotion, inasmuch as a permanent captain is no higher in rank in the Navy than a temporary captain. The real promotion which he enjoys is from permanent commander to permanent captain. The rank or grade, therefore, from which he is promoted is that of commander and his precedence is determined according to the rule prescribed by the act of August 29, 1916, by his seniority in the grade of commander in the permanent Navy.

"Replying to question (*a*), you are informed that, in my opinion, the officers so promoted should take rank and precedence in accordance with their rank and precedence as permanent commanders without regard to length of service in grade.

"Replying to question (*b*), you are informed that it is the understanding of this office that all officers holding the temporary rank of captain in the Navy are permanent commanders in the Navy. The provision of the act of July 11, 1919, applies only to officers of the permanent Navy who hold temporary rank and only such officers are eligible for promotion thereunder. The provision of the act of August 29, 1916, with reference to service in grade is waived in order that such officers may be promoted and it is my opinion that the matter of service in grade should have no bearing on their rank and precedence in the rank or grade to which advanced. Inasmuch as the promotion provided for is not a temporary promotion but is a promotion to a rank in the permanent Navy from a lower rank in the permanent Navy, it is my opinion that the above-mentioned provision of the act of August 29, 1916, prescribing the rule for determining the rank and precedence on promotion should apply. Under this provision such officers will take rank and

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precedence when promoted in accordance with their rank and precedence in the permanent grade of commander and not in accordance with their rank and precedence as temporary captains" (File 11130–64, J. A. G., Sept 29, 1919).

SENTENCES: "TO BE DISMISSED FROM THE NAVAL SERVICE"; EFFECT ON STATUS OF ONE WHO HOLDS BOTH RANK AND RATING.

A gunner (temporary) was recently sentenced by court martial "to be dismissed from the naval service." The sentence was duly confirmed by the President and notice thereof communicated through proper channels to the officer by the Secretary of the Navy. The Secretary's letter transmitting such notice contained the statement "You accordingly cease to be an officer in the United States naval service," thus presenting the question whether the foregoing statement had the effect of merely terminating said officer's appointment as gunner (temporary) and allowing him to continue in the naval service in his permanent rating of chief gunner's mate.

[P. 22] The Judge Advocate General was of the opinion that the receipt of notice by the officer in question that the above sentence had been confirmed by the President completely severed his connection with the naval service. As stated in Winthrop's Military Law and Precedents (vol. 1, p. 619), with reference to sentences of dismissal—

> "This punishment is executed, by operation of law, immediately upon approval or confirmation, and notice to the officer. Upon the day of the official announcement to an officer of the approval or confirmation by the proper authority of a sentence dismissing him from the military service, his connection with the Army at once ceases and he becomes a civilian."

In the Digest of Opinions of the Judge Advocate General of the Army, 1912 (817a) it is further stated:

> "The declaration is indeed sometimes added in the orders of confirmation, that the party ceases thereupon to be an officer of the Army; but this declaration is immaterial and surplusage."

Therefore, said letter of the Secretary, in communicating to the officer in question the exact language of the sentence in his case, which was that he "be dismissed from the United States naval service," and the information that said sentence had been confirmed by the President of the United States, operated to change his status to that of a civilian immediately upon the delivery of said letter to him and no further discharge of any character is required to accomplish this purpose (File 26262–6326:2, J. A. G., Sept. 11, 1919).

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[P. 1] Ensign (T) Charles Earl Chamberlain, U. S. Navy, was tried by general court martial on August 7, 1919, on board the U. S. S. *Black Hawk*, by order of the Commander, Minesweeping Detachment, U. S. Atlantic Fleet, on the following charges:

Charge I.—Drunkenness (two specifications).

Charge II.—Conduct to the prejudice of good order and discipline (two specifications).

Charge III.—Conduct unbecoming an officer and a gentleman (one specification).

Charge IV.—Using obscene, abusive, and profane language (one specification).

FINDINGS

The court found the specifications of the first charge proved, and the accused guilty of the first charge; the first specification of the second charge proved except as to certain words, the second specification of the second charge not proved, and the accused not guilty of the second charge; the specification of the third charge proved, and the accused guilty of the third charge; the specification of the fourth charge proved, and the accused guilty of the fourth charge.

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SENTENCE

"The court, therefore, sentences him, Ensign (T) Charles Earl Chamberlain, U. S. Navy, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On August 21, 1919, the convening authority approved the proceedings, findings, and sentence, and referred the record to the Secretary of the Navy for transmission to the President in conformity with article 53 of the Articles for the Government of the Navy.

[P. 2] OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On September 19, 1919, the Judge Advocate General placed the following endorsement upon the record:

"In the review of this case it is noted that the court found the accused not guilty of the second charge, but failed to include the statement that the court acquits the accused of the second charge, as required by section 322, Naval Courts and Boards. This omission in nowise affects the legality of the finding.

"In my opinion, the specification of the third charge does not support the charge, and it is, therefore, recommended that proceedings and finding upon this charge be disapproved.

"Subject to the above remarks, in the opinion of this office, the proceedings, findings, and sentence of the general court martial in the foregoing case of Ensign (T) Charles E. Chamberlain, U. S. Navy, are legal."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On September 22, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence as amended by the remarks made thereon by the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

On September 25, 1919, the Secretary of the Navy approved the recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On September 29, 1919, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Ensign (T) Charles E. Chamberlain, U. S. Navy.

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[P. 1] Lieutenant (J. G.) Fred M. Conrad, Pay Corps, U. S. Navy, was tried by general court martial on July 1, 1919, in general court-martial room, Steneck Building, Hoboken, N. J., by order of Commander, Cruiser Force, United States Fleet, and found guilty of the following charges:

Charge I.—Embezzlement (one specification).

Charge II.—Violation of a lawful regulation issued by the Secretary of the Navy (two specifications).

Charge III.—Culpable inefficiency in the performance of duty (one specification).

SENTENCE

"The court, therefore, sentences him, Lieutenant (J. G.) Fred M. Conrad, Pay Corps, U. S. Navy, to be dismissed from the United States naval service

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and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of two (2) years."

ACTION OF THE CONVENING AUTHORITY

On July 10, 1919, the convening authority approved the proceedings, findings, and sentence, designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement, and referred the record to the Secretary of the Navy for transmission to the President in conformity with article 53 of the Articles for the Government of the Navy.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On September 15, 1919, the Judge Advocate General placed the following endorsement upon the record:

"In reviewing the proceedings of the general court martial in this case it is noted that the accused was charged with (I) Embezzlement. (II) Violation of a lawful regulation issued by the Secretary of the Navy (two specifications). (III) Culpable [P. 2] inefficiency in the performance of duty, found guilty thereof, and sentenced to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of two years. The convening authority (fleet) approved the proceedings, findings, and sentence.

"The specification of the first charge alleges in part that the accused 'did * * * fail safely to keep and account for the sum of four hundred dollars ($400) * * * and did therein and thereby, then and there, embezzle and unlawfully convert to his own use the sum of four hundred dollars * * *.' The court found the specification proved and the accused of the charge guilty. The evidence introduced by the prosecution is not considered sufficient to prove that the accused failed safely to keep the money in question or that he converted the same to his own use. It seems that the money at all times remained in the safe provided for the safekeeping of such funds, though it was not all kept in the same compartment thereof. The mere fact that the accused did not keep all the money taken in as cash receipts together and extracted a portion thereof each day, which portion so extracted he placed in the safe, but in a different compartment from the one wherein he placed the remaining cash receipts, does not constitute an unlawful conversion to his own use of the funds so extracted. Conversion, although not a necessary element of the crime of embezzlement of public funds by officers of the United States, if it is alleged, there must be shown in order to support such allegation an act of appropriation of money to the agent's or officer's own use and enjoyment, or in exercising dominion over it, in exclusion or defiance of the principal's right (*State of Ohio* v. *Baxter*, 52 L. R. A., N. S. 1019, and accompanying editorial notes).

"Specification 1 of charge II alleges that the accused did accept a present from an accepted bidder for certain Government supplies. The principal testimony adduced by the prosecution in support of this specification consists of the narration by a witness of a conversation he is alleged to have had with a third party not in the presence of the accused, which testimony was admitted by the court over objection by counsel for the accused on the ground that it was hearsay evidence. The [P. 3] court was clearly in error in overruling the objection of counsel for the accused and in admitting said testimony. The statements of a third person not made in the presence of a party to the suit are not admissable in evidence against him, but are hearsay (11 Am. & Eng. Cyc. 520). Hearsay evidence is incompetent to establish any specific fact which is in its nature susceptible of being proven by witnesses who speak from their own knowledge (*Queen* v. *Hepburn*, 7 Cranch 290).

"As to the second specification of charge II, the prosecution established the facts alleged therein and the accused admitted the failure to make proper entry in his cash book, offering in defense that the false entries

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were made for the purpose of detecting irregularities in his department. The accused did not disclose the method by which he proposed to detect, by means of such false entries, the alleged irregularities in his department, nor does it appear that there is any merit in his proposal. I am therefore of the opinion that the finding of guilty on charge II and the second specification thereunder is in accord with the evidence.

"It is therefore recommended that the proceedings and findings as to charge I and the specification thereunder be disapproved; that the proceedings and findings as to specification 1 under charge II be also disapproved; and that the proceedings and findings as to charge II and specification 2 thereunder and charge III and the specification thereunder be approved; but in view of the requirements of General Order No. 452, it is recommended that so much of the sentence as relates to imprisonment be remitted, and that that part of the sentence involving dismissal be approved."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On September 20, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence as amended by the remarks made thereon by the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

On September 24, 1919, the Secretary of the Navy approved the recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and, in [P. 4] conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence, as mitigated, be confirmed.

ACTION OF THE PRESIDENT

On September 29, 1919, the President of the United States confirmed the sentence, as mitigated, of the general court martial in the foregoing case of Lieutenant (J. G.) Fred M. Conrad (SC), U. S. Navy.

C. M. O. 285—1919

[P. 1] Ensign Marvin J. Clark, U. S. Naval Reserve Force, was tried by general court martial on June 9, 1919, in general court-martial room, Steneck Building, Hoboken, N. J., by order of Commander Cruiser Force, United States Fleet, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (four specifications).

Charge II.—Conduct unbecoming an officer and a gentleman (one specification).

Charge III.—Executing a fraud against the United States (one specification).

Charge IV.—Conduct to the prejudice of good order and discipline (three specifications).

Charge V.—Perjury (seven specifications).

FINDINGS

The court found the first specification of the first charge proved, the second specification of the first charge proved except as to certain words, the third and fourth specifications of the first charge proved, and the accused guilty of the first charge; the specification of the second charge proved, and the accused guilty of the second charge; the specification of the third charge proved, and the accused guilty of the third charge; the specifications of the fourth charge proved, and the accused guilty of the fourth charge; the specifications of the fifth charge proved, and the accused guilty of the fifth charge.

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SENTENCE

"The court therefore sentences him, Ensign Marvin J. Clark, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of four (4) years."

[P. 2] RETURNED FOR REVISION

On June 21, 1919, the convening authority returned the record of proceedings to the court, directing the court to reconvene for the purpose of reconsidering its sentence, which, in his opinion, was entirely inadequate to the offenses found proved.

SENTENCE IN REVISION

"The court therefore sentences him, Ensign Marvin J. Clark, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of ten (10) years."

ACTION OF THE CONVENING AUTHORITY

On June 23, 1919, the convening authority approved the proceedings, findings, and sentence in revision, designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement, and referred the record to the Secretary of the Navy for transmission to the President in conformity with article 53 of the Articles for the Government of the Navy.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On September 5, 1919, the Judge Advocate General referred the record to the Chief of the Bureau of Navigation for comment as to disciplinary features, with the following comments and recommendation:

"Under the charge of 'Executing a fraud against the United States,' charge III, it is alleged that Ensign Clark 'did, on or about April 18, 1919, use a franked envelope of the Navy Department, Office of Force Commander, Cruiser and Transport Force, Atlantic Fleet, for the unlawful purpose of sending through the mails an unofficial private communication, the United States then being in a state of war.' The court erred in finding this charge and specification in due form and technically correct. The specification does not properly allege an offense. It is not an offense in itself for a person in the naval service or any other person to use a franked envelope of the [P. 3] Navy Department for the purpose of sending through the mails an unofficial private communication. It becomes an offense only when the franked envelope is so used to avoid payment of postage. This specification does not allege that the act was unlawful or that the franked envelope was used for the purpose of avoiding the payment of postage, which usage would make the act unlawful, but erroneously alleges that he used the envelope for 'the unlawful purpose of sending through the mails an unofficial private communication.' Such an allegation might be held to state an offense if it were unlawful for a person to send an unofficial private communication through the mails; but, since such an act is innocent in itself and not prohibited by any law or regulation governing the naval forces of the United States, the specification must be regarded as insufficient in law, and the proceedings and findings on said charge and specification should be disapproved.

"Section 227 of the Criminal Code of the United States provides that whoever shall make use of any official envelope to avoid the payment of postage on his private letter shall be fined not more than $300; but, obivously, the above-mentioned specification of charge III does not allege the violation of said section of the Criminal Code, in that it fails to specify that Ensign Clark used the official envelope to avoid the payment of postage.

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"Subject to the foregoing remarks, it is the opinion of this office that the proceedings, findings, and sentence of the general court martial in the case of Ensign Marvin J. Clark, U. S. Naval Reserve Force, are legal. It is recommended, however, that, in view of the foregoing and the youth and inexperience of the accused, the imprisonment be reduced to four (4) years."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On September 8, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in revision, as amended by the endorsement of the Judge Advocate General thereon, and, in view of all the circumstances, further recommended that the period of imprisonment be reduced to four (4) years.

[P. 4] ACTION OF THE ACTING SECRETARY OF THE NAVY

On September 18, 1919, the Acting Secretary of the Navy disapproved charge III and the specification thereunder, and specification 2 of charge IV, reduced the period of imprisonment adjudged to four (4) years, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence, as reduced, be confirmed.

ACTION OF THE PRESIDENT

On September 29, 1919, the President of the United States confirmed the sentence, as reduced, of the general court martial in the foregoing case of Ensign Marvin J. Clark, U. S. Naval Reserve Force.

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[P. 1] Ensign Harry Erlanger, U. S. Naval Reserve Force, was tried by general court martial on August 18, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (two specifications).

FINDINGS

The court found the first specification of the charge not proved; the second specification of the charge proved except as to certain words, and the accused guilty in a less degree than charged, guilty of violation of a lawful regulation issued by the Secretary of the Navy.

SENTENCE

"The court therefore sentences him, Ensign Harry Erlanger, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by five of the seven members of the court, was spread upon the record:

"In consideration of the excellent character and reputation of the accused prior to his entry into the naval service, and in consideration particularly of the fact that the accused enjoyed unfavorable opportunities for becoming acquainted with the obligations, customs, and traditions of the service, as well as with an understanding of the gravity of his offense, he having been in the service but little more than two months at the time of its occurrence, we recommend Ensign Harry Erlanger, U. S. Naval Reserve Force to the clemency of the reviewing authority."

RETURNED FOR REVISION

On September 13, 1919, the Acting Secretary of the Navy returned the record in the foregoing case to the court, and directed that the court reconvene for

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the purpose of reconsidering its findings and sentence, expressing the following views:

The accused was charged with "Scandalous conduct tending to the destruction of good morals." There were two specifications, as follows:

"*Specification 1.*—In that Harry Erlanger, now ensign, U. S. Naval Reserve Force, on active duty with the Navy, did, while serving as chief yeoman, U. S. Naval Reserve Force, on active duty with the Navy, at the naval recruiting station, 225 West [P. 2] Forty-second Street, New York, N. Y., on or about December 8, 1917, then and there, knowingly and unlawfully conspire, confederate, and agree with one B. J. Ellert, then chief pay clerk, U. S. Naval Reserve Force, attached to and serving at headquarters, third naval district, 280 Broadway, New York, N. Y., that for and in consideration of the help, aid, and assistance of the said Ellert in procuring and obtaining for the said Erlanger advancement and promotion from the rating of chief yeoman, U. S. Naval Reserve Force, to ensign, U. S. Naval Reserve Force, he, the said Erlanger, would purchase and pay for a fur coat costing from two hundred fifty dollars ($250) to three hundred dollars ($300) for the wife of the said Ellert; that, thereafter, to wit, on or about December 10, 1917, at the aforesaid city of New York, pursuant to said conspiracy and in order to effect the object thereof, the said Ellert did obtain and procure and cause to be obtained and procured from the Commandant of the Third Naval District orders directing the said Erlanger to appear before a naval examining board at Pelham Bay Park, N. Y., for examination for promotion to the rank of ensign, U. S. Naval Reserve Force, the United States then being in a state of war.

"*Specification 2.*—In that Harry Erlanger, now ensign, U. S. Naval Reserve Force, on active duty with the Navy, while serving as chief yeoman, U. S. Naval Reserve Force, on active duty with the Navy, at the naval recruiting station, 225 West Forty-second Street, New York, N. Y., did, on or about December 19, 1917, then and there, knowingly and wrongfully pay and give and cause to be paid and given to one B. J. Ellert, then chief pay clerk, U. S. Naval Reserve Force, attached and serving at headquarters, third naval district, New York, N. Y., a sum of money, to wit, three hundred dollars ($300), as payment, reward, and compensation for the said Ellert's services in aiding and assisting him, the said Erlanger, in obtaining advancement and promotion from the rating of chief yeoman, U. S. Naval Reserve Force, to the rank of ensign, U. S. Naval Reserve Force; the United States then being in a state of war."

The court found:

"The first specification of the charge 'not proved.' The second specification of the charge 'proved in part, proved except the words "as payment, reward, and compensation for the said Ellert's services in aiding and assisting him, the said Erlanger, in obtaining advancement and promotion from the rating of chief yeoman, U. S. Naval Reserve Force, to the rank of ensign, U. S. Naval Reserve Force," in the tenth to fourteenth lines, inclusive,' which words are not proved and for which excepted words the court substitutes the words 'this in violation of a lawful regulation issued by the Secretary of the Navy,' which words are proved.—And that the accused, Harry Erlanger, ensign, U. S. Naval Reserve Force, is of the charge guilty in a less degree than charged, guilty of violation of a lawful regulation issued by the Secretary of the Navy."

and sentenced the accused to be dismissed from the United States naval service.

[P. 3] The department has been unable, after a careful examination of the general orders and regulations, to find the "lawful regulation issued by the Secretary of the Navy" which Erlanger was guilty of violating. From the record of proceedings and a brief in behalf of the accused submitted by his counsel, it is noted that frequent reference is made to Article R–1520, U. S. Navy Regulations, and it is therefore assumed that Erlanger was found guilty by the court of violating this article. If so, the court's attention is called to the following observations, which should be carefully considered in connection with the proceedings in revision of the above-mentioned case.

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Article 1520 provides:

"(1) All votes, resolutions, or publications in praise or censure of any person in the naval service are forbidden.

"(2) No officer, clerk, or employee in the United States Government employ shall at any time solicit contributions from other officers, clerks, or employees in the Government service for a gift or present to those in a superior official position; nor shall any such officials or clerical superiors receive any gift or present offered or presented to them as a contribution from persons in Government employ receiving a less salary than themselves; nor shall any officer or clerk make any donation as a gift or present to any official superior. Every person who violates this section shall be summarily discharged from the Government employ (sec. 1784, R. S.).

"(3) No officer or other person under the Navy Department shall solicit subscriptions for the purpose of making a gift to a member of the immediate family of an officer of the naval service."

The only part of Article R–1520 that appears to be at all applicable to this case is that clause which provides that "nor shall any officer or clerk make any donation as a gift or present to any official superior." This clause is inapplicable to the present case, however, because Erlanger was not charged with making a "donation" as a gift or present to an official superior, nor was there any evidence that he made such a donation; furthermore, the prohibition is directed against officers and clerks, and Erlanger was neither an officer nor a clerk, but was a chief yeoman.

If the lawful regulation which the court had in mind was R–1520, the court's attention is specifically called to the following facts:

(*a*) Erlanger was not charged with making any donation as a gift or present to any official superior, nor was there any evidence that he made such a donation.

(*b*) Erlanger was at the time of the commission of the alleged offense a chief yeoman in the U. S. Naval Reserve Force. He was not an officer or clerk of the United States Government.

(*c*) The prohibition against making a donation as a gift or present to any official superior is directed against officers and clerks in the employ of the United States Government only.

[P. 4] The only other regulation issued by the Department which may have been within the mind of the court in reaching its finding is article R–1524, which reads as follows:

"Officers shall not borrow money nor accept deposits from, nor have any pecuniary dealings with, enlisted men, except as provided in article R–4376, for deposits with the pay officer."

This prohibition, however, is directed against officers and not against enlisted men and, as hereinbefore stated, Erlanger was not an officer at the time of the commission of the alleged offense but occupied an enlisted rating in the Naval Reserve Force.

Action in Revision

The court decided to revoke its former findings and sentence, and substituted therefor the following:

"The first specification of the charge not proved, the second specification of the charge not proved, and that the accused, Ensign Harry Erlanger, U. S. Naval Reserve Force, is of the charge not guilty; and the court does therefore acquit the said Ensign Harry Erlanger, U. S. Naval Reserve Force, of the charge."

Action of the Secretary of the Navy

On October 8, 1919, the Secretary of the Navy approved the proceedings of the general court martial in the foregoing case of Ensign Harry Erlanger, U. S. Naval Reserve Force; approved the proceedings, findings, and acquittal in revision, and directed that he be released from arrest and restored to duty.

[C. M. O. 296—1919]

C. M. O. 295—1919

[P. 1] First Lieutenant Samuel B. Ryan, U. S. Marine Corps, was tried by general court martial on July 18, 1919, at Marine Barracks, Cape Haitien, Republic of Haiti, by order of the Brigade Commander, First Provisional Brigade, U. S. Marine Corps, and acquitted of the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Manslaughter (one specification).

ACTION OF THE COVENING AUTHORITY

On August 18, 1919, the convening authority disapproved the proceedings, findings, and acquittal of the general court martial in the foregoing case of First Lieutenant Samuel B. Ryan, U. S. Marine Corps, and directed that he be released from arrest and restored to duty, expressing the following views in regard thereto:

> "The whole conduct and preparation of the record of this case show such laxity as to almost convey the impression to the convening authority that the court was not desirous of arriving at the facts in this case. In the case of a witness for the prosecution the court erred in sustaining the objection made by the counsel for the accused that the fact of a receipt of a letter by a witness was hearsay evidence. Again, the testimony of Captain George D. Hamilton, U. S. Marine Corps, was in some parts entirely hearsay evidence, yet the court overruled the objection by the judge advocate.
>
> "Exhibit 3 showed that fourteen shells, thirteen of them empty, were fired, yet this fact was not inquired into by the court. The contention by the defense that this shooting was necessary to the safety of the accused is not well taken. Keeping silently on his way would seem to have been a much more judicious method than bombarding two unarmed natives and emptying two clips, one containing seven and the other six cartridges, into them."

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[P. 11] ADDITIONAL NUMBER: OFFICERS DESIGNATED FOR ENGINEERING DUTIES ONLY; PROMOTION TO HIGHER GRADE.

Information having been requested as to whether an officer designated for engineering duties only in accordance with the act of August 29, 1916, while serving in the grade of commander, would become an additional number immediately upon his designation or promotion to a higher grade, the Judge Advocate General held that such officer would not become an additional number immediately upon designation, but would become an additional number only upon his promotion by selection to a higher grade, which opinion was approved by the Secretary (File 28687–24: 4: J. A. G., Oct. 7, 1919).

CHALLENGE: MEMBER OF COURT WHO IS ALSO A WITNESS.

A number of court-martial records have been received by the Department in which Naval Courts and Boards, 1917, page 349, [P. 12] section 288, as amended by Changes, Naval Courts and Boards, No. 2, was misconstrued, in that the accused were notified of their rights to challenge every witness for the prosecution who appeared before the court, when in fact no such right exists. Such procedure is wrong. The purpose of this change was to accord an accused an opportunity at the conclusion of the testimony of a member of the court to test the qualifications of that member of the court to sit as a member, where the accused believes that by reason of the dual status of the member as a witness and as a member of the court such member cannot render impartial judgment on the merits of the case. (See Naval Digest, p. 61, sec. 16.) It is not the purpose of Changes, Naval Courts and Boards, No. 2, to test the competency of the member as a witness nor to test the competency of any witness, inasmuch as that purpose cannot be accomplished by challenge.

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DISMISSAL: NOT OPERATIVE AS TO AN ENLISTED MAN WHO HAS CEASED TO BE A WARRANT OFFICER.

A warrant officer in the Marine Corps holding a temporary appointment was tried by general court martial, sentenced to dismissal, and the sentence was confirmed, but prior to its confirmation his temporary warrant was revoked and he reverted to his enlisted status as a quartermaster sergeant. Information being requested as to whether the sentence of dismissal could be accomplished in view of his change of status, the Department expressed the following views thereon:

"The sentence of the court was as follows: 'The court therefore sentences him, Quartermaster Clerk _____ _____, U. S. Marine Corps, to be dismissed from the United States naval service.' I do not see how a sentence of dismissal can apply to the present rank of Quartermaster Sergeant _____ _____. The sentence of the court was that Quartermaster Clerk _____ _____ should be dismissed from the naval service, but _____ _____ ceased to be a quartermaster clerk on August 23, 1919, by his demotion to an enlisted status, before the sentence of the court was confirmed and made effective. By his demotion he ceased ipso jure to hold the office to which alone the sentence related. (See 4 Op. Atty. Gen., 8.)

"The Department accordingly held that the dismissal adjudged by the general court martial against one who is a warrant officer is inoperative against that same person when his status changes to that of an enlisted man. It held further, however, that if the man's record warranted he might be discharged for the good of the service, giving him an ordinary discharge" (26251-21153: 3, J. A. G., Oct. 23, 1919).

JUDICIAL QUESTIONS: DEPARTMENT WILL NOT ENTER INTO MERITS OF.

In a case involving the payment of an insurance policy on the life of an enlisted man in the Navy, inquiry was directed to the Department as to the liability of the company. The Judge Advocate General expressed the following views thereon:

[P. 13] "The question presented is a judicial one which this Department is not authorized to answer" (20 Op. Atty. Gen. 383, 673; 19 Op. Atty. Gen. 56; 29 Op. Atty. Gen. 226; 24 Op. Atty. Gen. 59; 23 Op. Atty. Gen. 221, etc.).

As pointed out by the Attorney General in the opinions cited and numerous others to the same effect, there are many reasons why the executive branch of the Government should not undertake to decide questions pending in court or which can only be judicially determined. Thus such executive opinion would not bind the court in any way; the executive might be brought into conflict with a judicial tribunal; an opinion so rendered by the executive would have no more weight than the opinion of any unofficial person; to give an opinion in a matter where the subject involved is disputable and is the subject of a pending suit, would be equivalent to expressing an opinion as to whether the question ought to be decided in favor of one of the parties; and it is inexpedient, improper, and unwarranted for the executive to render opinions in such cases, etc. (File 26806-166, J. A. G., Oct. 8, 1919).

JURISDICTION: NAVAL COURT MARTIAL OF FORMER MEMBERS OF THE NAVAL SERVICE WHO COMMITTED OFFENSES WHILE IN THE NAVAL SERVICE.

An enlisted man of the naval service while employed in the naval post office receipted for a registered package belonging to another enlisted man and extracted therefrom a Liberty bond. He was subsequently discharged and upon discovery of the offense the opinion of the Department was requested as to whether, under article 14 of the Articles for the Government of the Navy, he could be apprehended and brought to trial by naval general court martial for the offense.

Article 14 of the Articles for the Government of the Navy relates to frauds against the United States and the theft, etc., of property of the United States. It does not cover the theft of the property of an individual, and therefore does not include the class of theft under consideration in this case.

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In a recent case the following question was submitted to the Attorney General for an opinion:

> "Whether a person in the United States Navy or in the United States Naval Reserve Force, and subject to the laws and regulations for the government of the Navy, who commits an offense against such laws and regulations, can be brought to trial before a naval general court martial, or otherwise punished for the offense, after he has been discharged from the Navy, or released from active duty therein, but within two years after the date of the commission of such offense."

On July 10, 1919, the Attorney General, after reviewing the authorities, came to the conclusion that a person discharged from the naval service before proceedings are instituted against him for violations of the Articles for the Government of the Navy, excepting article 14, cannot thereafter be brought to trial [P. 14] before a court martial for such violation, though committed while he was in the service.

In cases of this kind the facts should be reported to the United States attorney in order that proper action may be taken by the civil authorities (File 28550–511:3; Sec. Nav., Oct. 15, 1919).

MIDSHIPMEN: ELIGIBILITY OF, FOR PREFERENCE IN APPOINTMENT TO CIVIL-SERVICE POSITIONS.

Information having been requested as to the status of midshipmen in the U. S. Naval Academy, with reference to their being given preference in appointment to positions in the civil service in accordance with the act of Congress approved July 11, 1919, the Department expressed the following views thereon. The act in question provides:

> "That the act entitled 'An act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, so far as it relates to preference in employment of honorably discharged soldiers, sailors, and marines, be amended to read as follows: 'That hereafter in making appointments to clerical and other positions in the executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such, and to wives of injured soldiers, sailors, and marines who themselves are not qualified to hold such positions.' "

Pursuant to the foregoing provisions of law preference shall be given to "honorably discharged soldiers, sailors, and marines, and widows of such, and to wives of injured soldiers, sailors, and marines who themselves are not qualified to hold such positions." Midshipmen in the Naval Academy are neither soldiers, sailors, nor marines, but are students undergoing training for commissions as officers of the Navy (15 Op. Atty. Gen. 637). It has been held that they are persons in the "naval service" for certain purposes (File 5252–102, Jan. 2, 1918), and that they are "officers" within the meaning of section 1486 of the Revised Statutes (File 11130–2b, J. A. G., July 31, 1909; and that they are not officers within the meaning of section 122 of the Revised Statutes, which provides that no officer of the military or naval service shall, in time of peace, be dismissed from the service except upon and in pursuance of the sentence of a court martial (File 26262–189). Article 1002 (3) of the U. S. Navy Regulations prescribes that "midshipmen are, by law, officers in a qualified sense."

Midshipmen at the Naval Academy are not enlisted in the service but are appointed as midshipmen at the Naval Academy for training. Not being enlisted, they cannot be classified as "soldiers, sailors, or marines," within the meaning of the above-mentioned act of July 11, 1919 (File 5252–131; Sec. Nav., Oct. 11, 1919).

[P. 15] RETIRED OFFICERS: EMPLOYMENT OF, BY THE U. S. SHIPPING BOARD.

The opinion of the Department having been requested as to whether retired officers of the U. S. Navy may be employed by the U. S. Shipping Board, the following views were expressed thereon:

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Section 2 of the act of July 31, 1894 (28 Stat. 205), provides:

> "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate."

In an opinoin of August 12, 1912 (29 Op. Atty. Gen. 503), the Attorney General held that a retired officer of the Navy whose retired pay amounts to $2,500 per annum is an officer within the prohibition of the above-quoted act, and is, therefore, ineligible to hold any other office under the Government to which compensation is attached unless specific provision is made therefor by law. The Comptroller of the Treasury has also held that the term "office" as used in the above-quoted section is not restricted to an office within the constitutional sense but includes a position whether specifically appropriated for by statute or generally authorized under a lump-sum appropriation (8 Comp. Dec. 87; 26 id. 49). I am aware of no provision of law specifically authorizing the employment of a retired officer of the Navy in an office or position under the U. S. Shipping Board, and I am therefore of the opinion that a retired officer of the Navy whose retired pay amounts to $2,500 per annum is ineligible to hold any office or position under the U. S. Shipping Board.

The question as to whether a retired officer whose compensation is less than $2,500 per annum may be employed in an office or position with compensation of less than $2,500 per annum is covered by sections 1764 and 1765 of the Revised Statutes, as follows:

> "Sec. 1764. No allowance or compensation shall be made to any officer or clerk by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever which any officer or clerk may be required to perform, unless expressly authorized by law.
>
> "Sec. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation [P. 16] therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Under the above sections of the Revised Statutes it was held in the Saunders case (120 U. S. 126) that there is no prohibition against the holding by one person of two distinct offices, places, or employments, each of which has its own duties and its own compensation, and reference is made to an opinion of a former Attorney General (5 Op. Atty. Gen. 765) to the effect that the prohibition does not apply to distinct employments "with salaries or compensation affixed to each by law or regulation." (See also *Evans* v. *U. S.*, 226 U. S. 567; *Woodwell* v. *U. S.*, 214 U. S. 82; 24 Comp. Dec. 133; 22 id. 645; 21 id. 438.) It should be observed, however, that in order to come within the requirements of the above decisions the position or employment in which it is desired to employ a retired officer must be created and the compensation thereto fixed by a general regulation prior to such retired officer's employment, which compensation so fixed will go to the holder of such employment, whoever he might be, because the fixing of compensation for an individual appointed to the place is not equivalent to fixing by regulation the compensation of the place antecedent to the appointment and independently of the individual appointed (File 9736–79; J. A. G., Oct. 24, 1919).

WAR: TERMINATION OF.

The Department having been asked whether when the treaty of peace with Austria is signed the use of the phrase "the United States then being in a state of war" will be discontinued and whether the authority of commandants

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of naval districts to convene general courts martial automatically expires, the opinion was expressed that the war will not be at an end until so proclaimed by the President (*Salamandra Insurance Co.* v. *New York Life Insurance and Trust Co.*, 254 Fed. 852).

The act of August 29, 1916 (39 Stat. 586), provides that "in time of war, if then so empowered by the Secretary of the Navy, general courts martial may be convened by the commandant of any navy yard or naval station and by the commanding officer of a brigade or other forces of the Navy or Marine Corps on shore and not attached to a navy yard or naval station." Authority to convene naval general courts martial under this provision of law can be conferred upon the commandant of a navy yard or naval station only in time of war. Consequently, upon the termination of the war, the authority of the Secretary to empower such commandants is at an end and the power of the commandant to convene such courts then comes to an end, unless the authority is sooner withdrawn by the Secretary of the Navy. The "end of the war" will be determined in the manner prescribed in the preceding paragraph (File 26501-287 : 88; J. A. G., Oct. 28, 1919).

C. M. O. 297—1919

[P. 1] Captain George D. Hamilton, U. S. Marine Corps, was tried by general court martial on August 14, 1919, at the Marine Barracks, Cape Haitien, Republic of Haiti, by order of the Brigade Commander, First Provisional Brigade, U. S. Marine Corps, on the following charges:

Charge I.—Disobedience of a lawful order of his superior officer (one specification).

Charge II.—Murder (one specification).

Findings

The court found the specification of the first charge proved except as to certain words and the accused guilty of the first charge; the specification of the second charge not proved, the accused not guilty of the second charge, and acquitted the accused of the second charge.

Sentence

"The court therefore sentences him, Captain George D. Hamilton, U. S. Marine Corps, to lose fifty (50) numbers in his grade after he has passed his final examination as a permanent officer in the U. S. Marine Corps."

Action of the Convening Authority

On September 2, 1919, the convening authority approved the proceedings, findings, and sentence, expressing the opinion that the court erred in allowing the counsel for the accused to vilify Colonel Hooker, vide Naval Digest, page 32, "The court should not permit counsel to resort to a general malediction of a third party," and directed that the accused, Captain George D. Hamilton, U. S. Marine Corps, be released from arrest and restored to duty.

Opinion and Recommendation of the Judge Advocate General

On October 14, 1919, the Judge Advocate General, in referring the record to the Major General Commandant, U. S. Marine [P. 2] Corps, for comment, placed the following endorsement upon the record.

> "The accused was found guilty of 'Disobedience of a lawful order of his superior officer.' However, the specification thereunder clearly does not support the charge. The order in question, as quoted in the specification, insofar as relevant, was as follows: 'No prisoner while in custody, whatever his or her status, will be shot, executed, or permitted to be shot.' In order to constitute a disobedience of said order it is obvious that a prisoner while in custody must have been 'shot, executed, or permitted to be shot,' and that the accused must have himself 'shot, executed, or permitted to be shot'

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said prisoner or must have caused the prisoner in question to be 'shot, executed, or permitted to be shot.' The specification, however, does not allege that any person was 'shot, executed, or permitted to be shot.' It is thus apparent that the specification does not set forth facts constituting disobedience of the aforesaid order.

"The specification charges that the accused, notwithstanding the wording of the aforesaid order, did 'give orders or instructions to gendarmes serving under his command to shoot all native prisoners captured by them if such prisoners were considered "cacos" or persons in revolt against the Republic of Haiti.' The issuance of such an order by the accused would certainly be conduct to the prejudice of good order and discipline, particularly in view of the contrary order issued by higher authority; but unless said order of the accused was acted upon the mere fact of its having been issued could not in itself constitute a disobedience of the contrary order issued by higher authority. The specification does not allege that the order in question issued by the accused was acted upon in any case.

"In view of the foregoing, the charge and specification upon which the accused was found guilty in the case is fatally defective and cannot legally support the court's finding or sentence thereupon.

"The evidence shows that a prisoner was shot and killed while in the custody of a sergeant in the gendarmerie and while said sergeant was bringing the prisoner to the accused. However, the sergeant testified that his orders from the accused were not to shoot prisoners, but to bring them to the accused; that he had no orders to shoot any prisoners; that he himself issued no order for the shooting of the prisoner in question, but that [P. 3] said prisoner was shot by a civilian not a member of gendarmerie and not under the command of the aforesaid sergeant and without orders from anybody to do the shooting. This testimony is corroborated by all who were present at the time of the shooting, including the civilian who did the shooting. From this testimony, which is in no manner contradicted by the witnesses for the prosecution, it appears that the prisoner in question attacked the sergeant and that the civilian, who was present and saw the attack, thereupon shot and killed the prisoner.

"Even were the evidence otherwise, it could not cure the defect in the specification, as in order to support a finding of guilty and a sentence thereupon it is necessary first of all that there be a valid charge and specification.

"It was further alleged in the specification in this case that the accused, in violation of another portion of the same order, did neglect and fail to submit a report of prisoners shot. However, this allegation was found not proved by the court for the reason that it appeared from the prosecution's own testimony that the accused did report the shooting of the prisoner mentioned above within a few minutes after he himself received information thereof.

"Subject to the foregoing remarks, it is recommended that the proceedings in the foregoing case of Captain George D. Hamilton, U. S. Marine Corps, be approved; that the findings on the second charge and the specification thereunder be approved, and that the findings on the first charge and the specification thereunder and the sentence be set aside."

Concurrence of the Major General Commandant, U. S. Marine Corps

On October, 15, 1919, the Major General Commandant, U. S. Marine Corps, in view of the fact that in the opinion of the Judge Advocate General the charge and specification of which the accused was found guilty is fatally defective and cannot legally support the court's finding or sentence thereupon concurred in the recommendation of the Judge Advocate General that the finding and sentence be set aside.

Action of the Acting Secretary of the Navy

On October 31, 1919, the Acting Secretary of the Navy approved the proceedings of the general court martial in the foregoing [P. 4] case of Captain George D. Hamilton, U. S. Marine Corps, and the findings on the second charge and the specification thereunder, and set aside the findings on the first charge and the specification thereunder and the sentence.

C. M. O. 300—1919

[P. 1] Captain Louis W. Bartol, U. S. Marine Corps, was tried by general court martial on May 14, 1919, at the Marine Barracks, Cape Haitien, Republic of Haiti, by order of the Brigade Commander, First Provisional Brigade, U. S. Marine Corps, on the following charge:

Charge.—Negligence in obeying orders (one specification).

Findings

The court found the specification of the charge proved except as to certain words, and the accused guilty of the charge.

Sentence

"The court therefore sentences him, Captain Louis W. Bartol, U. S. Marine Corps, to lose five (5) numbers in his grade."

Action of the Convening Authority

On June 24, 1919, the court was reconvened for the purpose of correcting certain errors as to form in the record of proceedings.

On June 28, 1919, the convening authority approved the proceedings, findings, and sentence, and directed that the accused be released from arrest and restored to duty.

Opinion and Recommendation of the Judge Advocate General

On October 15, 1919, the Judge Advocate General placed the following endorsement upon the record:

> "The accused in this case was first charged with 'Disobeying the lawful order of his superior officer.' The court found the specification of the charge not in due form and addressed a communication to the convening authority to that effect. The convening authority replied by ordering the court to preceed with the trial.
>
> "When arraigned and before pleading, the accused, by counsel, moved to strike out the charge and specification on the [P. 2] ground that the specification did not support the charge, which motion was granted by the court and the convening authority so informed.
>
> "The convening authority thereupon ordered the court to return the original charge and specification and sometime later forwarded to the court a new charge, to wit, 'Negligence in obeying orders' the specification in support thereof being different from, but involving the same orders specified in, the charge of disobedience of orders.
>
> "Before pleading to the new charge the accused moved to strike out the charge and specification on the ground that the trial of the accused on the new charge was under the circumstances of this case a violation of article 43, Articles for the Government of the Navy, which reads as follows:
>
> " 'The person accused shall be furnished with a true copy of the charges, with the specifications, at the time he is put under arrest; and no other charges than those so furnished shall be urged against him at the trial unless it shall appear to the court that intelligence of such other charge had not reached the officer ordering the court when the accused was put under arrest, or that some witness material to the support of such charge was at that time absent and can be produced at the trial; in which case reasonable time shall be given the accused to make his defense against such new charge.'
>
> "The letter of the convening authority to the judge advocate of the general court martial read as follows:
>
> " 'The charge and specification, dated April 10, 1919, in the case of Captain Louis W. Bartol, U. S. Marine Corps, charging him with disobedience of orders of his superior officer, is hereby withdrawn, and the enclosed charge and specification of negligence in obeying orders is substituted therefor.

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"'You will obtain the copy, dated April 10, 1919, in possession of Captain Bartol, and forward it, with the copies of same in possession of the members of the court, to this office.

"There was no order that the accused be released from arrest under the charge originally preferred against him, or that he be placed under arrest under the new charge. The whole procedure indicated that the convening authority regarded the second trial as merely a continuation of the first. This attitude is evidenced by the comments of the convening authority in returning the case for revision, in which he informed the court that it should [P. 3] number the pages of the record of both trials consecutively, instead of beginning the record of the second trial with page one. Furthermore, the charge on which the accused was later arraigned was not one unknown to the convening authority at the time the accused was placed under arrest, but it was based on the very same state of facts as the charge originally brought against him.

"Attention is also invited to the seemingly improper action on the part of the convening authority in wiring the detachment commander that with the new charge and specification an order would be forwarded directing that Captain Chaffee (counsel for the accused) be not allowed to act in any general-court-martial case either as judge advocate, counsel, or member. Such action might have the effect of discrediting counsel for the accused in the eyes of the court and prejudicing the case of the accused. Besides it has been ascertained that the disbarment of Captain Chaffee from court-martial duty was without investigation or hearing and for no cause that was communicated to Captain Chaffee either before or after his disbarment. This matter is now the subject of correspondence, and will be separately treated by the department when all the facts are known to it.

"Attention is also invited to the letter of the convening authority, dated 28 June, 1919, wherein it is erroneously stated that the accused was found guilty of 'Disobeying the lawful order of his superior officer,' when, as a matter of fact, the accused was found guilty of 'Negligence in obeying orders.'

"The premises considered, it is recommended that the proceedings, findings, and sentence in the foregoing case be disapproved.

"Referred to the Major General Commandant, Marine Corps, for comment."

CONCURRENCE OF THE MAJOR GENERAL COMMANDANT, U. S. MARINE CORPS

On October 22, 1919, the Major General Commandant, U. S. Marine Corps, concurred in the recommendation of the Judge Advocate General that the proceedings, findings, and sentence be disapproved.

ACTION OF THE SECRETARY OF THE NAVY

On October 25, 1919, the Secretary of the Navy disapproved the proceedings, findings, and sentence of the general court [P. 4] martial in the foregoing case of Captain Louis W. Bartol, U. S. Marine Corps.

C. M. O. 304—1919

[P. 12] PAY: LOSS OF, REMITTED BY COURT MARTIAL.

A summary court martial adjudged the following sentence: "* * * to lose pay amounting to fifteen (15) dollars. Loss of pay to be remitted in accordance with article 4893, Naval Instructions 1913." The convening authority approved the proceedings, findings, and sentence. The paymaster checked the loss of pay in accordance with Article I, 4893. The department held the sentence was illegal and therefore set it aside.

In doing so the department held that summary courts martial are restricted in their sentences to the punishments specifically set forth in article 30, Articles for the Government of the Navy, and where the punishment for an offense is fixed by statute the sentence of the court must conform strictly thereto (Nav. Dig. 87–89, p. 619).

A convening authority may mitigate a sentence if he deems the ends of justice will be subserved by so doing, but no such power is given to the court.

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Therefore the remission of the loss of pay adjudged, as attempted in the above sentence, is illegal. The convening authority could have remitted the loss of pay in accordance with article I, 4893, but he cannot approve an illegal sentence, vitalize the same, and thereby cause it to operate to remit the loss of pay in accordance with article I, 4893.

A convening authority has the power to remit or mitigate a sentence, but not to commute, nor can he increase the sentence as adjudged. Hence it could not be held that that part of the court's sentence, which attempted to remit the loss of pay in accordance with article I, 4893, could be stricken out as illegal, and the other part, which adjudged the loss of pay, be approved, for such action would in effect be increasing the sentence of the court. The whole sentence, therefore, must be considered as illegal and hence was disapproved (File 26287-6021; J. A. G., Nov. 17, 1919).

CITIZENSHIP: PAY—NATURALIZED ASIATIC ENTITLED TO.

The question being presented as to whether a naturalized Asiatic was entitled to the benefits of citizenship pay, the department expressed the view that a Japanese who has been issued a certificate [P. 13] of naturalization by a court of competent jurisdiction is entitled to the benefits of citizenship pay and quoted in support thereof an opinion of the Comptroller of the Treasury of August 22, 1919, wherein it was held:

> "The question of citizenship is one of fact which this office is not required or authorized to decide. It is decided by a court of competent jurisdiction subject to the usual review by higher courts.
>
> "However, it would appear, in view of the decision of this office dated February 21, 1912 (18 Comp. Dec. 618, and decisions cited therein), that where an enlisted man became naturalized under regular procedure and by a duly authorized court during his second or subsequent term of enlistment he is entitled to the additional pay provided by General Order 34 from the date of said naturalization" (File 7657-881: 8, J. A. G., Oct. 13, 1919).

CIVIL AUTHORITIES: SURRENDER OF MEMBER OF NAVAL SERVICE TO, UPON DEMAND.

In a recent case in which an enlisted man of the Navy was accused of a misdemeanor alleged to have been committed in the State of New Jersey some time prior to his enlistment in the Navy, information was requested as to whether the department would authorize his delivery to the civil authorities of New Jersey upon proper demand and whether he was liable to arrest for the said offense by the civil authorities of Pennsylvania, in which State he was then stationed, in the event he was granted liberty.

The department expressed the view that under the provisions of paragraph 14 of General Order No. 121 of September 17, 1914, the governor of the State of New Jersey is required to make requisition upon the Secretary of the Navy, showing that the man is charged with an extraditable offense in that State, before his delivery will be authorized by the department.

In case the man is granted leave of absence and is arrested by the civil authorities of Pennsylvania while away from his station he would have the right to demand extradition proceedings before his removal from the State of Pennsylvania. In case of such arrest by the civil authorities of Pennsylvania the man should immediately report the facts to his commanding officer, who will make demand for his return to the naval authorities, and, in case of refusal of the civil authorities to comply with such demand, will immediately wire a full report thereof to the department in order that proper steps may be taken through the Department of Justice to protect the interests of the Navy if the facts so warrant.

If the man is delivered to the civil authorities of New Jersey upon requisition of the governor of the State, as indicated above, his case becomes one for the court to decide as to his guilt or innocence of the offense charged, and the securing of legal assistance [P. 14] at his trial would be a matter of his own concern. In a proper case the department takes action through

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the Department of Justice to protect persons in the naval service from consequences which may ensue from the performance by them of official duties; but where, as in this case, the offense is not one resulting from the performance of official duties it is not the policy of the department to take steps to afford legal assistance at the expense of the United States (File 26524–837, Sec. Nav. Nov. 21, 1919).

[P. 16] FIGURES: IDENTIFICATION; USE OF IN CHARGES AND SPECIFICATIONS.

In framing charges and specifications, identification figures (i. e., the serial number of the accused) will not be used in the body of the specification. They may, however, be inserted in the heading of the order for the trial of the accused, in the wording of the subject, after the name and rating of the accused.

NAVAL RESERVISTS: ENLISTMENT OF, IN THE LAND FORCES OF STATE MILITIA ORGANIZATIONS.

Information having been requested as to the eligibility of Naval Reservists to enlist in the land forces of the State Militia, the department expressed the following opinion:

The provision of the act of July 11, 1919, to which reference is made reads as follows:

> "*Provided*, That no part or parts of any existing laws shall be construed as having discharged from the Naval Militia of any State, Territory, or the District of Columbia, those members of the National Naval Volunteers who were transferred to the Naval Reserve Force by authority of the act of Congress making appropriations for the Naval Service which became a law on July 1, 1918; nor to prevent members of the Naval Reserve Force from being or becoming members of the Naval Militia of any State, Territory, or the District of Columbia: *Provided*, That such membership in the Naval Militia shall not interfere with the discharge of duties by such members thereof who are in the Naval Reserve Force."

The foregoing provision is almost too clear to require construction. It refers, first, specifically to those members of the National Naval Volunteers who were transferred to the Naval Reserve Force by authority of the act of Congress approved July 1, 1918, and states that no existing law shall be construed as having discharged such persons from the Naval Militia of any State, Territory, or the District of Columbia. The provision then specifies further that no existing law shall be construed to prevent members of the Naval Reserve Force from being or becoming members of the Naval Militia of any State, Territory, or the District of Columbia; "*Provided*, That such membership in the Naval Militia shall not interfere with the discharge of duties by such members thereof who are in the Naval Reserve Force."

The word "militia" appears in the provision three times and each time it appears it is qualified by the word "Naval." The words being plain and unambiguous require no construction. The meaning is so clear that he who runs may read. If it had been the intention of Congress to provide that members of the Naval Reserve Force might join organizations other than the Naval Militia of a State, Territory, or the District of Columbia, and to have authorized their joining the land forces of the militia of the States, Territories, and the District of Columbia, such an intent could easily have been accomplished [P. 17] by omitting the word "naval" as a qualification of the word "militia." That Congress specified Naval Militia in the foregoing provision is sufficient proof that it intended to authorize such persons to join only the naval forces of the States and not the land forces.

Members of the Naval Reserve Force were still precluded from entering the land forces of the militia of the States, Territories, or the District of Columbia by the following provision of the act of August 29, 1916:

> "No existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service, except as an officer or enlisted man in any branch of the military

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service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay" (File 28550–1216, J. A. G., Nov. 15, 1919).

OATH OF WITNESS: NATURE OF TESTIMONY REQUIRED BY

Recommendation having been made to the department that naval courts and boards be so modified as to prescribe that the judge advocate shall read the charges and specifications to each witness before the witness is sworn, because the oath prescribed by law requires that the witness swear that he will state everything within his knowledge in relation to the charges, the department in disapproving the recommendation, held that it would be improper and inexpedient to read the charges and specifications to the witnesses. The following is quoted from the decision of the department on the subject:

"The witness is not required to state everything within his knowledge, but only such matters as may be inquired into during the course of his examination. He is under no compulsion to state anything which is not inquired into, and the oath, in effect, merely obligates him to tell the whole truth concerning the matters to which his attention is directed and concerning which he is questioned" (File 12821–170; J. A. G., Nov. 8, 1919).

RETIRED: WHOLLY: OR SUSPENDED FROM PROMOTION FOR ONE YEAR AND THEN REEXAMINED.

In a recent examination for promotion before a marine examining board the board of medical examiners reported to the full board that Captain _____ _____ was not physically qualified for promotion. The marine examining board thereupon proceeded with the examination as a marine retiring board under the provisions of General Order No. 325 and section 718, Naval Courts and Boards, and reported its findings in accordance with section 771, Naval Courts and Boards (sec. 1252, Revised Statutes). that—

"The board, having deliberated on the evidence before it, decided that Captain _____ _____, U. S. Marine Corps, is permanently [P. 18] incapacitated for active service by reason of chronic valvular disease of the heart, and that his incapacity is not the result of an incident of the service; not due to his own misconduct; and the board recommends that he be wholly retired from the United States Marine Corps."

The question for decision in this case is whether under the foregoing circumstances Captain _____ _____ is eligible for retirement under the provisions of section 1252, Revised Statutes, or whether it is required by the provisions of the act of October 1, 1890, and July 28, 1892, that he be suspended from promotion for one year and then be reexamined.

The above-mentioned statutes provided as follows:

Section 1252, Revised Statutes: "When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register."

Act of October 1, 1890, section 3: "That the President be, and he is hereby authorized to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, such an examination to be conducted at such times anterior to the accruing of the right to promotion as may be best for the interests of the service: *Provided*, That the President may waive the examination for promotion to any grade in the case of any officer who, in pursuance of existing law, has passed a satisfactory examination for such grade prior to the passage of this act: *And provided*, That if any officer fails to pass a satisfactory examination and is reported unfit for promotion, the officer next below him in rank, having passed said examination, shall receive the promotion: *And provided*, That should the officer fail in

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his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should fail for any other reason he shall be suspended from promotion for one year, when he shall be reexamined, and in case of failure on such reexamination he shall be honorably discharged with one year's pay from the Army: * * * and no act now in force shall be so construed as to limit or restrict the retirement of officers as herein provided for."

Act of July 28, 1892: "That hereafter promotions to every grade of commissioned officers in the Marine Corps below the grade of commandant shall be made in the same manner and under the same conditions as now are or may hereafter be prescribed, in pursuance of law for commissioned officers of the Army: *Provided*, That examining boards which may be organized under the provisions of this act to determine the fitness of officers of the Marine Corps for promotion shall in all cases consist of not less than five officers, three of whom [P. 19] shall, if practicable, be officers of the Marine Corps, senior to the officer to be examined, and two of whom shall be medical officers of the Navy: *Provided further*, That when not practicable to detail officers of the Marine Corps as members of such examining boards, officers of the line in the Navy shall be so detailed."

The above act of October 1, 1890, is entitled "An act to provide for the examination of certain officers of the Army and to regulate promotions therein," and under its terms the President was specifically authorized to prescribe a system of examination of such officers to determine their fitness for promotion. The act itself provides no general scheme of retirement. It, however, confers upon an officer, who upon examination for promotion is found physically incapacitated for service by reason of physical disability contracted in line of duty, the right to be retired in the higher rank to which his seniority entitled him to be promoted; and further provides that no act then in force shall be so construed as to limit or restrict such retirement. The procedure for such retirement and the manner in which it is accomplished must, however, be governed by the general laws upon the subject of retirement, as no further provision is made therefor in said act.

So also the provision for suspension from promotion of an officer "if he should fail for any other reason" does not preclude the retirement of such officer under the general retirement laws if it is deemed proper to do so. The said provision of the act is mandatory in that such officer cannot be promoted within a year; but it clearly does not contemplate if such officer upon his physical examination is found permanently disabled that he must be retained upon the active list for a year before he can be removed therefrom.

Inasmuch as the act of October 1, 1890, and section 1252, Revised Statutes, are Army statutes, it might be of interest to consider the construction placed thereupon by the Judge Advocate General of the Army. In the case of Second Lieutenant _____ _____ (C. 22809 Mar. 15, 1908), who was found by an examining board to be incapacitated for service by reason of physical disability contracted not in line of duty, and as the result of his habitual use of morphine, and was then examined for retirement—a case quite similar to the one now under consideration by me—the Judge Advocate General of the Army states:

> "It is proper to state that, although Lieutenant _____'s case is still within the jurisdiction of an examining board, the proceedings of which have been had in respect to his retirement are laid under an entirely different set of statutes, having no connection with the act of 1890, which governs the examination of commissioned officers for promotion.
>
> * * * * * * *
>
> "If the law governing the findings of retiring boards be examined, it will be seen that, in the case in reference, an exercise of discretion is required of the President with a view to determine whether, in [P. 20] the event that the findings of the board are found to warrant executive approval, the officer shall be placed on the retired list, or wholly retired with one year's pay and allowances in the operation of section 1252, Revised Statutes.
>
> "The discretion so exercised should be based, in part upon the facts elicited by the board in its investigation, and in part upon the practice

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of the department in previous cases in which officers have been found by retiring boards to be incapacitated for active service by causes which were not incident to the service."

I agree with the above construction of the Judge Advocate General of the Army and I am, therefore, of opinion that while Captain _____'s case is still within the jurisdiction of an examining board and further action might be taken in accordance with the act of October 1, 1890, as amended by the act of July 28, 1892, it appears to me that, in view of the finding of the retiring board that Captain _____ is permanently incapacitated for active service, it is quite evident that he could not pass the physical examination in a year's time and, therefore, he should be retired under the provisions of section 1252, Revised Statutes, which was made applicable to the United States Marine Corps by section 1622, Revised Statutes. It is therefore directed that appropriate action be prepared recommending that he be wholly retired from the United States Marine Corps in accordance with the foregoing recommendation of the retiring board, and that he be granted one year's pay upon such retirement (File 26253–538:1, J. A. G. Nov. 7, 1919).

C. M. O. 306—1919

[P. 1] Ensign Harold R. Parker, U. S. Navy, was tried by general court martial on October 2, 1919, on board the U. S. S. *Florida*, by order of the Commander in Chief, U. S. Atlantic Fleet, and found guilty of the following charge:

Charge.—Neglect of duty (one specification).

Sentence

"The court therefore sentences him, Ensign Harold R. Parker, U. S. Navy, to lose twenty-five (25) numbers in his grade."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his youth and inexperience, we recommend Ensign Harold R. Parker, U. S. Navy, to the clemency of the reviewing authority."

Action of the Convening Authority

On November 7, 1919, the convening authority placed the following endorsement upon the record:

"After a careful reading of the proceedings in the foregoing case, the convening authority is convinced that while Ensign Parker was guilty of a grave dereliction of duty there is something to be said on his part in the way of lack of experience. There is no doubt in the mind of the convening authority that the accused desired to shield his messmate, but the convening authority also believes that this action on the part of Ensign Parker was due to the fact that he has not as yet been sufficiently instructed in his duties as officer of the deck as laid down by the Navy Regulations which gives officers in this position much authority with corresponding responsibility.

"Subject to the above remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of [P. 2] Ensign Harold R. Parker, U. S. Navy, are approved, but in view of the unanimous recommendation of the court for clemency, and without implying that the punishment inflicted by the court is any too severe for an officer found willfully guilty of the offense of which Ensign Parker stands convicted, still on account of his youth and lack of experience and the belief that the act was a thoughtless one the sentence is reduced to the loss of five numbers. Ensign Parker will be released from arrest and restored to duty."

C. M. O. 309—1919

[P. 1] Lieutenant Commander William D. Owens, Medical Corps, U. S. Navy, was tried by general court martial on October 14, 1919, at the U. S. Naval Academy, Annapolis, Md., by order of the Secretary of the Navy, and acquitted of the following charge:

Charge.—Drunkenness (one specification).

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On November 18, 1919, in submitting the record to the Secretary of the Navy, the Judge Advocate General expressed the following views thereon:

"In the within case of Lieutenant Commander William D. Owens, M. C., U. S. Navy, the accused was acquitted by the trial court. At the end of the prosecution's case the defense offered no evidence and the case went to the court upon the evidence adduced by the Government and the arguments made by counsel and by the judge advocate. The case is one offering no doubtful features; the sole testimony which, even by a process of argument and deduction, could be made patient of an interpretation unfavorable to the accused, is to the effect that (*a*) accused was ordered off Mr. ——'s premises by the latter, and (*b*) accused was without hat, coat, and collar. Laying aside for the moment the elementary principles of law that accused is innocent until proven guilty, that the burden of proof is upon the prosecution, and that the accused must be proven guilty beyond a reasonable doubt, the testimony above adverted to is wholly without probative value to establish drunkenness, because consistent with so many other conclusions.

"Had the trial court, upon the evidence of record in this case, arrived at any finding other than acquittal, this office would have been compelled to recommend a disapproval thereof as being contrary to the evidence and, in fact, wholly without evidence to sustain it.

"Were the situation such as to make the case one requiring that conflicting evidence be carefully weighed in order to assess the credibility and weight which is to be accorded the various witnesses the result would be unaltered, as this matter is one resting peculiarly within the province of the jury, or, where the power to pass upon questions of both law and fact resides [P. 2] in the court, as in this case, then within the province of the court. This proposition is so elementary that it is not considered necessary or profitable to devote much time to it. * * *

"The President of the United States, as recently as July 14, 1919, has directed, with regard to this matter, as follows:

"'No authority will return a record of trial to any military tribunal for reconsideration of—

"'1. (*a*) An acquittal.

"'(*b*) A finding of not guilty of any specification.

"'(*c*) * * *

"'(*d*) The sentence originally imposed, with a view to increase its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

"'2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited. * * *' (G. O. No. 88, War Dept., July 14, 1919).

"It would appear that the return of a naval case to a naval court for reconsideration of an acquittal, or to impose a more severe sentence upon a conviction, would be in direct contravention of the President's published policy in the premises and of his mandate to courts of the military service. Legislation now pending before Congress provides inter alia that cases of acquittal shall not be returned to an Army court martial for reconsideration (H. R. 367).

"In view of the foregoing, it is recommended that the proceedings and finding of the court in the within case of Lieutenant Commander William D. Owens, M. C., U. S. Navy, receive the approval of the Department."

[C. M. O. 312—1919]

ACTION OF THE SECRETARY OF THE NAVY

On December 1, 1919, the Secretary of the Navy approved the proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant Commander William D. Owens, M. C., U. S. Navy, and directed that he be released from arrest and restored to duty.

C. M. O. 312—1919

[P. 1] Lieutenant Colonel Richard P. Williams, U. S. Marine Corps, was tried by general court martial on October 7, 1919, at the U. S. Naval Academy, Annapolis, Md., by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Conduct to the prejudice of good order and discipline (three specifications).

FINDINGS

The court found the specification of the first charge proved, and the accused guilty of the first charge; the specifications of the second charge proved except as to certain words, and the accused guilty of the second charge.

SENTENCE

"The court therefore sentences him, Lieutenant Colonel Richard P. Williams, U. S. Marine Corps, to lose ten (10) numbers in his temporary grade of lieutenant colonel, and to lose ten (10) numbers in his permanent grade of major."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

> "In consideration of his excellent service in the recent war, as shown by reports of fitness and letters from his superior officers, we recommend Lieutenant Colonel Richard P. Williams, U. S. Marine Corps, to the clemency of the reviewing authority."

RETURNED FOR REVISION

On October 24, 1919, the department returned the record to the court, directing the court to reconvene for the purpose of reconsidering its finding on the second specification of the second charge, which should have been "not proved" inasmuch as all words involving criminality had not been proved. The court was further directed to correct certain clerical errors in the record.

[P. 2] FINDINGS IN REVISION

The court revoked its former finding on the second specification of the second charge, and substituted therefore the following finding:

> "The second specification of the second charge, 'not proved.'"

The court adhered to its finding of guilty on the second charge and the first specification.

RECOMMENDATION OF THE MAJOR GENERAL COMMANDANT, U. S. MARINE CORPS

On December 3, 1919, the Major General Commandant placed the following endorsement upon the record:

> "In view of the fact that Lieutenant Colonel Richard P. Williams has been found guilty of the charge of "Drunkenness" and "Conduct to the prejudice of good order and discipline," I am of the opinion that the sentence adjudged by the court is sufficiently mild to preclude my concurring in the unanimous recommendation of the court for clemency, and I therefore recommend approval of the sentence."

[C. M. O. 315—1919]

ACTION OF THE SECRETARY OF THE NAVY

On December 5, 1919, the Secretary of the Navy, being of the opinion that the sentence as adjudged in this case is comparatively mild for the offenses found proven, but in view of this officer's meritorious and commendatory war service overseas, approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Colonel Richard P. Williams, U. S. Marine Corps, and directed that he be released from arrest and restored to duty.

C. M. O. 315—1919

[P. 1] Lieutenant Charles L. Greene, U. S. Navy, was tried by general court martial on October 6, 1919, on board the U. S. S. *Black Hawk*, by order of the Commander, Mine Force, and found guilty of the following charge:

Charge.—Drunkenness on duty (one specification).

SENTENCE

"The court therefore sentences him, Lieutenant (T) Charles L. Greene, U. S. Navy, to be dismissed from the United States naval service."

RECOMMENDATION TO CLEMENCY

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of—

"(1) His length of service in the United States Navy.

"(2) Previous good record.

"(3) Exceptional ability shown both during the war and since the armistice, as evidenced by letters from previous superior officers and his successor in command.

"(4) Hazardous character of work for the past five months, with accompanying mental and physical strain, involving huge responsibilities for one of his rank, and duty of from eighteen to twenty-two hours a day on the mine fields of the North Sea barrage for periods of from one to four weeks, we recommend Charles L. Greene, lieutenant (temporary), U. S. Navy, to the clemency of the reviewing authority."

ACTION OF THE CONVENING AUTHORITY

On November 7, 1919, the convening authority, in referring the record to the Secretary of the Navy for transmission to the President, in conformity with article 53 of the Articles for the Government of the Navy, placed the following endorsement upon the record:

"The preliminary motion entered by the counsel for the accused in the foregoing case of Lieutenant Charles L. Greene, [P. 2] U. S. Navy, to quash the trial, is considered without grounds. Lieutenant Greene was informed, on September 16, 1919, that he had been reported for drunkenness on duty, and a copy of the specification was delivered to him on September 17, 1919. It would appear that the counsel for the accused was attempting to confuse the court and prevent the proper administration of justice. The motion is, therefore, not sustained.

"Subject to the above remarks, the proceedings and finding are approved.

"The unanimous recommendation for clemency by the members of the court is noted. As the convening authority can only remit and cannot commute a sentence, to take favorable action upon this recommendation would allow the accused to escape all punishment. However, before final disposal of this case, it will come for review before higher authority possessed of the power to adapt the sentence to the merits of the case. In view of these facts, the convening authority does not feel that he would be warranted in extending clemency.

"The convening authority adds his recommendation for clemency to that of the court.

"Subject to the above remarks, the sentence is also approved."

[C. M. O. 316—1919]

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 10, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence, but in view of the unanimous recommendation for clemency by the court and on account of the accused's previous good record, his service during the war, and especially the duty performed since the war in the removal of the North Sea mine barrage, recommended that the sentence be remitted to the loss of fifty dollars ($50) per month of his pay for a period of six (6) months.

ACTION OF THE SECRETARY OF THE NAVY

On December 13, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (T) Charles L. Greene, U. S. Navy, but in view of the unanimous recommendation for clemency by the court, the accused's previous good record, and his excellent service during the war, mitigated the [P. 3] sentence to the loss of fifty dollars ($50) per month of his pay for a period of six (6) months, and directed that this officer be released from arrest and restored to duty.

C. M. O. 316—1919

[P. 1] Lieutenant Harold W. Johnson (CEC), U. S. Navy, was tried by general court martial on July 14, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (two specifications).

Charge II.—Falsehood (one specification).

FINDINGS

The court found the first specification of the first charge proved except as to certain words, the second specification of the first charge not proved, and the accused guilty of the first charge in a less degree than charged, guilty of "Neglect of duty"; the specification of the second charge not proved, the accused not guilty of the second charge, and acquitted the accused of the second charge.

SENTENCE

"The court therefore sentences him, Harold W. Johnson, Civil Engineer Corps, U. S. Navy, to lose fifty dollars ($50) per month of his pay for a period of four (4) months."

RECOMMENDATION TO CLEMENCY

The following recommendation to clemency, signed by three of the five members of the court, was spread upon the record:

> "In consideration of the high efficiency, and excellent character of the accused, as testified to, and the favorable impression made by him upon us, we recommend Lieutenant Harold W. Johnson (CEC), U. S. Navy, to the clemency of the reviewing authorities."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On November 8, 1919, the Judge Advocate General, in referring the record to the Chief of the Bureau of Navigation for [P. 2] comment as to disciplinary features, placed the following endorsement upon the record:

> "The accused in this case was tried on two charges, I. Scandalous conduct tending to the destruction of good morals (two specifications), and II. Falsehood. The court found specification 2 under charge I not proved and the specification under charge II not proved, therefore acquitting him of charge II. The first specification of charge I was found proved with

exceptions and the accused was found 'guilty in a less degree than charged, guilty of neglect of duty.'

"It is noted in the review of this case that the court adjourned from September 8, 1919, to September 18, 1919, and again from September 18, 1919, to September 25, 1919. No note is made in the record, nor was a letter appended to the record showing that the authority for these adjournments was granted by the convening authority. Although these adjournments were apparently taken without the sanction of the convening authority as required by the 45th article of the Articles for the Government of the Navy and section 291, Naval Courts and Boards, it is not felt that the interests of the accused were prejudiced.

"The specification found proved by the court and supporting a substitute charge of 'Neglect of duty' is as follows:

"'In that Harold W. Johnson, now a lieutenant, Civil Engineer Corps, U. S. Navy, while so serving as officer in charge of the U. S. Navy fuel depot, Constable Hook, N. J., the site of which had been commandeered by the United States, on or about June 3, 1918, did at said fuel depot, on or about August 15, 1918, the United States then being in a state of war, well knowing that one carload or thereabouts of scrap metal of the value of about $661.35, the property of persons to the Secretary of the Navy unknown, had been sold, did receive into his keeping part of the proceeds of said sale, to wit, $250, and did neglect to take any proper and immediate steps to ascertain ownership of such moneys, which was his duty to do.'

"This specification is faulty and fatally in error, as no offense is alleged therein. It simply relates that the accused was on duty at a certain site which had been commandeered by the Government, and while so on duty he knew of a sale of a carload of scrap metal, from the proceeds of which sale he received [P. 3] into his keeping $250 and neglected to ascertain the true owner of such money, which was his duty to do. Not only does the specification deny that the United States has any property rights in the carload of metal sold but it fails to aver in what way the United States was interested or responsible for the safekeeping or care of this carload of scrap metal. As far as the facts in the specification relate, the metal may have been collected and sold in any country or place in the world, and the fact that the accused knew of the sale did not place any military duty upon him to take steps to ascertain who the true owner of $250 (part of the proceeds) of this sale was. Further the specification does not allege that the accused was not the owner or part owner of the metal, which would not be necessary were the true owners disclosed, but, where they are unknown, any ownership rights of the accused should be denied.

"Where a specification is drawn under a charge of 'neglect of duty,' it must be shown that the duty neglected by the accused was one which was required of him by reason of certain specified naval orders or regulations, and where the duty neglected falls within another class the accused should be charged under scandalous conduct tending to the destruction of good morals or conduct to the prejudice of good order and discipline. It is not shown that the money received by the accused was received by him by reason of naval duties; hence no obligation arose requiring him to ascertain who the true owner of the money received by him was. Failing to endeavor to find the true owner is alleged by the specification to have been the duty neglected. Winthrop's Military Laws and Precedents (p. 582) states as follows: 'Wherever a lesser offense is found, the findings upon the specification and the charge should be so framed as to be consistent, and the finding on the specification should be such as to support the finding on the charge. With this view there should properly be excepted from the specification such words as in law characterize only the superior offense, * * * and in so excepting the court should further substitute * * * other words properly descriptive of the real offense.'

"The court further erred in substituting the charge of 'Neglect of duty' for the charge of 'Scandalous conduct tending to the destruction of good morals,' as the substituted charge is not [P. 4] a lesser kindred one. Winthrop's Military Law and Precedents (p. 581) states as follows: 'Conviction of a lesser kindred offense—This is a species of partial finding

[C. M. O. 316—1919]

familiar to the civil procedure and which at military law illustrates also the practice of exception and substitution. It is properly resorted to where the offense charged is one which includes, as a necessary constituent, another offense of lesser gravity and where the evidence—the accused having pleaded not guilty—falls short of fixing upon the accused the superior but show him to have committed the inferior offense. In such case the court may find him not guilty of the offense charged but guilty of the minor constituent. And it should so find, since otherwise the true degree of criminality in the case will not be pronounced, and the accused will escape conviction and punishment altogether, for if simply found not guilty of the major offense he is fully acquitted of the minor contained within it.

" 'Thus, under a charge of desertion, where the testimony, while showing an unauthorized absence, fails to fix upon the offender the animus peculiar to desertion, the court may, and properly will, find him not guilty of desertion, but guilty of absence without leave, and this whether his plea has been to such effect or he has simply pleaded not guilty. Similarly manslaughter may be found under a charge of murder, larceny under robbery, and an attempt to commit an offense under a charge for the offense itself.

" '* * * It need scarcely be noted that while a court may always convict of a lesser kindred offense, it is not empowered to find a higher or graver offense than the one charged nor an offense of a different nature, etc.'

"It may be clearly seen that a charge of scandalous conduct tending to the destruction of good morals does not necessarily involve neglect of duty and, in fact, more often does not; hence it is an offense of a different nature and, for the reasons cited, is an improper substitution.

"It is recommended that the proceedings, subject to the remarks narrated in paragraph 2, be approved; but, for the reasons set forth in paragraphs 4 and 5, it is recommended that the findings on charge I and the first specification thereunder and the sentence be disapproved. It is further recommended that the finding on specification 2, charge I, and the findings on [P. 5] charge II and the specification thereunder be approved, and that Lieutenant Harold W. Johnson (CEC), U. S. Navy, be released from arrest and restored to duty."

Recommendation of the Bureau of Navigation

On November 17, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence of the general court martial as amended by the remarks made thereon by the Judge Advocate General.

Action of the Secretary of the Navy

On December 6, 1919, the Secretary of the Navy placed the following endorsement upon the record:

"While the accused cannot be legally convicted of the offense found proved, the evidence in this case shows that his conduct has not been of the high standard required of commissioned officers of the Navy, for, while there is some conflict in the evidence as to whether he authorized the sale of scrap metal, yet by his own admission he had knowledge of the sale and had in his custody for an unreasonable period of time, without having made any report thereof to proper authority, a part of the proceeds of the sale.

"It is my opinion, after reading the record of proceedings, that the court would have been fully justified, from the evidence adduced, in finding the first specification of Charge I proved as alleged. But as this opinion is based upon the bare facts set forth in the record, without having had the opportunity of personally observing the bearing and manner of the witnesses as they testified, so as to give relative weight to their testimony, I reluctantly refrained from returning the record of proceedings to the court for revision.

"It is with deep regret that in approving the remarks and recommendations of the Judge Advocate General I must permit the accused to escape all punishment for his conduct in the premises.

[C. M. O. 317—1919]

"Subject to the foregoing remarks, the foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved; accordingly Lieutenant [P. 6] Harold W. Johnson (CEC), U. S. Navy, will be released from arrest and restored to duty."

C. M. O. 317—1919

[P. 1] Lieutenant Commander Christopher Marsden, U. S. Naval Reserve Force, was tried by general court martial on September 29, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and acquitted of the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (seven specifications).

Charge II.—Violation of a lawful order of the Secretary of the Navy (seven specifications).

Opinion of the Judge Advocate General

On December 13, 1919, the Judge Advocate General, in referring the record to the Bureau of Navigation for comment as to disciplinary features, placed the following endorsement upon the record:

"Lieutenant Commander Marsden was brought to trial on September 29, 1919, on charges of 'Scandalous conduct tending to the destruction of good morals' (seven specifications) and 'Violation of a lawful order of the Secretary of the Navy' (seven specifications). The trial extended over a period of 24 days and resulted in the acquittal of the accused on both charges. There are eight volumes of the record, containing 1,405 pages of testimony of witnesses and argument of counsel. These volumes and pages are made up, in a large measure, of testimony and matter irrelevant and wholly incompetent, without which the record could have been greatly reduced and the trial greatly expedited. To comment upon these matters in detail and with thoroughness would require almost as much time and space as was devoted to the trial and the record of the proceedings. Consequently in the interests of brevity and in view of the fact that the accused was not prejudiced by any of the errors of the court, but was acquitted, only the most glaring errors will be commented upon.

"In view of the findings of the court, it is obvious that the court absolutely refused to believe the testimony of any of the Government's witnesses, who were 14 in number, and 13 of whom gave testimony which directly supported the allegations contained in the charges and specifications. It is true that most of the Government's witnesses were self-confessed accomplices in the offenses with which the accused was charged, and the two principal witnesses for the Government in support of the first charge and specifications thereof (Lieutenant B. J. Ellert and Mr. Louis Markowitz) were confessedly parties to the conspiracy in which it was alleged that Lieutenant Commander Marsden participated, but all of the witnesses were testifying against their own interests, with the possible exception of Ellert [P. 2] and Markowitz, one of whom was probably testifying with the hope that his sentence would be mitigated by the department, and the other in the belief that the department would recommend for him immunity from prosecution by the civil authorities.

"Aside from the two witnesses above named there were no less than seven witnesses in support of the charge of violation of a lawful order of the Secretary of the Navy by the enrollment of persons in the U. S. Naval Reserve Force after August 8, 1918. These witnesses were all testifying voluntarily without any hope of reward or fear of punishment. Their stories appear from the record to have been straightforward, and they were unshaken by cross-examination. While it is not difficult to understand how the court refused to believe Ellert and Markowitz, who were the principal witnesses in support of the allegations that Marsden accepted money and presents for enrolling and transferring men, it is difficult, indeed, to understand how the court could reject the testimony offered by all of the other witnesses, whose credibility was not seriously attacked. The only possible answer is that the court absolutely refused to believe them, and accepted

the explanation of the accused testifying in his own behalf. The court was within its rights in doing this, as the court is and must be the sole judge of the credibility of witnesses and the weight which should be given to their testimony. I deem it to be the department's duty, however, to call the attention of courts martial to the fact that while the testimony of accomplices and coconspirators is to be viewed with suspicion and examined critically, the testimony of an accused is of its very nature subject to the same suspicion and critical examination, since 'his interest in the case is "greater than that of any other witness," and therefore may seriously affect the credence that should be given to his testimony' (Winthrop's Military Law and Procedure, 2d ed., vol. 1, p. 544; *Reagan* v. *U. S.*, 157 U. S. 301, 310).

"It is noted with regret that the court failed in its duty of protecting the witnesses from the abuse of counsel for the accused. Although counsel for the accused took advantage of every possible opportunity to vilify and abuse the Government's witnesses and others connected with the prosecution, and most of his assaults were based upon absolutely no evidence before the court of misdeeds or bad character, only on one occasion did the court assert its authority to stop his abuse and vilification. That was when counsel in his argument cast aspersions upon the motive and character of the investigating officer who brought to light the fact concerning the graft in the Third Naval District, and reported to the Department the alleged implication of Lieutenant Commander Marsden. The court on this occasion very properly ordered the remarks of counsel to be stricken from the record (Record, pp. 1361 and 1364). The court, however, should have gone further and reprimanded counsel for his unwarranted attacks upon the investigating officer.

"Among other incompetent evidence offered by counsel for the defense, and received in evidence by the court, was a letter [P. 3] written by Commander Hanus, a character witness for the defense, in which the witness asked to be excused from sitting on the court by which Lieutenant Commander Marsden was to be tried because of his friendship for Lieutenant Commander Marsden. Letters written by a third person to another third person or to the prosecutor are not admissible (16 Corpus Juris 644, and cases cited therein). This letter had absolutely nothing to do with the case. It was not evidence in any sense of the word, but it was admitted by the court over the objection of the judge advocate (Record, p. 929).

"The court also erred in permitting to be introduced, over the objection of the judge advocate, certain papers which appear from the record of the proceedings in this case to be certified records of a civil case tried in the Circuit Court of Allen County, Ind., in October 1900, entitled *Charles F. Phieffer* v. *Benoit J. Ellert, Peter Noll;* also a copy of an indictment filed against Benoit J. Ellert in the Allen County Circuit Court of the State of Indiana containing four counts of alleged forgery, together with an affidavit of the clerk of the court to the effect that there were five other indictments for forgery and uttering forged instruments on file in his office (not specifying against whom said indictments were filed or when or how they were disposed of). There are no conceivable grounds upon which these documents could be lawfully received in evidence by the court martial in this case. They were absolutely irrelevant, incompetent, and immaterial, having no bearing on the case whatsoever. Yet they were admitted by the court, over the objection of the judge advocate to the introduction of the record of the indictment and his statement that the competency of the record of the civil case had not been shown (Record, pp. 1267 and 1284). The judge advocate should have objected to the introduction of the record of the civil proceedings, but he probably regarded it as useless to do so after the action of the court in admitting the copy of indictment. Before these incompetent documents were admitted in evidence the witness Ellert was closely examined concerning them (Record, pp. 1260–1267 and 1284–1297). After said documents were received in evidence and after considerable cross-examination and heckling of the witness Ellert by counsel for the accused in regard to the matters contained therein, the court ordered the copy of the indictment and the testimony concerning the same to be stricken from the record (Record, p. 1297). This action of the court was proper, but it came too late.

[C. M. O. 318—1919]

"It should be remembered by naval courts martial that although evidence that a witness has been convicted of a crime is admissible for the purpose of impeaching him, evidence of a mere accusation or indictment is not admissible for that purpose (*Glover* v. *U. S.*, Fed. Rep. 426). This rule applies to both criminal and civil actions and to all witnesses whether parties or not (*People* v. *Morrison et al.*, 195 N. Y. 116). The reason for this rule ought to be apparent even to the lay mind. Proceedings before a grand jury are ex parte, and the accused has neither the right nor the opportunity to be present and defend. He has not had his day in court, and the indictment [P. 4] against him is at most a mere accusation on which there has been no judgment. The witness Ellert in a vain attempt to defend himself from the unreasonable and unwarranted attack of counsel for the defense very correctly stated: 'Some of the best persons in the world have been indicted and never brought to trial, and the indictments have been dropped' (Record, p. 1296). In the instant case the witness testified under oath that the indictments against him had been dropped, or 'nol prossed.'

"As for the copy of the record of the court of Indiana relating to the civil proceedings in which the witness was a party some 19 years ago, surely no comment is necessary except to say that its introduction in the case was highly improper. There was no question before the court concerning the matter at issue in said proceedings, and certainly there was nothing in the bare record of the case which would shed any light upon the character of the parties thereto or their credibility as witnesses.

"Attacks upon the character and credibility of witnesses were not limited to counsel for the defense, but the accused himself, while on the stand as a witness in his own behalf, was permitted by the court to take a hand in the matter and frequently to state his opinion of the veracity of the Government's witnesses, and what he thought of bribe givers in general (Record, pp. 1210 and 1211).

"It is noted that the findings of the court as recorded in the handwriting of the judge advocate contain an erasure, contrary to section 325, Naval Courts and Boards.

"Subject to the foregoing remarks, it is the opinion of this office that the proceedings, findings, and acquittal of the court in the above-mentioned case are legal, and that none of the errors referred to is such as would invalidate the proceedings or findings."

Concurrence and Recommendation of the Bureau of Navigation

On December 18, 1919, the Bureau of Navigation, concurring in the endorsement of the Judge Advocate General, recommended approval of the proceedings, findings, and acquittal.

Action of the Secretary of the Navy

On December 20, 1919, the Secretary of the Navy approved the proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant Commander Christopher Marsden, U. S. Naval Reserve Force, and directed that this officer be released from arrest and restored to duty.

C. M. O. 318—1919

[P. 1] Commander William F. Amsden, U. S. Navy, was tried by general court martial on October 24, 1919, on board the U. S. S. *Rochester*, by order of the Commander, Destroyer Squadron Three, U. S. Atlantic Fleet, on the following charges:

Charge I.—Improperly hazarding the vessel under his command, in consequence of which she was run upon a shoal and seriously injured (one specification).

Charge II.—Through negligence suffering a vessel of the Navy to be stranded (two specifications).

[C. M. O. 318—1919]

FINDINGS

The court found the specification of the first charge not proved, the accused not guilty of the first charge, and acquitted the accused of the first charge; the first specification of the second charge proved in part, the second specification of the second charge not proved, and the accused guilty of the second charge in a less degree than charged, guilty of "through negligence suffering a vessel of the Navy to be hazarded."

SENTENCE

"The court therefore sentences him, Commander William F. Amsden, U. S. Navy, to be publicly reprimanded by the convening authority.

RETURNED FOR REVISION

On October 27, 1919, the convening authority, being of opinion that the findings were not in accord with the evidence adduced, returned the record of proceedings to the court for the purpose of reconsidering the findings and sentence, calling the attention of the court to the fact that the department has, in many court-martial orders, announced that it does not look with favor upon sentences involving public reprimand.

[P. 2] The court decided respectfully to adhere to its former finding, and to revoke its former sentence and to substitute therefore the following sentence:

> "The court therefore sentences him, Commander William F. Amsden, U. S. Navy, to lose one number in his temporary grade of commander and to lose one number in his permanent grade of lieutenant."

ACTION OF THE CONVENING AUTHORITY

On October 29, 1919, the convening authority approved the proceedings of the general court martial in the foregoing case of Commander William F. Amsden, U. S. Navy; disapproved the findings on the specification of the first charge and on the first charge, and on the second specification of the second charge; approved the findings on the first specification of the second charge and on the second charge, and the sentence, and directed that he be released from arrest and restored to duty.

> "In the opinion of the convening authority, as stated in returning the record to the court for revision, the evidence clearly supports the first charge and the specification thereunder and the second specification of the second charge, and, therefore, in the findings of the court and the inadequate sentence adjudged there has been a failure of justice in this case."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 18, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence in revision, but for the following reasons recommended that the sentence be remitted: The court in its findings found, in effect, that the U. S. S. *Laub* was not run upon a shoal and seriously injured, but that the accused, through his negligence, the weather being foggy, suffered his vessel to be hazarded by failing to take soundings while near shoal water in the vicinity of Cape Cod. In the opinion of the bureau the degree to which the U. S. S. *Laub* was hazarded on this occasion would in a great measure depend upon the density and characteristics of the fog, distance of visibility, time of day, state of the sea, speed and maneuvering [P. 3] qualities of the vessel, nature of the coast line with reference to depth of water and outlying dangers, lookouts stationed, and other special precautions taken. These conditions at the time do not appear to have been fully brought out in this record, and for that reason and the fact that the court found, in effect, that the *Laub* suffered no damage as a result of this hazard the above recommendation is made.

Prudence, usual naval practices, and good judgment should have caused Commander Amsden, as an additional precaution, to have taken soundings and

checked the ship's position by bearings from available radio compass bearing stations, and for this failure the bureau recommended as an entirely separate proceeding that a letter of reprimand be addressed to that officer.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On December 29, 1919, the Acting Secretary of the Navy approved the proceedings, findings, and sentence in revision of the general court martial in the foregoing case of Commander William F. Amsden, U. S. Navy, but disapproved that part of the recommendation of the Bureau of Navigation which recommends that the sentence be remitted.

C. M. O. 320—1919

[P. 1] Lieutenant (J. G.) Felix Roy West, U. S. Naval Reserve Force was tried by general court martial on November 6, 1919, on board the U. S. S. *Idaho* by order of the Commander in Chief, U. S. Pacific Fleet, and acquitted of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (one specification).

Charge II.—Using abusive, obscene, and profane language toward another person in the service (one specification).

Charge III.—Drunkenness (one specification).

RETURNED FOR REVISION

On December 2, 1919, the convening authority returned the record in the foregoing case to the court, and directed that the court reconvene for the purpose of reconsidering the findings, with the following remarks:

> "The question of guilt or innocence apparently hinges on the voluntary or involuntary intoxication of the accused. The fact that the accused was under the influence of some intoxicant and unfit for the proper performance of duty is clearly established. The fact that the accused took several medicines without the advice or consent of the medical officer who was on board ship and also admitted taking two drinks ashore seem to the convening authority to remove beyond a reasonable doubt whether or not the actions of the accused were voluntary or involuntary."

ACTION IN REVISION

The court was of the opinion that the condition of Lieutenant (J. G.) Felix R. West, U. S. Naval Reserve Force, on the night in question was not the result of intoxicants taken for their intoxicant effect, but the result of drugs taken for medicinal purposes, and that while these drugs were taken inadvisedly, they were taken with proper intent, and that the intoxication was consequently involuntary.

"The court therefore respectfully decided to adhere to its former finding."

[P. 2] On December 11, 1919, the convening authority approved the proceedings of the general court martial in the foregoing case of Lieutenant (J. G.) Felix Roy West, U. S. Naval Reserve Force, but disapproved the findings and acquittal for the following reasons: The question of guilt or innocence apparently hinges on the voluntary or involuntary intoxication of the accused. The fact that the accused was under the influence of some intoxicant and unfit for the proper performance of duty is clearly established. The fact that the accused took several medicines without the advice or consent of the medical officer who was on board ship, and also admitted taking two drinks ashore, seem to the convening authority to remove beyond a reasonable doubt whether or not the actions of the accused were voluntary or involuntary. The convening authority directed that the accused be released from arrest and restored to duty.

C. M. O. 321—1919

[P. 11] ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED: ARREST AND ACQUITTAL BY CIVIL AUTHORITIES; NOT A DEFENSE TO.

In a recent case the accused was charged with desertion, the specification alleging that he deserted about June 2, 1919, and remained a deserter until he was delivered to the naval authorities about October 23, 1919. The accused pleaded not guilty and then admitted the absence, and manner of return to the naval service, as alleged in the specification. He then took the stand at his own request and testified that he had been arrested by the civil authorities on June 30, 1919, and held for trial until October 23, 1919, when the case against him was dismissed. The following remarks of the judge advocate appear upon the record: "If this man * * * has been arrested and acquitted, and his acquittal controverts his absence without leave, he is only absent without leave up to such time as he is arrested. If he is convicted, he is then absent until the time he returns. If he is acquitted, he is * * * not absent without leave." The judge advocate then intimates that these conclusions are supported by Naval Digest, 1916. The court found the specification proved with exceptions, i. e., that the accused was absent after leave had expired from June 2, 1919, to June 30, 1919, on which latter date he was arrested by the civil authorities.

It would appear that the reference made to the Naval Digest in the remarks of the judge advocate, quoted above, must be section 3 on page 6, "Arrest and acquittal by civil authorities—A defense to—Where an accused is charged with 'Absence from station and duty without leave' or 'Desertion' and upon his trial by naval court-martial for the offense it is proved that his unauthorized absence was solely due to his arrest and detention by the civil authorities, which detention was followed by an acquittal in the civil court, the accused should be acquitted in the court-martial proceedings. If, however, the unauthorized absence was caused by the misconduct of the accused, as evidenced by his conviction in the civil courts, such facts do not constitute a legal defense to the unauthorized absence (C. M. O. 5, 1912, 3–14; 14, 1914, 4–6)."

It likewise appears that the court in its findings misinterpreted this section, which refers to an unauthorized absence solely due to arrest and detention by civil authorities, which was not the fact in the instant case, the accused being absent without authority at the time of his arrest, for had he not been so absent he would not have been arrested. It therefore follows that the entire absence of the accused was due to his own misconduct, and the court should have found the entire absence proved. Subject to these remarks the Judge Advocate General was of opinion that the proceedings, findings, and sentence were legal (File 26251–22032, J. A. G., Dec. 12, 1919; G. C. M. Rec. No. 45910).

[P. 12] JUDGES ADVOCATE: SHOULD EXERCISE CARE IN REGARD TO THE AUTHENTICITY OF STATEMENTS.

In a recent case an accused was charged with "Uniting with a mutiny." In submitting the case to the court the judge advocate made the following statement in his argument:

> "The very first Article for the Government of the Navy lays down that the punishment of death in time of peace may be adjudged to any one in the naval service who makes or even attempts to make or even being a witness to a mutiny * * *. Then how much more is the offense of the accused aggravated when it is recalled that although the punishment of death may be adjudged in time of peace, yet he and the men with him, united in a mutiny in time of war, yes, in time of actual warfare in the field against bandits."

The judge advocate erred in his argument as article 1 of the Articles for the Government of the Navy does not mention the subject of mutiny. It is realized that a great deal of latitude should be allowed both counsel for the accused and the judge advocate in their closing argument to the court. However, great care should be taken by both in regard to the authenticity of their statements and especially in this so with regard to the judge advocate. He

[C. M. O. 321—1919]

should be careful not to make any misstatements of law or fact because of his advisory status to the court and his duty to safeguard the ends of justice.

The judge advocate also stated to the court that the punishment of death may be adjudged in time of peace for an offense of this kind (uniting with a mutiny). The Judge Advocate General expressed the following opinion thereon, which was approved by the Secretary of the Navy:

> "Article 4 of the Articles for the Government of the Navy provides: 'The punishment of death, or such other punishment as a court martial may adjudge, may be inflicted on any person in the naval service, (1) Who makes, or attempts to make, or unites with any mutiny or mutinous assembly, or, being witness to or present at any mutiny, does not do his utmost to suppress it, etc.' Article 63 of the Articles for the Government of the Navy provides: 'Whenever, by any of the Articles for the Government of the Navy of the United States, the punishment on conviction of an offense is left to the discretion of the court martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe.' The limitation of punishment which the President has prescribed for the offense of mutiny in time of peace for an enlisted man is imprisonment at hard labor for ten years and dishonorable discharge.
>
> "Therefore, as there is no mandatory punishment prescribed for mutiny but the punishment is one of those left to the discretion of the court, article 63 applies, with the result that the limitation of punishment for said offense in time of peace is imprisonment at hard labor for 10 years and dishonorable discharge, and not the death penalty as stated by the judge advocate."

Subject to the foregoing remarks, the Judge Advocate General was of opinion that the proceedings, findings, and sentence were legal (File 26262-6893, J. A. G. Nov. 7, 1919).

[P. 13] SPECIFICATION: NECESSARY ALLEGATIONS IN.

In a recent case an accused was tried by court martial and charged with "Conduct to the prejudice of good order and discipline," the specification alleging that he "did * * * in the village of Lormont, France, unlawfully carry concealed upon his person a blackjack." The carrying of a concealed weapon is not, per se, an offense under either the Federal Statutes, or the Articles for the Government of the Navy, although it is an offense under the laws of certain of the States of the Federal Union, and the mere allegation that an accused did unlawfully carry a concealed weapon does no constitute an offense of which a court martial may take cognizance. To render the above specification sufficient all the facts and circumstances which constitute the unlawfulness must be set down (C. M. O. 237, 1919, p. 16). For the above reasons the Judge Advocate General recommended disapproval of the proceedings and findings on the charge indicated, which recommendation was approved by the Secretary of the Navy (File 26262-6925, J. A. G. Nov. 17, 1919; G. C. M. Rec. No. 45623).

[P. 14] DESERTER: MINOR HAVING ENLISTED FRAUDULENTLY; AMENABILITY TO TRIAL BY GENERAL COURT MARTIAL.

An enlisted man who was a minor fraudulently enlisted by making oath to a false date of birth, and it appears, further, that his consent papers were signed by one X who made oath that he was the grandfather of the man and his sole legal guardian, when in fact Y, the father of the recruit, was and always has been his legal guardian. Subsequently the man deserted and the question involved is the amenability of the man to trial by general court martial having in view his minority and fraudulent enlistment. The law applicable is as follows: "Minors between the age of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardian" (sec. 1419, Revised Statutes, as amended). "When it is afterward found upon evidence satisfactory to the Navy Department that the recruit has sworn falsely as to age, and is under eighteen years of age at the time of enlistment, he shall, on request of either parent, or, in case of their death, by the legal guardian, be released from service in the Navy upon payment of full

[C. M. O. 1—1920]

costs of first outfit, unless in any given case the Secretary, in his discretion, shall relieve said recruit of such payment" (act of March 4, 1913, 37 Stat. 894; reenacted March 3, 1915, 38 Stat. 931). From a careful consideration of the foregoing provisions of law and the facts as above set forth, it is the opinion of the Judge Advocate General that the man is not discharged by his fraudulent enlistment from the criminal liabilities incurred through desertion, and that the enlistment of a minor without the consent of his parents or guardian, either where he has made false representations as to age or where someone other than his parents or legal guardian has acted in their place without proper authority, while valid as to the minor is voidable at the instance of a parent or guardian, and upon application of parent or guardian the civil courts will by habeas corpus proceedings direct the immediate discharge of a minor, except in those cases where disciplinary action his been commenced by the naval authorities, at least until he has answered and satisfied the charges pending against him (Naval Courts and Boards, page 84; *U. S.* v. *Reaves*, 126 Fed. Rep. 127; *Dillingham* v. *Booker*, 163 Fed Rep. 696; 16 Ann. Cas. 127; *Ex parte Rock*, 171 Fed. Rep. 240; see also *Solomon* v. *Davenport*, 87 Fed. Rep. 318; *In re Lessard*, 134 Fed. Rep. 305; *In re Scott*, 144 Fed. Rep. 79; (File 26516–324, J. A. G., December 2, 1919).

[P. 15] NAVAL RESERVE FORCE TRANSFERRED TO THE REGULAR NAVY: REFUND OF COURT-MARTIAL CHECKAGES.

Information having been requested as to the right of refund of court-martial checkages in the cases of members of the Naval Reserve Force who have been transferred to the Regular Navy, the Department expressed the following views: The act of July 11, 1919, authorizes the transfer of enrolled men of the Reserve Force of the Navy and provides "That enrolled men so transfered shall be entitled to and receive the same pay, rights, privileges, and allowances, in all respects as now provided by existing law for men regularly discharged and reenlisted immediately upon expiration of their full four-year enlistment in the Regular Navy or Marine Corps." One of the rights to which a man is entitled when discharged from a four-year enlistment is the refund of court-martial checkages which were remitted by the convening authority subject to the provisions of article 4893, Naval Instructions, 1913. The department held that enrolled men of the Naval Reserve Force transferred to the Regular Navy under the provisions of the act of July 11, 1919, are entitled to the refund of court-martial checkages which were remitted subject to article 4893, Naval Instructions, 1913 (File 26803–112, J. A. G., December 11, 1919).

C. M. O. 1—1920

[P. 1] Boatswain Ernest Godfrey, U. S. Naval Reserve Force, was tried by general court martial on September 12, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and found guilty of the following charges:

Charge I.—Absence from command without leave (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (two specifications).

Charge III.—Forging a signature for the purpose of obtaining payment of a claim against the United States (one specification).

Sentence

"The court therefore sentences him, Ernest Godfrey, boatswain, U. S. Naval Reserve Force, to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of two (2) years."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

"In consideration of his inexperience in the usages and rules of the U. S. Naval Service, and the circumstances connected with this case as testified

to, we recommend Ernest Godfrey, boatswain, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On November 14, 1919, the Judge Advocate General placed the following endorsement upon the record:

"The accused was tried on three charges.

"I. Absence from command without leave.

"II. Scandalous conduct tending to the destruction of good morals.

"III. Forging a signature for the purpose of obtaining payment of a claim against the United States."

[P. 2] "The court found him guilty of all the charges.

"Article 14, section 5, A. G. N., provides for the punishment of forging any signature for the purpose of obtaining payment of any claim against the United States or any officer thereof. The third charge against the accused is:

"'Forging a signature for the purpose of obtaining payment of a claim against the United States.'

"The specification in support of this charge alleges that the accused forged the signature of one ——, E. C., U. S. N. R. F., for the purpose of fraudulently obtaining payment to himself of the claim of the said —— against the United States for pay, to whom the said check had been lawfully sent to satisfy said claim. The evidence in support of this specification is to the effect that the accused received the check for —— as his agent, and that he endorsed it with ——'s name for the purpose of cashing it. The following questions arise:

"(*a*) Is the forged endorsing of a check for the purpose of obtaining the money for which it is an order a forgery for the purpose of obtaining payment of a claim against the United States?

"(*b*) Is the forged endorsing of a pay check for the purpose of obtaining the money for which it is an order a forgery for the purpose of obtaining the payee's claim for pay?

"Bouvier defines a claim to be:

"'A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant,'

and a check to be:

"'A written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money.'

"Section 6383, Compiled Statutes, provides, among other things, that assignments of claims and the instrument of assignment shall be void unless they are freely made and executed in the presence of at least two attesting witnesses. No such restriction exists with a check; it is assigned by endorsement; also claims when allowed are usually paid by checks.

"Section 10317, Compiled Statutes, reads:

"'The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, national (bank) currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks,' etc.

"The next section, 10318, provides that:

"'Every person who, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or security of the United States shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than fifteen years.'

"Section 10199 provides for the presenting of false claims. Compiled Statutes, section 1147, provides:

[P. 3] "'Every claim against the United States cognizable by the Court of Claims shall be forever barred * * * within six years after the claim first accrues,' etc.

"Section 480 provides that checks issued in liquidation of a debt due from the United States and not paid within three years shall be covered into the Treasury and credited to the party in whose favor they were

[C. M. O. 1—1920]

issued. Section 481 provides that this money shall remain as a permanent appropriation for their payment, and section 482 provides for the manner of payment. In *McKnight* v. *U. S.* (13 C. of C. R. 292) the court said with reference to Treasury drafts:

"'Such drafts are understood to constitute new contracts on the part of the Government into which the previous claims upon which they issue are merged.'

"In none of the decisions or statutes referred to or cited is the payment of a check considered or even intimated to be payment of a claim. For instance, section 368, Compiled Statutes, provides that all claims shall be adjusted and settled by the Treasury Department. There is nothing to adjust or settle in the case of a check. The amount is not in dispute. It is payment for a right already adjusted. Again, Naval Instructions, 4888, provides for presenting claims for pay. A Government check is an obligation, it is negotiable, it circulates much as money does, it is payable on demand, is governed by the laws of negotiable instruments, and its forgery is provided against. It is considered as an obligation based on the contract expressed on its face. The word 'claim' in all of the above sections has a definite legal meaning, and there is no reason for believing that another meaning was intended in article 14, A. G. N. Forging a Government check for the purpose of obtaining its payment is forging for the purpose of obtaining another's contractual rights in the check, rights which are assured by sections 480, 481, and 482, C. S., as a trust obligation, not barred by the statute of limitations barring claims. As previously shown checks are considered in the same class as bills and currency.

"Considering the payment of a check as not being payment of a claim, and bearing in mind that the forging of a check is provided for as a crime, it is found that one crime is alleged in the specification and evidence tending to prove another and different crime is relied upon at the trial.

"In *McKnight* v. *U. S.*, supra, it was decided that Treasury drafts constitute new contracts into which the previous claims merge. In *Wardwell* v. *U. S.* (32 C. of C. R., p. 34), it was decided:

"'That the legal character of a demand for goods sold and delivered becomes an obligation of the United States arising upon the new form of indebtedness when checks are issued in payment of the claim. That although the claim for goods sold and delivered would be barred by the statute of limitations, the check, having been issued in liquidation of a just debt due from the United States, and not having been paid in three years, had [P. 4] been carried to the account of "outstanding liabilities," and being covered into the Treasury, became a trust obligation which was not barred by the statute of limitations barring claims.'

"Applying these decisions, it becomes clear that _____'s right to present a claim for pay in the event he were not paid and his right under the contract as represented by the check issued in payment for his services rendered are two separate and distinct rights. For instance, at law if recovery cannot be had for a breach of the contract rights a payee has in a check, he can still recover for services rendered in an action of assumpsit.

"Even if the forgery of a check were considered as the forging of a claim against the United States, to allege that the accused forged the signature of another as endorsee of a check for the purpose of obtaining the payment to himself of the other's 'claim for pay' against the United States, and to prove that it was for the purpose of obtaining the 'rights of the other to the payment of the face value of the check,' i. e., his contract rights under the check, would be a material variance in that it would be alleging a forgery to obtain the payment of one claim and the proving of a forgery to obtain the payment of an entirely different claim. Evidence of a different claim than the one alleged could not make out the one alleged. The one alleged is the one that must be proven.

"Certain matter constituting no legal excuse was introduced in evidence to show the motive for the act and the attending circumstances. In consideration of this the court unanimously recommended clemency. It is pointed out also that the accused has been confined since July 27, 1919."

Subject to the foregoing remarks, it is recommended that the proceedings in the foregoing case of Ernest Godfrey, boatswain, U. S. N. R. F., be approved;

[C. M. O. 4—1920]

that the findings on the third charge and the specification thereunder be disapproved; that the findings on the first and second charges and the specifications thereunder be approved; that, in view of the unusual circumstances of the case, that part of the sentence involving confinement be remitted, and that he be dismissed from the United States naval service.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 4, 1919, the Bureau of Navigation recommended approval of the proceedings and the findings of the general court martial, as amended by the remarks made thereon by the Judge Advocate General, and in view of all the unusual circumstances of this case and the court's recommendation for clemency, recommended that that part of the sentence involving confinement be remitted.

[P. 5] ACTION OF THE ACTING SECRETARY OF THE NAVY

On December 8, 1919, the Acting Secretary of the Navy approved the foregoing remarks of the Judge Advocate General, concurred in by the Bureau of Navigation, approved the proceedings, findings, and sentence of the general court martial, but remitted that portion of the sentence which involves imprisonment, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record of proceedings to the President of the United States, with the recommendation that the sentence, as mitigated, be confirmed.

ACTION OF THE PRESIDENT

On January 2, 1920, the President of the United States confirmed the sentence, as mitigated, of the general court martial in the foregoing case of Boatswain Ernest Godfrey, U. S. Naval Reserve Force.

C. M. O. 4—1920

[P. 1] Lieutenant (J. G.) Benoit J. Ellert, U. S. Naval Reserve Force, was tried by general court martial on August 1, 1919, at the Navy Yard, New York, N. Y., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (fifty-one specifications).

SENTENCE

"The court therefore sentences him, Lieutenant (J. G.) Benoit J. Ellert, U. S. Naval Reserve Force, to be publicly stripped of the insignia of his rank, to be dismissed from the United States naval service, and to be imprisoned at hard labor in such prison or penitentiary as the convening authority may designate for a period of twenty (20) years."

RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On November 7, 1919, the Judge Advocate General recommended that the proceedings, findings, and sentence be approved, but, in view of the fact that Lieutenant Ellert had already been in confinement for nearly a year and other circumstances of the case, that the period of imprisonment be reduced to fifteen (15) years; and that the U. S. naval prison, Portsmouth, N. H., be designated as the place for the execution of so much of the sentence as relates to confinement.

CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On November 11, 1919, the Bureau of Navigation, concurring in the recommendation of the Judge Advocate General, recommended approval of the proceedings, findings, and sentence.

[C. M. O. 5—1920]

ACTION OF THE SECRETARY OF THE NAVY

On November 13, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence, but in view of all the circumstances of the case, reduced that portion of the sentence [P. 2] which involves imprisonment to fifteen (15) years, designated the naval prison, Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence, as reduced, as relates to imprisonment, and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence, as reduced, be confirmed.

ACTION OF THE PRESIDENT

On January 2, 1920, the President of the United States confirmed the sentence, as reduced, of the general court martial in the foregoing case of Lieutenant (J. G.) Benoit Ellert, U. S. Naval Reserve Force.

C. M. O. 5—1920

[P. 1] Lieutenant (J. G.) Thomas Patrick Hogan, U. S. Naval Reserve Force, was tried by general court martial on September 2, 1919, on board the U. S. S. *Black Hawk*, by order of the Commander, Mine Force, and found guilty of the following charges, proved by plea:

Charge I.—Violation of a lawful regulation issued by the Secretary of the Navy (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (two specifications).

Charge III.—Falsehood (two specifications).

SENTENCE

"The court therefore sentences him, Lieutenant (Junior Grade) Thomas Patrick Hogan, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On September 4, 1919, the convening authority approved the proceedings, findings on the second and third charges and on all of the specifications thereunder, and the sentence. Under the first charge the accused plead guilty to "knowingly * * * permit two women * * * to take passage from Inverness, Scotland, to Kirkwall, Orkney Islands, * * *" and his subsequent statement denies all knowledge of their presence on board until the ship was outside Inverness Bay, and then gives reasons which in the estimation of the accused prevented him from getting rid of his unlawful passengers. In other words, he denies culpability, and such denial is inconsistent with the culpability admitted in his plea. The court should have directed him to change his plea to not guilty on charge I. For the foregoing reasons the convening authority disapproved the findings on the specification of the first charge and on the first charge. In conformity with article 53 of the Articles for the Government of the Navy, the record was referred to the Secretary of the Navy for transmission to the President.

[P. 2] RECOMMENDATION OF THE BUREAU OF NAVIGATION

On October 6, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence, as amended by the convening authority's remarks thereon.

ACTION OF THE SECRETARY OF THE NAVY

On October 10, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised

Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On January 2, 1920, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant (J. G.) Thomas P. Hogan, U. S. Naval Reserve Force.

C. M. O. 14—1920

[P. 1] Ensign Albert W. Rader, Supply Corps, U. S. Naval Reserve Force, was tried by general court martial on September 2, 1919, at U. S. Naval Base Seven, by order of the Commander U. S. Naval Forces in France, and found guilty of the following charge:

Charge.—Absence from station and duty without leave (one specification).

SENTENCE

"The court therefore sentences him, Ensign Albert W. Rader, Supply Corps, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

ACTION OF THE CONVENING AUTHORITY

On September 9, 1919, the convening authority approved the proceedings, finding, and sentence of the general court martial, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION OF THE JUDGE ADVOCATE GENERAL

On October 31, 1919, in referring the record to the Bureau of Navigation for comment as to disciplinary features, the Judge Advocate General placed the following endorsement upon the record:

> "The accused in this case was tried for 'Absence from station and duty without leave' and pleaded not guilty thereto. A witness for the prosecution was called and testified to the fact that the commanding officer of the accused had officially reported to him that the accused was absent without leave. This witness further testified that he directed the commanding officer to make that report in writing. The witness then identified the official report and it was offered in evidence. The accused objected to the introduction of this documentary evidence. The objection was overruled by the court. Official reports made [P. 2] contemporaneously with the facts stated therein are admissible as evidence (Nav. Dig. 19, 31; p. 226).
>
> "With this foundation the prosecution introduced in evidence by the testimony of several witnesses confessions made by the accused to these witnesses of the offense charged. The accused in his statement also admitted the facts charged.
>
> "As the letter objected to was an official report as required by article R–3640, U. S. Navy Regulations, I am of the opinion that the court properly admitted it in evidence, and therefore a proper foundation was laid for the admission in evidence of the confessions of the accused."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On November 3, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

ACTION OF THE SECRETARY OF THE NAVY

On November 8, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence be confirmed.

[C. M. O. 17—1920]

ACTION OF THE PRESIDENT

On January 3, 1920, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Ensign Albert W. Rader (SC), U. S. Naval Reserve Force.

C. M. O. 17—1920

[P. 1] Lieutenant Earl T. Lockerby, U. S. Naval Reserve Force, was tried by general court martial on October 8, 1919, at U. S. Naval Headquarters, London, England, by order of the Commander, U. S. Naval Forces Operating in European Waters, and found guilty of the following charges:

Charge I.—Wrongfully and knowingly disposing of property of the United States intended for the naval service thereof (two specifications).

Charge II.—Attempting to execute a fraud against the United States (two specifications).

Charge III.—Scandalous conduct tending to the destruction of good morals (three specifications).

SENTENCE

"The court therefore sentences him, Lieutenant Earl T. Lockerby, U. S. Naval Reserve Force, to be dismissed from the United States naval service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year."

ACTION OF THE CONVENING AUTHORITY

On November 22, 1919, the convening authority placed the following endorsement upon the record:

> "In reviewing the record of the foregoing case of Lieutenant Earl T. Lockerby, U. S. Naval Reserve Force, the convening authority notes that the counsel for the accused objected to the introduction of a note written by the accused to a witness on the grounds that it had not been shown that the note was in the accused's handwriting. The objection was not sustained and the note admitted in evidence. Subsequent examination of the witness showed that he was competent to testify as to the genuineness and authenticity of the note objected to. This fact should have been elicited from the witness prior to the admission of the note as evidence.
>
> "The convening authority further notes that in two separate instances the court improperly permitted the judge advocate to read in open court extracts from the record of an investigation out of which arose the charges of the present trial. This was highly irregular. The proper procedure, in such cases, is to have the judge advocate sworn as a witness, identify the [P. 2] record of the investigation in the manner prescribed in Naval Courts and Boards, and then to testify. In the first of these instances, the judge advocate was apparently endeavoring to establish the value of the articles specified in the specification. In view of the fact that the accused later in the trial admitted in open court the correctness of the values specified, and, also, in view of the fact that the record affirmatively shows that the accused did not object to the judge advocate's reading from the record of the investigation, the convening authority considers the facts thus elicited admissions rather than evidence. The convening authority is unable to conceive the judge advocate's object in introducing the record of the investigation in the second instance, as no evidence material to the issue at trial is brought out.
>
> "Subject to the foregoing remarks, the proceedings, findings, and sentence in the foregoing case of Lieutenant Earl T. Lockerby, U. S. Naval Reserve Force, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is referred to the Secretary of the Navy for transmission to the President."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On December 22, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

[C. M. O. 18—1920]

ACTION OF THE SECRETARY OF THE NAVY

On December 26, 1919, the Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States, with the recommendation that the sentence be confirmed, and designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of that portion of the sentence which involves imprisonment.

ACTION OF THE PRESIDENT

On January 2, 1920, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant Earl T. Lockerby, U. S. Naval Reserve Force.

C. M. O. 18—1920

[P. 1] Second Lieutenant Charles A. Howell, U. S. Marine Corps, was tried by general court martial on September 29, 1919, at Marine Barracks, Quantico, Va., by order of the Secretary of the Navy, and found guilty of the following charges, proved by plea:

Charge I.—Disobeying the lawful order of his superior officer (one specification).

Charge II.—Absence from station and duty after leave had expired (one specification).

Charge III.—Conduct unbecoming an officer and a gentleman (five specifications).

Charge IV.—Breaking arrest (one specification).

Charge V.—Absence from station and duty without leave (one specification).

Charge VI.—Drunkenness (one specification).

Charge VII.—Violation of a lawful general order issued by the Secretary of the Navy (one specification).

SENTENCE

"The court therefore sentences him, Second Lieutenant Charles A. Howell, U. S. Marine Corps, to be dismissed from the United States Marine Corps, and from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year."

RECOMMENDATION OF THE MAJOR GENERAL COMMANDANT, U. S. MARINE CORPS

On October 17, 1919, the Major General Commandant recommended that so much of the sentence as prescribes imprisonment for one year be remitted, with the following remarks:

> "In making this recommendation I am of the opinion that this officer's dismissal from the service is the thing to be desired, and I do not believe that any good purpose would be accomplished by his imprisonment. If the disgraceful manner [P. 2] of his exit from the service is not a sufficient warning to him that his character must undergo a radical change before he can overcome the stigma placed upon him by his confession of guilt to all the charges upon which he was tried, then I am afraid that a year's imprisonment will have no effect."

ACTION OF THE SECRETARY OF THE NAVY

On October 18, 1919, the Secretary of the Navy approved the proceedings, findings, and sentence, but in view of the recommendation of the Major General Commandant, U. S. Marine Corps, remitted so much of the sentence as relates to imprisonment and, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence, as mitigated, be confirmed.

[C. M. O. 30–31—1920]

ACTION OF THE PRESIDENT

On January 3, 1920, the President of the United States confirmed the sentence, as mitigated, of the general court martial in the foregoing case of Second Lieutenant Charles A. Howell, U. S. Marine Corps.

C. M. O. 30–31—1920

[P. 1] Lieutenant Moses K. Goodridge, U. S. Naval Reserve Force, was tried by general court martial on March 5, 1919, at U. S. Naval Headquarters, London, England, by order of the Commander, U. S. Naval Forces Operating in European Waters, on the following charges:

Charge I.—Drunkenness (one specification).

Charge II.—Falsehood (one specification).

Charge III.—Using abusive, obscene, and profane language toward another person in the United States military service (four specifications).

Charge IV.—Conduct unbecoming an officer and a gentleman (two specifications).

FINDINGS

The court found the specifications of the first and second charges not proved, the accused not guilty of the first and second charges, and acquitted the accused of the first and second charges; the first specification of the third charge not proved, the second, third, and fourth specifications of the third charge proved, and the accused guilty of the third charge; the first specification of the fourth charge not proved, the second specification of the fourth charge proved, and the accused guilty of the fourth charge.

SENTENCE

"The court therefore sentences him, Lieutenant Moses K. Goodridge, U. S. Naval Reserve Force, to be publicly reprimanded and to be disenrolled from the U. S. Naval Reserve Force."

RETURNED FOR REVISION

On March 24, 1919, the convening authority, being of the opinion that the sentence adjudged by the court was not adequate to the offenses found proved, returned the record, directing that the court reconvene for the purpose of reconsidering its sentence, with the following remarks:

> "In his closing argument to the court, the counsel for the accused stated as a legal conclusion that dismissal in time of war [P. 2] carries with it loss of citizenship. The judge advocate did not call the attention of the court to the error of the counsel for the accused in this connection. The attention of the court is invited to the fact that dismissal or dishonorable discharge from the naval service of the United States inflicted by reason of conviction of an offense other than that of 'desertion in time of war,' is not attended with loss of rights of citizenship under the laws of the United States."

ACTION IN REVISION

The court decided "respectfully to adhere to its former findings and sentence."

ACTION OF THE CONVENING AUTHORITY

On July 5, 1919, the convening authority approved the proceedings and findings and, in order that the accused might not wholly escape the consequences of his misconduct, the sentence.

> "In reviewing the record of proceedings of the general court martial in the foregoing case of Lieutenant Moses K. Goodridge, U. S. Naval Reserve Force, the convening authority was of the opinion that the sentence adjudged by the court was entirely inadequate to the offenses of which the accused

[C. M. O. 30–31—1920]

was found guilty. The convening authority accordingly reconvened the court for the purpose of reconsidering this sentence; and, as it appeared that the court might perhaps have been influenced by the uncorrected statement of the accused's counsel that a sentence of dismissal in time of war carries with it the loss of United States citizenship, the court's attention was called to the error of this statement.

"The court in its proceedings in revision respectfully adhered to its former sentence, but the case was not further acted upon, by the officer who convened the court, before his detachment and relief.

"His successor, the present reviewing officer, concurs in the opinion that the sentence adjudged is entirely inadequate to the offenses found proved by the court. A reprimand to an officer in the Reserve does not carry the weight that it does to one who is in the permanent service. Similarly, disenrollment from the Reserve at a time when many officers of the Reserve [P. 3] were seeking disenrollment, cannot be regarded as a serious punishment. Together they form an utterly inadequate punishment for an officer found guilty of charges of 'Using abusive, obscene, and profane language toward another person in the United States military service' and 'Conduct unbecoming an officer and a gentleman.' The reviewing authority cannot refrain from expressing his astonishment at the conception the court held of its duty to adjudge a punishment adequate to the offense in adhering, in proceedings in revision, to its sentence after the inadequacy of the sentence had been pointed out by the convening authority."

Second Trial

On June 10, 1919, while awaiting action on his prior trial, Lieutenant Goodridge was again placed on trial, on board the U. S. S. *Israel*, Spalato, Dalmatia, by order of the Commander, U. S. Naval Forces, Eastern Mediterranean, and found guilty of the following charges, proved by plea:

Charge I.—When on shore maltreating and abusing inhabitants of a foreign country (four specifications).

Charge II.—Maltreating a person subject to his orders (two specifications).

Charge III.—Using provoking and reproachful words, gestures, and menaces toward another person in the Navy (one specification).

Sentence

"The court therefore sentences him, Lieutenant Moses K. Goodridge, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Returned for Revision

On June 25, 1919, the convening authority returned the record, directing that the court reconvene for the purpose of reconsidering its sentence, which, in his opinion, was entirely inadequate to the offenses found proved. The convening authority pointed out to the court that the accused pleaded guilty to three very serious charges; that in the evidence offered in extenuation and in his statement he endeavored to justify his actions by stating that in no other way was it possible to protect the interests of the United States Government. In the opinion of [P. 4] the convening authority, such contention is entirely without weight. It is plain if such contentions were generally admitted, an intolerable situation would be created entirely at variance with the dictates of justice, with the rights of civilians and with the rights of enlisted men of the U. S. Navy. The convening authority has never heard of a case where the actions of an officer in striking enlisted men, or in firing a revolver at their heels to hasten their movements, was condoned or even tolerated.

Sentence in Revision

The court decided to revoke its former sentence and substitute therefor the following:

"The court therefore sentences him, Lieutenant Moses K. Goodridge, U. S. Naval Reserve Force, to be dismissed from the United States naval

[C. M. O. 30–31—1920]

service and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year."

ACTION OF THE CONVENING AUTHORITY

On June 26, 1919, the convening authority approved the proceedings, proceedings in revision, and findings. Although he considered the sentence to be inadequate, the convening authority approved the sentence in order that the accused might not entirely escape punishment, designated the naval prison at the Navy Yard, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

OPINION AND RECOMMENDATION OF THE ACTING JUDGE ADVOCATE GENERAL

On October 13, 1919, the Acting Judge Advocate General placed the following endorsement upon the record:

"There are submitted herewith to the Secretary of the Navy the record of proceedings of two general courts martial in the case of Lieutenant Moses K. Goodridge, U. S. Naval Reserve Force.

"In the first case, which was tried at U. S. Naval Headquarters, London, England, March 5, 1919, the accused was found [P. 5] guilty of 'Using abusive, obscene, and profane language toward another person in the United States Military Service' (three specifications), and 'Conduct unbecoming an officer and a gentleman' (one specification), and was sentenced 'to be publicly reprimanded and to be disenrolled from the U. S. Naval Reserve Force.' The court adhered to its former sentence upon the record being returned to it for revision by the Commander, U. S. Naval Forces Operating in European Waters.

"The offenses committed by the accused, even to the extent admitted in his own testimony, together with the surrounding circumstances indisputably established by the evidence, are such as to make the sentence adjudged appear entirely inadequate. The convening authority in approving the sentence stated that he did so 'in order that the accused may not wholly escape the consequences of his misconduct.' The record was forwarded to the Department by the convening authority 'for such action as may be necessary to execute the sentence.'

"In the second case, which was tried on board the U. S. S. *Israel*, Spalato, Dalmatia, June 10, 1919, by order of the Commander, U. S. naval forces, Eastern Mediterranean, the accused pleaded guilty to 'When on shore maltreating and abusing inhabitants of a foreign country' (four specifications), 'Maltreating a person subject to his orders' (two specifications), and 'Using provoking and reproachful words, gestures, and menaces toward another person in the Navy' (one specification). The court sentenced the accused 'to be dismissed from the United States naval service,' and, upon the record being returned to it by the convening authority, changed its sentence by adding thereto, 'and to be imprisoned in such prison or penitentiary as the convening authority may designate for a period of one (1) year.' The convening authority approved the sentence in revision, but in so doing stated that he considered the sentence 'to be inadequate,' and approved same 'in order that the accused may not entirely escape punishment.' The convening authority designated the naval prison, Portsmouth, N. H., as the place for the execution of so much of the sentence as relates to confinement, and referred the record to the Secretary of the Navy for transmission to the President in conformity with article 53 of the Articles for the Government of the Navy.

"The offenses to which the accused pleaded guilty, briefly stated, consisted of his 'willfully and without justifiable cause' assaulting, kicking, and striking Greek inhabitants, including three Greek boys and also an Italian laborer employed in the vicinity of the U. S. Naval Base 25 at Corfu, Greece; also in 'willfully and without justifiable cause' assaulting and striking two enlisted men of the Navy under his command; and in firing his revolver at the heels of an enlisted man

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"The accused offered evidence purporting to be in extenuation of his offenses, but insofar as such evidence relates to the specific offenses charged against him, it is impossible to discover extenuating facts therein. Also the accused made a plea for [P. 6] leniency, in connection with which there are forwarded herewith papers transmitted by the force commander containing sworn statements of witnesses to the various acts set forth in the specifications, from which it appears that the conduct of the accused was brutal and un-American almost beyond belief, and that, had the prosecution's evidence been adduced before the court to substantiate the charges, which was rendered unnecessary by the plea of the accused, a very much more severe sentence must have been adjudged.

"In both of the foregoing cases the accused has filed appeals to the Secretary of the Navy under date of June 27 and July 14, 1919, basing such appeals on the ground principally that the court martial in each case was without jurisdiction to try him upon the charges and specifications in question, for the reason that, after the commission of his offenses he was relieved from active duty in the Naval Reserve Force and that this divested the naval authorities of jurisdiction to punish him for his offenses, notwithstanding his recall to active duty prior to his trials. In my opinion, the contention of the accused in this respect is wholly without merit and should not be sustained. It has previously been decided by the department that a member of the Naval Reserve Force recalled to active duty is subject to trial by court martial for offenses committed by him prior to his release from active duty, and acting upon the advice of the Attorney General, the department has recently asserted jurisdiction to try members of the Naval Reserve Force on inactive duty for offenses committed by them prior to their release from active duty without recalling them to active duty prior to trial. If the department is wrong in asserting jurisdiction in these cases, the accused has his remedy by appeal to the civil courts in habeas corpus proceedings. Certainly in the absence of a contrary ruling by a civil court of competent jurisdiction, whose decision must be accepted as authoritative and final, the department should insist upon its jurisdiction, and proceed in accordance with its prior rulings upon this question.

"The other objections made in the appeals of the accused are also no legal basis for disapproval of the proceedings. Thus the accused contends that the statement and evidence submitted by him in his second trial, in which he attempted to establish extenuating circumstances, are inconsistent with his plea of guilty to the specifications alleging that his conduct was 'without justifiable cause.' However, no such inconsistency is found, as neither the evidence nor statement referred to contain matters amounting to legal justification for the offenses committed by the accused and the allegation 'without justifiable cause' appearing in the specifications refers, of course, to circumstances which in law are sufficient to justify acts otherwise illegal.

"The accused further contends that the findings of the court upon his second trial are based in part upon evidence read from the proceedings of a court of inquiry and therefore the maximum punishment imposed upon conviction cannot extend to dismissal, but must instead be limited to the loss of one hundred [P. 7] numbers in rank, citing section 390, Naval Courts and Boards. However, in this case, as shown by the records, the findings of the court were based upon the plea of the accused. The reference made by him to the use of proceedings of a court of inquiry has relation to certain testimony given before said court of inquiry which was read before the court martial by request of the accused as part of the evidence submitted by him in extenuation. Section 390, Naval Courts and Boards, publishing the limitations of punishment for offenses established before courts martial has no application to this case. (See also section 198 (a), Naval Courts and Boards, Changes No. 1, subparagraph (e). The accused further contends that the proceedings in connection with his second trial were irregular in that certain reports were not previously referred to him for statement, in violation of articles 1404, paragraphs 1 and 2, and 1409, Navy Regulations, 1913. Whatever the facts may be as to this point, the proceedings of the court martial could not possibly be invalidated thereby. Also, inasmuch as the accused pleaded guilty to all speci-

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fications upon this trial, it is obvious that any omission to refer reports to him for statement, if such occurred, could not have been prejudicial to the accused at his trial.

"The accused further contends that, in returning the proceedings of his trial in the second case to the court for reconsideration of the sentence, the convening authority improperly quoted from a letter written by Admiral Benson concerning the charges against him, which letter was based upon reports made prior to the court of inquiry which preceded this trial, and unduly influenced the court martial. Inasmuch as the letter in question was quoted by the convening authority to the court after the accused had pleaded guilty to all the charges and specifications in the case, the views expressed by the admiral concerning the serious nature of the offenses committed by the accused were, at that stage of the proceedings, properly a matter for consideration by the court, if the convening authority saw fit to incorporate same, as he did, in his letter directing the court to reconsider the totally inadequate sentence which had been adjudged. The accused having pleaded guilty, and having been found guilty by the court in accordance with his plea, the question of the punishment which it should adjudge, within legal limitations, was one entirely in its discretion, and concerning which it might take into consideration matters properly submitted to it either in behalf of the accused or in behalf of the Government. Certainly in this case it cannot be said that the court, even in revision, dealt harshly with the accused in the punishment adjudged, which is exceedingly mild for the exceptionally grave acts of misconduct to which he pleaded guilty.

"It is recommended that the proceedings, findings, and sentences in both of the foregoing cases be approved, but that, in view of the sentence of dismissal and imprisonment adjudged in the second case, the sentence imposed by the court martial which tried Lieutenant Goodridge at London, March 5, 1919, be remitted.

[P. 8] CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On October 15, 1919, the Bureau of Navigation recommended approval of the proceedings, findings, and sentences in the two cases, and concurred in the remarks and recommendations made by the Acting Judge Advocate General thereon.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On October 18, 1919, the Acting Secretary of the Navy approved the foregoing recommendations of the Acting Judge Advocate General, concurred in by the Bureau of Navigation, accordingly remitted the sentence adjudged by the general court martial convened on March 5, 1919, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record to the President of the United States with the recommendation that the sentence adjudged by the general court martial convened June 10, 1919, be confirmed.

ACTION OF THE PRESIDENT

On January 3, 1920, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant Moses K. Goodridge, U. S. Naval Reserve Force.

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[P. 16] ACCUSED: LIMITATION OF CROSS-EXAMINATION OF AN; WHO HAS WAIVED HIS CONSTITUTIONAL RIGHT AND TAKES STAND IN HIS OWN DEFENSE

The following excerpt of general court-martial order No. 17, 1910, is reprinted for the information and guidance of the service:

(C. M. O. 17—1910, pp. 12 to 16)

"From the record of proceedings in the case of Charles E. West, fireman first class, alias James Draper, formerly fireman first class, U. S. Navy, who

was tried by general court martial for 'fraudulent enlistment,' it was noted that the accused took the stand as a witness in his own behalf and testified that he was in Hongkong, China, during a portion of the time he was alleged to have been serving in the navy under a previous enlistment, from which it was alleged he had been dishonorably discharged.

"After the accused had testified in his direct examination that he was in Hongkong on a certain date (a matter pertinent to the issue there being tried), he was subjected to cross-examination by the judge advocate on the subject-matter of his testimony. Upon being asked on board what ship he went to Hongkong, and whether he went there by way of the Atlantic or the Pacific Ocean, the witness in each instance declined to answer the question without stating his gronuds for so refusing. A member of the court objected to the witness refusing to answer one of the foregoing questions, whereupon the court sustained the witness in his refusal.

"The witness was questioned further as to whether he was plying his trade in Hongkong, what he did while there to subsist himself, the date when he returned to the United States, and other questions regarding his presence in Hongkong at the time he had testified he was in that city, all of which questions the accused declined to answer.

"The witness was then asked by the judge advocate: 'Why did you refuse to answer the question that I asked, "What were you doing in Hongkong to subsist yourself," and yet you gave an answer to the question by the court that you were aboard ship at Hongkong?' To this question the witness answered: 'I did not understand how to answer it; I was taking advantage of what the court allowed me to protect myself.'

"From this entry on the record it is obvious that the reason for the refusal of the witness to answer the questions put to him on cross-examination was that he was availing himself of the privilege granted him by the court of declining to answer any questions which might criminate or tend to criminate him. This reason for the witness's refusal should appear upon the record, and not be made to appear solely by inference. In fact, the proper course in any case where a witness claims the privilege of declining to answer questions on the grounds of self-crimination is for the witness to state in specific terms why he refuses to [P. 17] answer, and then the court must decide whether or not the privilege should be allowed. In any case where it is rightly claimed and is upheld by the court, the privilege is so complete that the prosecutor will not be allowed to even comment upon the refusal of the witness to answer; nor will he be allowed to draw any unfavorable inferences therefrom.

"In this case the witness was not entitled to the privilege of silence (he being the accused and having voluntarily taken the stand to testify in his own behalf as to certain matters), and the judge advocate should have pressed him for an answer to questions asked him in cross-examination. It was also the duty of the judge advocate to have objected to the refusal of the witness to answer such questions, in spite of the fact that objection was made by a member and overruled by the court.

"The ruling of the court in this case, which practically granted the accused exemption from cross-examination while on the stand as a witness in his own behalf, on the ground that his answers might tend to criminate him, was erroneous and not in accord with the opinions of the best authorities nor the rulings of the highest courts.

"It is a well-settled rule of evidence, recognized by the authorities on military law, that when an accused voluntarily takes the stand as a witness he cannot claim the privilege of silence as to the offenses for which he is on trial; nor can it be claimed on cross-examination where the witness has voluntarily testified without objection as to the subject of the question on the examination in chief (Winthrop's Military Law and Precedents, 2d ed., p. 525; Wharton's Criminal Evidence, sec. 432).

"A clear exposition of this question, as decided by the Supreme Court of the United States, appears in the case of *Fitzpatrick* v. *U. S.* (178 U. S. 304). In this case the defendant was on trial for murder, and after having sworn to an alibi, he went on the stand at his own request. The Supreme Court held it was not error that the trial court permitted questions to be asked him as to where he was on the night of the murder, in whose company he was, etc. Mr. Justice Brown, speaking for the court, said:

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" 'Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement it is clear that the prosecution has the right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts. * * * Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are.'

"In this connection it might properly be noted that witnesses other than the accused cannot claim the privilege of silence after [P. 18] having voluntarily testified without objection as to the subject of the question on examination in chief.

"In the case of *Gill* v. *People* (3 Hun. 187; affirmed, 60 N. Y. 643), where the same question arose, the court said:

" 'Gill chose to take the stand as a witness upon his own behalf, and it then became perfectly proper, and indeed the duty of the court, to interrogate him as fully as might be needful to test the truth of his direct testimony.'

"In the case of *State* v. *Ober* (52 N. H. 459), it was held that the accused refusing to answer on cross-examination, after having taken the stand at his own request, was proper subject for comment to the jury.

"Wharton on Criminal Law, seventh edition, volume 1, section 808, recites as follows:

" '*Waiver to part is waiver to all.*—If the witness voluntarily states a fact, he is bound to state how he knows it, although in so doing he exposes himself to a criminal charge (*State* v. *K.*, 4 N. H. 562). If he waive his privilege so far as to answer one question, he is bound to answer everything relative to the transaction, (*East* v. *Chapman*, 1 M. & Malk. 46; *Low* v. *Mitchell*).

"Rice, in his work on evidence, volume III, page 343, adopts the view that a defendant, having taken the stand as a witness in his own behalf, is subject to examination on all matters pertinent to the issue. He says (citing the Federal Constitution—'No person shall be subject to be twice put in jeopardy for the same offense, nor shall he be compelled in any criminal case to be witness against himself'):

" 'The State must prove the averments and implications of its indictment, and to achieve this result it cannot rely upon the testimony of the party accused. But where, under the emergencies that confront the defendant, he for any reason deems it advantageous to take the stand as a witness in his own behalf, it is not a perversion of common sense and natural justice to say to the State's attorney, "The accused may swear to whatever will exculpate him, but you, on cross-examination, cannot deviate from the rule that confines your questionings to such as have been suggested by the examination in chief." Such a rule as this offers a premium on crime and is a direct encouragement to gross perjury, while it refuses to harmonize with the first elements of natural justice. The accused renounces the privilege of silence by becoming a witness, and in placing himself upon the stand he avowedly and by implication invites and challenges such questioning as may be pertinent to the issues involved—such scrutiny of his conduct as may be fairly deemed within the scope and nature of the indictment. * * * These assumptions are fully vindicated by the entire tenor and trend of modern adjudication.'

"The following excerpts are from volume III, Wigmore on Evidence, sections 2276 to 2278:

" '*Waiver*—(*b*) *By volunteering testimony on the stand.*—(1) The case of the ordinary witness can hardly present any doubt. He may waive his privilege; this conceded. He waives it by exercising his option of answering; this is conceded. Thus [P. 19] the only inquiry can be whether, by answering as to fact X, he has waived it for fact Y. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts, because the privilege exists for the sake of the criminating fact as a whole.

" 'The case of an accused in a criminal trial who voluntarily takes the stand is different. Here his privilege has protected him from being asked even a

single question, for the reason that no relevant fact that could be inquired about would not tend to criminate him (ante, par. 2260). On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all. His situation is distinct from that of the ordinary witness with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come till later, when some part of the criminating fact is asked for, while the accused has the choice at the outset. From the point of view of the actual prescience of witness and accused the result is the same. Each knows well enough that the inquiries will be upon topics relevant to the charge an issue, but that is immaterial. The question is, What does he know as to the connection between the first question and a possible subsequent incriminating question? Now, the accused knows that there must always be such a connection, but in the witness' case there may or may not be such a connection, and if there is not, then his answer cannot be a waiver. The result is, then, that the accused, as to all facts whatever (except those which merely impeach his credit and therefore are not related to the charge in issue), has signified his waiver by the initial act of taking the stand.

" 'The judicial and legislative solutions of this problem have been numerous. Leaving aside for the moment (post, par. 2277), certain rules that are to be distinguished, there are a half dozen forms of solution:

" '(*a*) The first is that the voluntary taking of the stand is a waiver as to all facts, whatever, including even those which merely affect credibility.

" '1872, Church, C. J., in *Connors* v. *People* (50 N. Y. 240), permitting answers as to former arrests as affecting credibility: "The prohibition in the Constitution is against compelling an accused person to become a witness against himself. If he consents to become a witness in the case voluntarily and without any compulsion, it would seem to follow that he occupies for the time being the position of a witness with all its rights and privileges and subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His own act is the primary cause, and if that was voluntary he has no reason to complain."

" 'This goes beyond the limit above suggested. It may be supported on the ground that as the privilege protects the accused [P. 20] against any form of compulsory disclosure as a witness (ante, par. 2263), so its waiver abandons any right to refuse as a witness.

" '(*b*) The second view is the one suggested as correct and appears in varying phraseology. Commonly it is said that the waiver extends to all matters relevant to the issue, meaning thereby to exclude "collateral" matters, i. e., facts merely affecting credibility.

" '1875, Appleton, C. J., in *State* v. *Wentworth* (65 Me. 234, 243): "He was not obliged to testify. He does testify * * * he exonerates himself. He denies the commission of the offense charged. He is subject to cross-examination as the necessary result of his assuming the position of a witness. * * * If he discloses part, he must disclose the whole in relation to the subject matter about which he had answered in part. Answering truly in part with answers exonerating, he cannot stop midway, but must proceed, though his further answers may be self-incriminative. Answering falsely as to the subject matter, he is not to be exempt from cross-examination, because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth." '

"Wigmore further remarks, on page 3155 of the same volume, referring to the accused as a witness:

" 'The subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts except those merely affecting credibility.'

"From the foregoing it is clearly evident that the questions propounded the accused on cross-examination were proper ones and that he should have been compelled to answer them."

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ADEQUATE SENTENCES: DUTY OF COURT TO ADJUDGE PUNISHMENT ADEQUATE TO THE OFFENSE.

An accused was charged with, and pleaded guilty to, "Fraudulent enlistment," and the court sentenced him to be dishonorably discharged. The court then made a unanimous recommendation to clemency. In adjudging the above sentence it is deemed that the court has failed to comply with article 51, A. G. N., which requires that "It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense"; and "Congress, as shown by its legislation on the subject, has evidently not been willing to entrust the power of exercising clemency to courts martial, but has preferred to repose such power in the Secretary of the Navy * * *" (Nav. Dig., 1916, p. 18, Adequate sentences, 3).

It is presumable that when a convening authority refers a case of fraudulent enlistment to a court martial for trial he [P. 21] considers that some punishment greater than discharge is necessary, for otherwise he could void the enlistment on account of the fraud and summarily discharge the man from the service, and a court martial is in fact simply an instrumentality of the executive power, provided by Congress for the President as Commander in Chief to aid him in properly commanding the Army and Navy and enforcing discipline therein.

As to what may in general be considered an adequate punishment for an offense is revealed in the limitations to punishments in time of peace prescribed by the President and the table of offenses of approved sentences published in Court-Martial Orders for the guidance of all concerned.

In this case the court has adjudged a punishment so lenient that the recommendation to clemency becomes an absurdity, because there is nothing to remit without letting the accused escape all punishment, and it was because the convening authority considered it necessary for him to receive some punishment greater than discharge that the case was referred to the court for trial. Subject to the foregoing remarks, the Secretary of the Navy approved the proceedings, findings, and sentence (File 26251–22185, J. A. G., Jan. 30, 1920).

PLEA OF GUILTY: LEGAL EFFECT OF.

In a recent case the accused pleaded guilty to all of the charges and specifications except the fourth specification of the second charge. Nevertheless the prosecution proceeded as though the accused had pleaded not guilty. The effect in law of this plea is that of a confession of the offense or admission of the act as charged (Winthrop), and is the highest kind of conviction of which the case admits (1 Bishop, C. P., sec. 795). Therefore unless the prosecution desired to bring out circumstances of aggravation, which does not appear from the record, the time taken by the prosecution in proving all but the fourth specification of charge II was wasted as the testimony adduced adds nothing to the proof of the other specifications. Subject to the above remarks, the Judge Advocate General recommended that the proceedings, findings, and sentence be approved, which recommendation was approved by the Secretary of the Navy (File 26251–22415, J. A. G., Jan. 31, 1920).

PRECEDENCE: BRIGADIER GENERALS AND REAR ADMIRALS.

The question having been presented as to the precedence of Brigadier General X, U. S. Marine Corps, and Rear Admiral Y, U. S. Navy, the former's commission being of a date prior to that of the latter's commission, the Judge Advocate General expressed the opinion, which was approved by the Secretary of [P. 22] the Navy, that Rear Admiral Y takes precedence over Brigadier General X by virtue of his rank as rear admiral, which is one grade higher than that of brigadier general and corresponds to the rank of major general of the Army and Marine Corps (article 1010 (1), U. S. Naval Regulations, and section 1466, Revised Statutes of the United States).

The provision contained in the war-risk insurance amendment of October 6, 1917, "that brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half of the grade" has never been given effect or

put into operation by the War Department, to which department it most intimately relates. On the contrary the net result of correspondence between the Secretary of War and the Secretary of the Navy was that the former agreed with the latter that the legislation was undesirable and expressed the intention to request of Congress that it be repealed. (See a letter from the Secretary of the Navy to the Secretary of War, dated March 4, 1918, File No. 3980–1402, and the reply from the Secretary of War, dated April 10, 1918.)

It is not known to the department what steps were taken by the Secretary of War looking to the repeal of the above-cited provision, but at least one bill has been introduced in Congress for that purpose. However, it was not enacted into law; and so far as the department is advised the provision of the act of October 6, 1917, above cited, remains unrepealed.

Although said provision has not been repealed, this department cannot act to make it effective for obvious reasons. The department cannot construe it as reducing rear admirals to the rank of brigadier general, and the War Department has not construed it as elevating brigadier generals to the rank of major general or of reducing major generals to the rank of brigadier general. Rear admirals still rank with major generals; and as long as the War Department regards major generals as superior in rank to brigadier generals the Navy Department must, of course, continue to regard rear admirals as superior in rank to brigadier generals, regardless of date of commission (File 2108–437, J. A. G. Dec. 8, 1919).

PRECEDENCE: ORDER OF, DATE FROM TEMPORARY OR PERMANENT COMMISSION.

An officer of the Navy originally appointed ensign (temporary) in August 1917, and commissioned as a permanent ensign August 16, 1918, raised the question as to whether his permanent commission as ensign should not date from the time of his original appointment as temporary ensign. The Judge Advocate General expressed the view, which was approved by the Secretary of the Navy, that officers originally appointed to a temporary office in the Navy under a provision of the act of May 22, 1917, and later commissioned in the same rank or [P. 23] grade take precedence from the date of their permanent commissions and not from the date of their temporary commissions; that on receipt of a permanent commission in the Navy the temporary commission issued to such officers becomes null and void and is superseded by the permanent commission of the later date. C. M. O. No. 72, 1917, p. 20, is applicable only to officers of the permanent Navy who have received a temporary promotion and who later receive a permanent commission in the same rank or grade (File 11130–37:4, March 12, 1918; 28687–27, January 20, 1920).

PROMOTION BY SELECTION: ADDITIONAL NUMBER OFFICER.

X, a temporary rear admiral and additional number in grade (former engineer officer), was selected for promotion to permanent rear admiral. Y, the officer immediately below X in the grade of captain, did not hold a temporary commission as rear admiral. Other junior officers who held temporary commissions as rear admirals were promoted to that permanent rank from July 1, 1919, ahead of X, the latter's promotion being delayed until July 20, 1919, when a vacancy occurred in the permanent grade of rear admiral to which Y could be promoted. *Held*, that additional number officers of the class to which X belongs should be promoted precisely in the same manner as though they were not additional numbers. (See Naval Digest, p. 17.) It was accordingly contrary to practice and prior rulings to delay the promotion of X in order to promote him with the officer next below him. If X had not been an additional number, he would have been promoted to the permanent rank of rear admiral ahead of all officers junior to him who were selected at the same time. Accordingly, held that the request of X to have his nomination corrected to date from July 1, 1919, may legally be granted, and it would be more fully in accordance with the spirit of the law, prior practice, and simplification of precedence if this should be done. However, the question whether or not his request shall be granted is one resting in the sound discretion of the Executive, not controlled by any positive provision of law (File 11130–66, J. A. G., Jan. 26, 1920).

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PROMOTION BY SELECTION: ADDITIONAL NUMBER OFFICERS; VACANCY REQUIRED.

No officer, whether an additional number or not, can be promoted unless a vacancy exists in the grade to which such promotion is made; when a vacancy does exist, if the officer selected and promoted thereto is an additional number, his promotion will not fill same, and another officer, who is a regular number, may accordingly be promoted to such vacancy (File 11130–66, J. A. G., Jan. 26, 1920).

[P. 24] PROMOTION: BY SELECTION; OFFICERS OF EACH GRADE TAKE PRECEDENCE IN ACCORDANCE WITH THEIR SENIORITY IN THE GRADE FROM WHICH PROMOTED AND NOT NECESSARILY FROM THE DATE OF COMMISSION.

The act of August 29, 1916 (39 Stat. 579), entitles officers promoted by selection to take precedence with one another "in accordance with their seniority in the grade from which promoted" and not according to date of commission. Therefore the promotion of Rear Admiral X from a later date than that given his juniors in the permanent grade of captain, who were recommended for promotion by the same selection board, would not cause him to suffer any loss of precedence with reference to such officers whom he would continue to outrank in the grade of rear admiral, notwithstanding their earlier dates of commission. While the act of August 29, 1916, above cited, forbids the promotion of officers from the permanent grade of captain to the permanent grade of rear admiral, unless they have been selected therefor upon the recommendation of a board as therein provided, said act does not purport to require, nor could it constitutionally require, that officers so selected be promoted in any particular order. It was therefore entirely legal for the President to nominate officers junior to Admiral X for promotion from a date earlier than that for which he was nominated, such officers having been duly selected for promotion in accordance with law. However, it was evidently the intention of the law that the officers selected for promotion should be promoted in the order of their standing in the permanent grade from which promoted, and to do otherwise would complicate the resulting questions of precedence by making officers with the permanent rank of rear admiral precede others with the same permanent rank but an earlier date of commission. There is no avoiding the fact that, under the law, when all promotions to a particular grade have been made pursuant to the recommendation of the same selection board the officers so promoted must take precedence in accordance with their standing in the next lower grade. Hence to promote a junior from an earlier date than his senior, although legally permissible, would result in making dates of commission worthless in determining the precedence of such officers, and there would be no guide to arranging their precedence when serving together except by reference to their commissions in the lower grade and evidence establishing the fact that their promotions were made upon the recommendation of the same selection board. It would seem, therefore, in the interest of good administration, that the promotion, as well as the precedence, should be governed in practice by the order of standing in the lower grade (File 11130–66, J. A. G., Jan. 26, 1920).

[P. 25] NAVAL RESERVE FORCE: MEMBERS OF, NOT ON ACTIVE DUTY, MAY BID ON CONTRACTS FOR SUPPLIES TO BE FURNISHED THE GOVERNMENT EITHER ON THEIR OWN BEHALF OR AS AGENTS.

In answering the question as to whether the law prohibits members of the Naval Reserve Force from bidding on contracts for naval supplies, either on their own behalf or as agents, (1) while the reservist is in inactive status, or (2) temporarily on active duty for training, or (3) temporarily on active duty in time of national emergency, the Judge Advocate General expressed the opinion, which was approved by the Secretary of the Navy, that the law which prohibits officers and clerks of the Government from receiving compensation for any service rendered in relation to any contract, etc., to which the United States is a party or interested does not apply to members of the Naval Reserve Force in an inactive status. The opinion of the Judge Advocate General is not conclusive in the matter, however, as the question might resolve itself into a judi-

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cial one, which could be only determined by a proper court. Under existing law members of the Naval Reserve Force are subject to naval laws and regulations only during the period of active service in the Navy of the United States, either at their own request or when called into service in time of emergency or when employed in authorized travel or while wearing the uniform of their respective rank, grade, or rating. It appears that Congress intended that members of the Naval Reserve Force should have absolute freedom of action, except that they might not become officers or enlisted men in any other branch of the military service of the United States or any State thereof, except the Naval Militia. The Navy Department will not prosecute for violation of the above prohibitory laws unless the offender is subject to the laws and regulations of the Navy. The Navy Department, however, cannot speak for the Department of Justice as to the circumstances under which that department will institute criminal proceedings for the punishment of persons alleged to have violated the criminal laws of the United States (File 3973–215:8, J. A. G., Jan. 19, 1920).

[P. 26] PUBLIC PROPERTY: PAYMENT IN CASH BY ENLISTED MAN, IN CASE OF LOSS OF.

Information was requested as to whether an enlisted man may be permitted to make a cash deposit with a supply officer to cover the value of a bugle lost by the man if such action be voluntary on his part and in lieu of being tried by court martial. The department held that there is no law or regulation which requires or permits an enlisted man to make a cash deposit covering the value of lost public property in lieu of being tried by court martial for responsibility for such loss. Such a deposit is not sanctioned or authorized by the department.

If the loss of Government property by an enlisted man is, in the opinion of the man's commanding officer, due to his carelessness or negligence, and such carelessness or negligence is of such a degree as to require disciplinary action, it would appear that the interests of justice require that disciplinary action be taken against him. If the loss is not due to the fault or negligence of the enlisted man, he should not be held responsible for such loss and no action should be taken against him (File 22465–31, Sec. Nav., Jan. 22, 1920).

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[P. 1] Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force, was tried by general court martial on June 30, 1919, at U. S. Naval Base Number Twenty-Nine, Cardiff, Wales, by order of the Base Commander, and found guilty of the following charge:

Charge.—Embezzlement (one specification).

Sentence

"The court therefore sentences him, Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force, to be dismissed from the United States naval service."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

> "In view of the previous good record of the accused, and his apparent misinterpretation of the responsibilities of a naval commander relative to stores and cargo, we, the undersigned members of the court, recommend Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force, to the clemency of the reviewing authority."

Action of the Convening Authority

On July 1, 1919, the convening authority approved the proceedings, finding, and sentence, but in view of the unanimous recommendation to clemency, and in that the evidence adduced shows that as commanding officer the accused

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apparently relied upon the report of the executive officer as regards steps having been taken to bring to the notice of proper authority the portion, ten (10) sacks of flour, which had been withheld from delivery to the American Food Commission at Danzig, Germany, remitted the sentence, and directed that the accused be released from arrest and restored to duty.

[P. 2] OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On September 16, 1919, the Judge Advocate General, in referring the record to the Bureau of Navigation for comment, placed the following endorsement upon the record:

"In reviewing the proceedings of the general court martial in this case it is noted that the accused, Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force, was tried on the charge of "Embezzlement," the specification alleging—

" 'In that Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force, having, while serving as commanding officer on board the U. S. S *Lake St. Regis*, on board said ship, received into his possession and under his control, in the execution and under the color of his office as aforesaid, ten (10) one hundred (100) pound sacks of flour, of aggregate value of about fifty (50) dollars, consigned to the American Food Commission, Danzig, Germany; did, on or about April 2, 1919, at Danzig, Germany, fail to discharge aforesaid flour from aforesaid ship, and did, therein and thereby, then and there embezzle the aforesaid flour, consigned to the American Food Commission, Danzig, Germany; the United States then being in a state of war.'

"Embezzlement is a statutory offense and as such must be construed strictly. In the Articles for the Government of the Navy the crime of embezzlement is provided for only in article 14, in the following terms:

" 'Fine and imprisonment or such other punishment as a court martial may adjudge, shall be inflicted upon any person in the naval service of the United States * * *

" '8. Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use and benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipment, ammunitions, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military or naval service thereof; * * *.'

"The word 'embezzles' is not specifically defined therein and therefore recourse must be had to sections 87–92 of the act of March 4, 1909, 35 Stat. 1088, which define embezzlement by public officers of the United States. A careful analysis of these sections discloses that the ownership of the funds under consideration must not only be in another than the accused, but they must be the public funds of the United States, and that said [P. 3] accused must have obtained possession lawfully and retained it unlawfully against the interest of the rightful owner.

"It is a well-recognized rule of pleading that the essential element of an offense must be affirmatively and specifically set forth in the pleading, and a court is not warranted in taking judicial notice of the existence of any essential elements unless they are so affirmatively and specifically set forth. This rule is fully supported by the case of *Pettibone* v. *United States*, 148 U. S. 202, as follows:

" 'The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital.'

"The specification in this case, in order to support the charge of embezzlement, must, therefore, not only show that the accused did not have a better legal title to goods in question than the party alleged to have been defrauded, but it must affirmatively set forth that the said goods alleged to have been embezzled by the accused were the property of the United States, furnished or intended for the military or naval service thereof. (See sample specification in Naval Courts and Boards, 1917, p. 100). The specification in question alleges that the goods were consigned to the

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American Food Commission, Danzig, Germany, but it fails to allege the ownership thereof, and therefore is fatally defective and not sufficient to support the charge under which it appears.

"In view of the above it is the opinion of this office that the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force, are illegal, and it is recommended that the same be set aside.

"The convening authority, the Commander, U. S. Naval Base No. 29, Cardiff, Wales, on July 1, 1919, in his action on the case of Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force, in view of all the circumstances of the case, etc., remitted the sentence adjudged and directed that the above-named officer be released from arrest and restored to duty. Therefore no further action looking toward the release from arrest and restoration to duty of Lieutenant Commander Jacobsen is required."

[P. 4] CONCURRENCE AND RECOMMENDATION OF THE BUREAU OF NAVIGATION

On September 23, 1919, the Bureau of Navigation recommended disapproval of the proceedings, findings, and sentence, and concurred in the remarks made thereon by the Judge Advocate General. The Bureau noted that the department, as a result of the general court martial of Lieutenant Joseph F. Boulian, U. S. Naval Reserve Force, addressed a letter of caution to Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force.

ACTION OF THE SECRETARY OF THE NAVY

On September 27, 1919, the Secretary of the Navy approved the foregoing recommendation and remarks of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and accordingly disapproved the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander Lawrence Jacobsen, U. S. Naval Reserve Force.

C. M. O. 38—1920

[P. 1] Ensign Elmer Sidney Rodenbaugh, U. S. Naval Reserve Force, was tried by general court martial on October 20, 1919, on board the U. S. S. *Arkansas*, by order of the Commander in Chief, U. S. Pacific Fleet, and acquitted of the following charges:

Charge I—Drunkenness (one specification).

Charge II—Conduct to the prejudice of good order and discipline (three specifications).

RETURNED FOR REVISION

On December 2, 1919, the convening authority returned the record to the court, directing the court to reconvene for the purpose of reconsidering the findings and acquittal, with the following remarks:

"The testimony of the principal witness, Dr. Whitehead, is extremely clear and explicit. The testimony in rebuttal, that of Dr. Richardson, is negative at best. He did not examine the accused. His testimony is simply to the effect that the symptoms described by Dr. Whitehead might have been caused by heat prostration. He admitted that they were also caused by alcoholism. There has been no testimony introduced to prove that the accused was suffering from heat prostration. The testimony of Lieutenant Denny, who is cited by counsel as a witness for the defense, is, on the contrary, a very definite indication of the accused's condition. 'Come, button up your coat; don't make a fool of yourself.' If the accused was so normal, the patrol officer's remarks cited above are at least incomprehensible. Again, the testimony of Lieutenant McFall is clear and definite. He was so certain of the accused's condition that he turned in a report to the commanding officer, and lastly, the accused was placed on the sick list for alcoholism not in line of duty by the medical officer, who had had most ample opportunity, both in the steamer and on board ship, of judging his condition."

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[P. 2] Action in Revision

The court decided respectfully to adhere to its former findings and acquittal, on the following grounds:

"In weighing the evidence both for the prosecution and the defense it appears that, although medical testimony was offered which tended to show a state of drunkenness on the part of the accused, however, the additional testimony of witnesses of his actions prior to getting in the boat, and the impression created on Lieutenant Denny and occupants of the boat, namely, the chief petty officers who testified, leave a reasonable doubt in the minds of the court as to his exact condition in the steamer. It is noticeable that no one, not even the two officers who reported him, smelled alcohol on the breath of the accused, except the principal witness, Dr. Whitehead. The fact that the following two statements in the first part of the testimony of Dr. Whitehead, wherein he stated, 'I heard Mr. Denny, the patrol officer, order the accused into the steamer,' and 'I saw the accused, who was lying in a small boat next the steamer, assisted into the steamer by a junior officer,' both were disproved by the testimony of other witnesses, leaves a taint on the whole of Dr. Whitehead's testimony, principally as to its accuracy and his powers of observation and memory. Again, although the testimony of Lieutenant McFall reads direct and clear, still his manner of testifying was very evasive, as if his memory of the facts was very hazy.

"It struck the court as particularly noticeable that, although the accused's actions, general bearing, and appearance was so normal when he reported his return that the officer of the deck did not report him. It also struck the court as peculiar that his general condition was so normal as testified to by Lieutenants Redman and Ramsay just prior to the turning in of the accused, still that he could be in such a condition of abject helpless drunkenness as Dr. Whitehead testified he found upon his examination of the accused soon thereafter.

"Although Dr. Whitehead's testimony is clear and explicit in ascribing the condition of the accused as due to alcoholism, both from his observation in the steamer and from his examination after arrival on board ship, and true that Dr. Richardson did not examine the accused, however, from the testimony of Dr. Richardson that all the symptoms described by Dr. Whitehead [P. 3] from which he diagnosed the condition of the accused as due to alcoholism could be, from his own (Dr. Richardson's) experience in the tropics, due to the effects of the heat and from eating tropical foods; all this leaves in the minds of the court a reasonable doubt as to the cause of the accused's condition. The fact that no evidence was introduced to show that the accused was suffering from heat prostration does not prove beyond a reasonable doubt that he was not suffering from that cause, especially in the face of Dr. Whitehead's testimony that, in his opinion, it would be impossible to tell whether the accused were suffering from alcoholism, heat prostration, or a combination of both. It was also from these symptoms that Dr. Whitehead placed the accused on the sick list for alcoholism not in the line of duty. The other witnesses for the prosecution who testified as to the condition of the accused as due to alcoholism drew their conclusions from some of these same symptoms.

"In conclusion the court feels that from the above facts the evidence produced by the prosecution does not so far outweigh that produced by the defense as to leave in their minds an absolute proof of the guilt of the accused beyond a reasonable doubt."

Action of the Convening Authority

On January 8, 1920, the convening authority placed the following endorsement upon the record:

"Although the convening authority realizes that the manner of a witness in testifying before a court greatly affects the testimony, still the positive declaration of a medical officer who had had ample and excellent oppor-

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tunity to judge of the condition of the accused seems to be almost incontrovertible evidence of the condition of the accused. Note is made of the fact that question 12, page 18, is not a part of the recorded testimony of Lieutenant Whitehead.

"Again as a separate and independent action Lieutenant McFall on his own responsibility reported the accused for drunkenness.

"It seems incomprehensible to the convening authority, in view of the testimony, how the members of the court could have rendered an acquittal.

"Subject to the above remarks, the proceedings of the general court martial in the foregoing case of Ensign Elmer Sidney Rodenbaugh, U. S. Naval Reserve Force (5), are approved. The [P. 4] findings and acquittal are disapproved for the foregoing reasons. He will be released from arrest and restored to duty."

Opinion of the Judge Advocate General

On January 22, 1920, in referring the record to the Bureau of Navigation for comment, the Judge Advocate General placed the following endorsement upon the record:

"The accused in this case, under charge I, was charged with 'Drunkenness,' supported by one specification; under charge II with 'Conduct unbecoming an officer and a gentleman,' supported by two specifications; and under charge III with 'Drunkenness on duty,' supported by one specification, the time under each specification having been alleged as 'on or about July 27, 1919.' The specification of charge I alleged that accused was 'while on shore leave under the influence of intoxicating liquor.' The first specification of charge II alleged that accused was 'so much under the influence of liquor as to require assistance in getting into a steamer'; the second specification alleged that he was 'so much under the influence of intoxicating liquor on board a steamer from the U. S. S. *Texas* that he was nauseated and unable to sit up * * * in the presence of many enlisted men * * *.' The specification of charge III alleged that accused having returned to his station and duty on board the U. S. S. *Texas*, was 'placed on the sick list for intemperate use of alcoholic liquors.'

"Counsel for accused objected that the charges and specifications were not in due form and technically correct in that (*a*) the specifications of charges I, II, and III did not state with sufficient exactness the time of the offenses; (*b*) specifications 1 and 2 under charge II did not support the charge, although they did support charge I; (*c*) the specification of charge III did not specifically state what duty accused was performing, nor were the words, 'on duty' included therein; and (*d*) that charge III is a duplication of charge I. For the foregoing reasons counsel for accused moved that charges II and III be stricken out and that the specifications thereunder, if retained, be included in the first charge.

"The court sustained accused's counsel's objections and communicated same to the convening authority, who subsequently authorized change in charge II to 'Conduct to the prejudice of [P. 5] good order and discipline,' withdrew charge III, and changed the specification thereunder to specification 3 of charge II.

"On reopening of the case counsel for accused objected to the amended charges and specifications on the ground that there was lack of definiteness as to time and that there was also a plurality of charges. The court overruled the objection, proceeded with the trial, and accused was acquitted.

"The convening authority returned the record of said proceedings to the court for reconsideration, on the ground that, in his opinion, the finding was not in accord with the evidence; the court, after proceedings in revision, returned same, stating that it adhered to its original findings and acquittal; and the convening authority disapproved the findings and acquittal and ordered accused's release from arrest and restoration to duty.

"The department has held that while there is no rule of law which prohibits the formulation of the same charge under more than one article, the rule which permits such duplication is not to be availed of when the offense falls quite clearly within the definition of a specific article, where

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there are no aggravating circumstances distinguishing it from the ordinary case and when there is no necessity to resort to multiplicity or plurality of charges (Nav. Dig., p. 66, par. 61).

"The allegations contained in specification 1 of the amended charge II, and as apparently attempted to be alleged in specification 3, do not set forth aggravating circumstances of charge I, but merely relate matters of evidence upon which the charge of 'Drunkenness' was based. As such there is a multiplicity of charges, and the remarks contained on page 66, paragraph 62, Naval Digest, are applicable, namely, 'it would appear that the facts alleged * * * that there had been but one act of becoming intoxicated and but one resulting state of intoxication. The mere fact that the location of the accused may have changed while intoxicated does not in itself constitute a distinct offense. * * * To hold otherwise would be, in effect, to allow a different specification for every second a man's intoxication might continue.'

"The third specification, however, of the amended charge II does not, as was apparently intended, charge that the accused was 'from previous indulgence in intoxicating liquors incapacitated for a proper performance of his duties to such an extent as to necessitate his being placed on the sick list' (fifth specimen [P. 6] specification on page 89, Naval Courts and Boards) but merely alleges that he 'was placed on the sick list' for the reason stated. That is to say, the charge against the accused is for the effect and not for the cause, an analogous case of which would be an allegation that one 'was arrested by the civil authorities for larceny,' in view of which I am of opinion that the specification fails to allege an offense.

"The second specification of the amended charge II does, in my opinion, allege an aggravating circumstance of the principal offense, in that the accused was in the alleged disgraceful condition in the presence of enlisted men, which is certainly conduct to the prejudice of good order and discipline, and therefore there was no error with respect to the charge and specifications last mentioned above.

"Subject to the foregoing remarks, in the opinion of this office, the proceedings, findings, and acquittal of the general court martial in the foregoing case of Ensign Elmer S. Rodenbaugh, U. S. Naval Reserve Force, are legal."

C. M. O. 46—1920

[P. 1] Lieutenant Cecil N. Henriques, Supply Corps, U. S. Naval Reserve Force, was tried by general court martial on January 7, 1920, at the Naval Station, New Orleans, La., by order of the Secretary of the Navy, and acquitted of the following charges:

Charge I.—Embezzlement (two specifications).

Charge II.—Scandalous conduct tending to the destruction of good morals (five specifications).

Opinion of the Judge Advocate General

On February 16, 1920, in referring the record to the Chief of the Bureau of Navigation for comment, the Judge Advocate General placed the following endorsement upon the record:

The accused in this case was tried on two charges: (I) "Embezzlement," and (II) "Scandalous conduct tending to the destruction of good morals." The court found the specifications under charge I and the fourth specification under charge II not proved. The remaining four specifications under charge II were proved in part, the court excepting the words which attached to the accused any criminal liability.

Based upon these findings the court properly acquitted the accused of the offenses charged, but in finding on the first, second, third, and fifth specifications of charge II, as it did, an unusual and irregular form of finding was introduced.

Naval Courts and Boards, 1917, authorizes a finding of a specification proved in part where such allegations as found proved, place upon the accused a criminal liability to the degree or a less degree than charged, but where no offense is proved by the evidence adduced, the proper finding of a general court martial is to find the specification not proved.

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The purpose of a general court martial is only to determine from the evidence adduced whether or not the accused had committed an offense. In this instance the court's findings on the specifications in question were more in the nature of findings of a board of investigation than those of a general court martial.

It is further noted that throughout the proceedings questions were asked by the counsel for the accused and the court which necessitated answers by the witness which were matters of opinion and not of fact. The judge advocate erred in most instances in not objecting to these questions on the grounds that the opinion requested did not beleng to one of the following three classes of opinion testimony: "* * * Opinions are not admissible except in three cases, as follows: (*a*) Opinions which are conclusions drawn from numerous facts within the [P. 2] daily observation and experience of a witness. Such relate to the demeanor or appearance of a person; his sanity, sobriety, or identity, or his resemblance to another; his physical condition, whether sick or well; his conditions as regards emotion or passion, as to anger, hope or fear, joy or sorrow, excitement or coolness, and the like. These are matters of every-day occurrence, with respect to which all thoughtful persons form conclusions of fact, to which they are competent to testify in a proper case; (*b*) opinions of experts; (*c*) opinions as to handwriting (Forms of Procedure, 1910, pp. 139–140"; Naval Digest, 1916, p. 437, Section 17, "Opinions").

Subject to the above, in the opinion of this office, the proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant Cecil N. Henriques, Supply Corps, U. S. Naval Reserve Force, are legal.

Recommendation of the Bureau of Navigation

On February 20, 1920, the Bureau of Navigation recommended approval of the proceedings, findings, and acquittal.

Action of the Secretary of the Navy

On February 25, 1920, the Secretary of the Navy approved the proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant Cecil N. Henriques, Supply Corps, U. S. Naval Reserve Force.

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[P. 8] APPOINTMENTS TO UPPER GRADES OF STAFF DEPARTMENTS. MARINE CORPS: ARE NOT PROMOTIONS REQUIRING EXAMINATIONS.

The question being presented as to whether an officer of a staff department of the Marine Corps is required to undergo examination for appointment to higher grade in that department when such appointment is for the term of four years only, the Judge Advocate General expressed the view, which was approved by the Secretary of the Navy, that such examination is not required, because such appointments to the upper grades of the staff departments of the Marine Corps are not regarded as promotions within the meaning of the act of March 3, 1899, section 20 (30 Stat. 1009), when such appointments are made, as provided by the act of August 29, 1916 (39 Stat. 610), for a term of four years only, instead of for an indefinite period as was formerly the case. Strictly speaking, appointments from a lower grade to a higher grade in the same branch of the service are promotions. Nevertheless, in a case of this character, the officer appointed to the higher grade retains his permanent position in the lower grade while serving under his new commission and upon the termination of his four-year term reverts to his permanent status. Examinations for promotions have always been required by law only in the cases of officers permanently leaving their present grade to enter a higher grade under a permanent appointment thereto. In cases like the present, where an officer retains his permanent place in grade, and is given an additional appointment for a limited period to another place carrying with it higher rank during the term of appointment thereto, such, for example, as in the cases of appointments of naval officers to the position of chief of bureau or judge advocate general, it has never been customary to require an examination.

It may be added that the act of August 29, 1916, governing appointments to the upper grades in the staff departments of the Marine Corps, repeatedly

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refers thereto as "appointments," and although it requires that such appointments be made from the lower grade in the same staff department where there is an officer holding a permanent appointment in such lower grade, it nevertheless does not use the word "promotion" at any time in connection therewith. While this is not controlling, it is indicative of the fact that Congress did not regard such appointments as promotions in the usual sense (File 26521–389, Sec. Nav., Feb. 4, 1920).

[P. 9] CIVILIANS: MAY BE ARRESTED BY NAVAL AUTHORITIES ON NAVAL RESERVATIONS FOR FELONIES OR MISDEMEANORS COMMITTED ON SAID RESERVATIONS.

Information was requested as to whether officers of the Navy or Marine Corps were authorized to arrest civilians who may be apprehended in the act of selling liquor or with liquor in their possession on the Government reservation or within the zones outlined by Navy Department General Orders, Nos. 411 and 412, of 1918. The Judge Advocate General expressed the views, which were approved by the Secretary of the Navy, that since the adoption of the eighteenth amendment to the Constitution of the United States and the enactment of the National Prohibition Act of October 28, 1919, both of which became effective January 16, 1920, and the whole Nation placed on a prohibtion basis, it became the duty of the Commissioner of Internal Revenue and the Attorney General of the United States, under the National Prohibtion Act, to enforce the law throughout the United States. The above-mentioned general orders and the law under which they were issued were not, however, repealed by the amendment to the Constitution nor the National Prohibition Act. On the contrary, section 7 of title 1 of the National Prohibition Act expressly provides that—

> "None of the prohibitions of this act shall be construed to repeal any of the provisions of the 'War Prohibition Act,' or to limit or annul any order or regulation prohibiting the manufacture, sale, or disposition of intoxicating liquors within certain prescribed zones or districts, nor shall the provisions of this act be construed to prohibit the use of the power of the military or naval authorities to enforce the regulations of the President or Secretary of War or Navy issued in pursuance of law, prohibiting the manufacture, use, possession, sale, or other disposition of intoxicating liquors during the period of the war and demobilization thereafter."

The above-mentioned general orders are therefore still in effect and should be enforced.

In the enforcement of said general orders, officers of the Navy or Marine Corps are authorized to arrest civilians who are apprehended in the act of violating any of the provisions of said orders and retain them in custody no longer than is necessary to turn them over to the proper civil authorities of the United States. They are not, however, authorized to arrest civilians except on the Government reservation. Outside of the Government reservation, within the zone prescribed by general orders or outside of said zone, arrests should be made by the civil authorities.

As stated by Mr. Justice Story in *U. S.* v. *Travers* (28 Fed. Cas. No. 16, p. 537):

> "In a military post or garrison every person who is voluntarily there either as a visitor or guest is bound to observe peace and order, and to conduct himself inoffensively. If he excite a riot, if he attempt to stab or wound or kill anyone within the lines, [P. 10] he is liable to be arrested and detained until he can be placed in the hands of the proper tribunals having jurisdiction to punish him. It is not competent for mere military officers in such case to apply imprisonment by way of punishment; but it is their duty to apply it, if necessary, to prevent bloodshed, and to restore peace, and to keep the offender to answer over to a competent tribunal."

The specific offenses referred to Mr. Justice Story are felonies, but the rule is the same in cases of misdemeanors—and violation of the Executive orders above referred to is punishable as a misdemeanor.

With reference to arrest of offenders apprehended in the zone and not on the Government Reservation, the facts should be reported to the United States

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commissioner of that district, or to the United States marshal, and a warrant obtained for the arrest of the offender, which should be served by the United States marshal or some one legally deputized to act for him (File 29163–2, Sec. Nav., Feb. 24, 1920).

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1. CONSTITUTIONAL RIGHTS: PERSONS IN THE NAVAL SERVICE ACCUSED OF CRIME ARE ENTITLED TO CERTAIN OF THE SAFEGUARDS AND GUARANTIES OF THE CONSTITUTION OF THE UNITED STATES, INCLUDING THE RIGHT TO A PUBLIC TRIAL.
2. TRIALS, PUBLIC: AN ACCUSED ON TRIAL BEFORE A NAVAL COURT MARTIAL MAY EXPRESSLY WAIVE HIS RIGHT TO A PUBLIC TRIAL.
3. RETIRED OFFICERS: MEMBERS OF NAVAL COURTS MARTIAL; THE RECORD OF PROCEEDINGS OF A NAVAL COURT MARTIAL ON WHICH RETIRED OFFICERS ARE EMPLOYED AS MEMBERS SHOULD SHOW AFFIRMATIVELY THAT SUCH RETIRED OFFICERS ARE EMPLOYED "ON ACTIVE DUTY" BY PROPER AUTHORITY.
4. RESERVE FORCE: ACTIVE DUTY; MEMBERS OF THE NAVAL RESERVE FORCE MAY BE LEGALLY RECALLED TO ACTIVE DUTY FOR TRIAL BY COURT MARTIAL FOR OFFENSES AGAINST NAVAL DISCIPLINE COMMITTED PRIOR TO THEIR RELEASE FROM ACTIVE DUTY.

X enrolled in the Naval Reserve Force as a seaman in April 1918, and was ordered to active duty in May of the same year. He was released from active duty on December 5, 1918, and shortly after evidence was discovered indicating that he had, while on active duty, committed certain acts in violation of the Articles for the Government of the Navy. As a consequence he was recalled to active duty with the Navy and brought to trial by general court martial, found guilty, and sentenced to five years' confinement and dishonorable discharge. Counsel for the accused now submits a memorandum of law in which the following points are raised:

(1) The trial was held behind closed doors in violation of the right of the accused to a public trial guaranteed by article 6 of the amendments to the Constitution—a right which cannot be waived by the accused.

(2) The court was composed of only five officers, three of whom were retired and therefore not legally authorized to sit as members of a general court martial. The court was therefore not legally constituted and its judgment is null and void.

[P. 11] (3) The accused, being a member of the Naval Reserve Force, and having been relieved from active duty, could not be recalled to active duty solely for the purpose of being tried by court martial for a crime alleged to have been committed prior to the time when he was relieved from active duty.

(4) The evidence presented at the trial of the accused raises a reasonable doubt as to his guilt.

It appears that the ruling was made that the court sit behind closed doors at the request of counsel for the accused, "for the reason that the accused was a member of a New York business concern and any publicity in connection with the matters of which he was accused during the trial might reflect unfavorably upon the business of which he was a member, thereby injuring the other members, who were in no wise connected with this case" (Record, p. 2).

In the case of *Falk* v. *U. S.* (15 App. D. C. 446, 460; cited with approval by the Supreme Court, 181 U. S. 618), in which it was held that the trial of an accused might be proceeded with during his absence where he had escaped from custody, Mr. Justice Morris said:

> "Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield."

It might be urged with equal force that the objection in this case should not be considered because the accused in a criminal case should not be permitted to take advantage of his own wrong were the question originally raised by the accused. This element, however, being absent, this point will be considered wholly upon its merits.

In the discussion of the question as to whether the ruling of the court that the trial should be held behind closed doors was erroneous, points arise which

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are of such vital importance in their effect upon the administration of justice in the Navy as to command the most careful and painstaking consideration. They are:

(*a*) Do the safeguards and guarantees of the Constitution of the United States contained in the first 10 amendments thereof known as the "Bill of Rights" apply to persons in the land and naval forces of the United States?

(*b*) If so, can the guaranty of a "public trial" in all criminal cases be waived by a defendant on trial for crime before a naval court martial?

Although it has been held by former Judge Advocates General of the Navy that the constitutional safeguards and immunities do not apply to members of the naval service on trial for crime before naval courts martial (File 26260–1392, 697, J. A. G., June 29, 1911, p. 29), yet it is noted that former Judge Advocates General have uniformly held that "military courts, [P. 12] though not bound by the letter, are within the spirit of the constitutional guarantees" (see C. M. O. 17, 1910, 9; C. M. O. 47, 1910, 5–6; C. M. O. 49, 1910, 14; C. M. O. 55, 1910, 8; C. M. O. 21, 1910, 9); and that persons on trial before naval courts martial for crime are usually accorded the privileges and immunities guaranteed by the Constitution, either by law, regulation, or departmental ruling. Thus, it is held that the accused is entitled under the sixth amendment to have the assistance of counsel for his defense, and the denial of the right constitutes fatal error (C. M. O. 49, 1910, 14; C. M. O. 55, 1910, 8; Naval Courts and Boards, 1917, sec. 265); that the accused is entitled as of right to be confronted with the witnesses against him (C. M. O. 47, 1910, 9; C. M. O. 49, 1910, 9, 10; C. M. O. 15, 1910, 9; C. M. O. 17, 1910, 12; C. M. O. 21, 1910, 16); that he is entitled to compulsory process for obtaining the presence of witnesses for his defense under the sixth amendment (N. C. & B., 1917, sec. 126; C. M. O. 17, 1910, 9); that he cannot be compelled to give evidence against himself (N. C. & B., 1917, secs. 138, 161; C. M. O. 29, 1914, 10); that no cruel or unusual punishment can be inflicted by a naval court martial (art. 815, U. S. Navy Regulations; art. 49, A. G. N.); that an accused cannot be placed twice in jeopardy for the same offense, such double jeopardy being prohibited by statute in the Army (art. 40, Articles of War); but not in the Navy (Naval Digest, 1916, pp. 296–303); that he must be informed of the charges against him (C. M. O. 21, 1910, 9; art. 43, Articles for the Government of the Navy (sec. 1624, R. S.); that he has the right to be present during all stages of the trial (Naval Courts and Boards, 1917, pp. 9, 10); that he is entitled under the Constitution to "a speedy and public trial" (Naval Digest, 1916, pp. 126, 127; N. C. & B., 1917, sec. 217); that even naval prisoners in naval prisons are entitled to be secure in their papers (letters) from unreasonable searches and seizures (art. 68, Manual for the Government of U. S. Naval Prisons); that, in the absence of legislation, a police officer of a State cannot arrest a military offender without a warrant or military order (*Kurtz* v. *Moffitt*, 115 U. S. 487, 504). In short, the attitude of the Navy Department has been, usually, to insist upon the accused being granted the benefit of these constitutional guarantees, although insisting at the same time that he is not legally entitled to such benefits in the absence of specific legislation.

In the Army the attitude has also been to deny that these constitutional safeguards apply, except as made applicable by statute (Winthrop's Military Law and Precedents, 2d ed., vol. 1, p. 241, note; id., p. 430, note; id., p. 605). Thus, speaking of the right of the accused before an Army court martial to be represented by counsel for his defense, Colonel Winthrop observes that it is a privilege allowed by Army orders, when convenient, and not a right guaranteed by the sixth amendment to the Constitution (id., p. 241). He says in a note on the same page:

> "Art. VI of the amendments to the Constitution provides that 'in all criminal prosecutions' the accused shall 'have the assistance [P. 13] of counsel for his defense.' The reference here is to prosecutions before the criminal courts of the United States only. *Barron* v. *Mayor of Baltimore*, 7 Peters 243, *Ex parte Watkins*, id., 573; *Twitchell* v. *Com.*, 7 Wallace 326; *Edwards* v. *Elliott*, 21 id. 557; *Walker* v. *Sauvinet*, 92 U. S. 90; *Pearson* v. *Yewdall*, 95 U. S. 294; 1 Bishop, C. L. sec. 725; Wharton, C. D. & P., sec 920. Military courts, however, though not bound by the letter, are within the spirit of the provision."

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Also in a note on page 430 of the same volume, speaking of the right of an accused to be confronted by the witnesses against him, Colonel Winthrop says:

> "Art. VI of the amendments to the Constitution, which declares that 'the accused shall enjoy the right * * * to be confronted with the witnesses against him.' has reference only to criminal cases in the Federal civil courts and thus no application to trials by courts martial."

And on page 605 much the same thought is expressed by the writer with reference to cruel and unusual punishments, as follows:

> "The Constitution, in art. VIII of the amendments, provides that 'excessive fines' shall not be 'imposed nor cruel and unusual punishments inflicted.' This provision applies, indeed, only to the courts of the United States, but courts martial, though, as we have seen, no part of the U. S. judiciary and not legally bound by such provision, will properly observe it as a general rule of practice."

It is noted also that in the Army "a court martial is also authorized, in its discretion, to sit with closed doors" (Military Law, Davis, 1913; Digest, Op. J. A. G., 318).

It will appear from the foregoing that the law officers of the Army and Navy have been of the same mind in holding that courts martial "though not bound by the letter are within the spirit of the amendment." That Colonel Winthrop was not referring alone to the safeguards surrounding trial and punishment for crime is indicated by the note on page 1015, volume 2, in Winthrop's Military Law and Precedents, second edition:

> "A statute making it obligatory upon officers or soldiers to attend religeous services on Sunday (or other day) would be of doubtful constitutionality, as opposed to the spirit, if not to the letter, of the organic law."

I agree with Colonel Winthrop and with former Judge Advocates General of the Navy that the fifth amendment, insofar as it requires presentment or indictment by a grand jury, is inapplicable to persons in the land and naval forces, because such persons are expressly exempted; and the sixth amendment, so far as it relates to trial by jury, is also inapplicable (*Ex parte Henderson*, 11 Fed. Cas. 6349; *Ex parte Milligan*, 4 Wall. 3, 123); but that aside from the provision relating to trial by a "jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by [P. 14] law," the spirit of the Sixth Amendment is applicable to persons in the land and naval forces. Furthermore, it is my opinion that all the amendments are applicable to persons in the land and naval forces in letter as well as in spirit, except the sixth amendment, and so much of the fifth amendment as relates to presentment or indictment by a grand jury (*Runkle* v. *U. S.*, 19 Ct. Cls. 410, 411; 22 Op. Atty. Gen. 137; *Weirman* v. *U. S.*, 36 Ct. Cls. 236; 9 Op. Atty. Gen. 230; *Grafton* v. *U. S.*, 206 U. S. 352). Take, for example, the first amendment. If this amendment is inapplicable, Congress can make laws, and the Secretary of War and the Secretary of the Navy can make regulations, establishing a religion for the Army and Navy or restricting the free exercise of any religion; and such law and regulation would be valid, there being no constitutional restriction on the exercise of such power by Congress or executive authority. If the first amendment is inapplicable to the land and naval forces, then, by law or regulation, citizens of the United States who may be for the time being, voluntarily or involuntarily, members of such forces, can be denied the free exercise of their religion, compelled to worship in the form prescribed by law or regulation, curtailed in their freedom of speech, and prohibited from assembling and petitioning the Government for redress of grievances. Surely the framers of the Constitution entertained no such intention.

It is provided by section 217, Naval Courts and Boards, 1917, that—

> "The sessions of courts martial shall be public, and in general all persons except such as may be required to give evidence shall be admitted. (In this connection see C. M. O. 51, 1914, 3, for procedure to be followed in case it is desired to exclude certain classes of persons.)"

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It was provided by U. S. Navy Regulations, 1909, article 1734, that—

> "Courts martial shall be assembled and held in a convenient part of a ship or navy yard, or as may be ordered. The sessions shall be public, and all persons except such as may be required to give evidence shall be admitted."

This provision was repeated in the U. S. Navy Regulations, 1913, article 761, and later inserted in Naval Courts and Boards in the form hereinbefore quoted. In C. M. O. 51, 1914, 3, it is stated that—

> "The sessions of a general court martial shall be public, and in general all persons except such as may be required to give evidence shall be admitted. However, in cases where it may seem desirable that certain classes of spectators, such as women, children, and others, should be excluded during the trial, the court, when convened by the Secretary of the Navy, or the convening authority in other cases, should communicate with the Secretary of the Navy requesting permission therefor and giving a full statement of the reasons. (See, in this connection, Navy Regulations, 1913, R–761; G. C. M. Rec. No. 21478a; File 26504–115, J. A. G., Jan. 24, 1911."

[P. 15] It is provided by the sixth amendment to the Constitution of the United States that—

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *."

This trial was without doubt a "criminal prosecution" in every sense of the term and not a trial for a misdemeanor or "petty crime." The offense for which the accused was tried was a felony, punishable by imprisonment for 15 years at hard labor in time of peace and "as a court martial might direct" in time of war. The accused was therefore entitled to all the privileges and immunities provided by law to safeguard the rights of persons accused of crime. Article 6 of the amendments to the Constitution has heretofore guided the Judge Advocates General of the Navy in such opinions as they have rendered on the question of "public trials," although a former Judge Advocate General stated, in an opinion dated January 24, 1911 (File 26504–115). "It seems evident that this amendment does not refer to trials by court martial." He expressed the view, however, that the spirit of the amendment had impressed itself upon the service, the Navy Regulations, and writers on naval law to such an extent that the amendment was adopted and followed in naval practice regardless of whether courts martial were bound by it as a matter of law. My opinion is that it is the constitutional right of a person in the land and naval forces of the United States accused of crime to enjoy a public trial, and this opinion seems to be in perfect harmony with the practice of the department and not far out of line with the earlier opinions of this office.

In the last-mentioned opinion the Judge Advocate General of the Navy cited Macomb on The Practice of Courts Martial, 1841, page 29, to the effect that—

> "All trials before courts martial, like those in civil courts of judicature, are conducted publicly and with open doors"; also De Hart's Courts Martial, 1846, and Military Law, 1861. In the latter book, on page 94, is the statement that—
>
> "Deliberation of the court takes place always with closed doors. At other times it is open to the public, military, or otherwise, with such restrictions as the convenience of the court and the parties and the capacity of the room may dictate." (See also Harwood on Naval Courts Martial, 1867, p. 65; Coppee's Field Manual of Courts Martial, 1863, p. 50.)

In said opinion of January 24, 1911, the Judge Advocate General of the Navy said:

> "It seems, therefore, that whether (or not) a court martial may technically, within its legal right, close its doors to the public during the trial of an accused, such a procedure is contrary to the authority of text writers on the subject, to the spirit of the Constitution, and to the usual practice of the Federal courts. To permit closed sessions would be to introduce **[P. 16]** a practice into the service that might be made an instrument of oppression contrary to the genius of our laws and institutions, to a sound

public policy, and one which, while upon occasion might be of benefit to an accused, could be made in cases a most objectionable procedure."

With reference to public trials before courts martial it has been said by the Attorney General of the United States (11 Op. Atty. Gen. 141) that—

> "The statutes regulating the course of procedure in military courts show that, in contemplation of Congress, these courts stand on the same footing as other judicial tribunals of the country. Their sittings, for example, are free to the attendance of the public, like those of other courts, and, as if to guard against improper secrecy in the case of courts martial held in the Army, the statute expressly provides that no proceedings or trials in such courts shall be carried on excepting between the hours of eight in the morning and three in the afternoon, except in cases which, in the opinion of the officer appointing the court martial, require immediate example."

Insofar as the opinions of the former Judge Advocates General of the Navy have been to the effect that the constitutional safeguards and guarantees do not apply to persons in the naval service, they have been based primarily upon the concurring opinion of the Chief Justice and three justices of the Supreme Court of the United States in the celebrated case of *Ex parte Milligan* (4 Wall. 1), and upon the Army rulings heretofore cited. At least, *Ex parte Milligan* and Winthrop's Military Law and Precedents are frequently cited as authority for the proposition. There is absolutely nothing in the whole opinion of the court in the *Milligan case* touching on the question in any way, but the concurring opinion does support the proposition that the amendments of the Constitution are inapplicable to the land and naval forces. However, it is of no authoritative consequence, being merely, as the Chief Justice himself denominated it, "a separate statement of their views on the whole case" (p. 132). It was a concurring opinion, but not the opinion of the court.

The Supreme Court held in the case of *Ex parte Milligan*, supra, that presentment or indictment by grand jury and trial by jury are not applicable to persons in the land and naval forces; but there was nothing surprising in this, for the fifth amendment by its very terms excepted "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger," and trial by jury is precluded by the very conditions of the service. It does not follow, however, because the framers of the Constitution specifically excepted cases arising in the land or naval forces from the provision regarding presentment or indictment by grand jury that they intended thereby to except such cases from all the guarantees and immunities of the amendments to the Constitution. On the contrary, under the rule of enumeratio unius est exclusio alterius this specific exclusion indicates that the other safeguards and immunities were intended to apply to cases tried by [P. 17] military and naval courts martial. This much is clear, however, that the views of the four judges in the statement appended to the opinion of the court in *Ex parte Milligan*, supra, are mere obiter dicta, unnecessary to the decision of the case, and not contained in the opinion itself.

Far better authority is the opinion of Mr. Justice Black (9 Op. Atty. Gen. 223, 230), in which he said in no uncertain terms:

> "The Constitution does apply, and is universally admitted to apply, with the same force and effect to military courts as to other tribunals. The protection against double punishment under one conviction is more important in military courts, because they are much more likely to do injustice. They are the most fallible tribunals in all this fallible world."

Also in the case of *Grafton* v. *United States* (206 U. S. 352) the Supreme Court subsequently held that the fifth amendment to the Constitution is applicable to trial by court martial, and said:

> "Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be

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tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States."

In this case the Supreme Court, having the specific question before it, held that the fifth amendment to the Constitution is applicable to trials by court martial. Therefore if it is possible to construe *Ex parte Milligan* as authority for the proposition that the amendments to the Constitution are inapplicable to persons in the land and naval forces of the United States, it falls as such under the weight of the decision in the *Grafton case.*

The constitutions of practically every State of the Union contain the provision that persons accused of crime shall enjoy the right to a public trial, but decisions of the courts concerning this right are surprisingly few and conflicting. Summarizing the decisions of the highest State courts on the question of excluding the public from criminal trials, it is remarked that in no case has any criminal court gone so far as to exclude the entire public, but the orders of courts which have been appealed from usually excepted all of the following persons, besides those connected with the trial: Attorneys at law, officers of the court, newspaper reporters, and friends of the accused. The grounds of exclusion in cases sustained by the appellate courts were, usually, where all the seats in the court room had been filled, to prevent noise or disorder, and to prevent young people and the morbidly curious from listening to obscene and indecent testimony. In the following cases it was held that the constitutional right of the accused to a public trial was not denied by such an order: [P. 18] *Grimmet* v. *State*, 22 Tex. App. 36; 58 Am. Rep. 630; *Stone* v. *People*, 3 Ill. 326; in the absence of an objection by the defendant, *People* v. *Swafford*, 65 Cal. 223; *State* v. *Nyhus* (N. D.), 124 N. W. 71, 27 L. R. A. (N. S.) 487; *State* v. *Callahan*, 10 Minn. 63, 110 N. W. 342; *State* v. *McCool*, 34 *Kans.* 617; 9 Pac. 745; *Jackson* v. *Commonwealth*, 100 Ky. 239, 38 S. W. 422, 1091; *People* v. *Hartman*, 103 Cal. 242; *State* v. *Brooks*, 92 Mo. 542, 5 S. W. 257, 330.

Contrary to the foregoing are the following State cases, in which it was held that the constitutional right of the accused to a public trial was violated by orders of the trial judges excluding spectators, or some classes of spectators. In none of these cases was the entire public excluded: *State* v. *Hensley*, 75 Ohio St. 255, 9 A. & E. Ann. Cas. 108, 9 L. R. A. (N. S.) 277; *People* v. *Murray*, 89 Mich. 276, 14 L. R. A. 809, 50 N. W. 995; *State* v. *Osborne*, 54 Ore. 289, 103 Pac. 63, 20 A. & E. Ann. Cas. 627; *Tilton* v. *State*, 5 Ga. App. 59, 62 S. E. 651; *State* v. *Keeler* (Mont.) L. R. A. 1916 E. 472; *People* v. *Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108; *People* v. *Yeager*, 113 Mich. 228, 71 N. W. 491. In *State* v. *Osborne*, supra, it was held that in the absence of a showing to the contrary, it is presumed that an order excluding the public from the court room was enforced, and such order is also presumed to have prejudiced the defendant.

From an examination of all the leading cases on the subject, it appears that in no case has any court of appellate jurisdiction been called upon to pass upon the legality of an order closing the doors of a criminal court during the trial of a criminal case to the public generally. In all the adjudicated cases the orders of the court excluding persons from the court room have related to particular individuals or classes of individuals, but in no case was the order so drastic as to exclude all the general public. Exceptions have almost invariably been made in favor of newspaper reporters, members of the bar, and, of course, jurors, officers of the court, and others interested in the case on trial.

With reference to the proceedings in criminal courts of the United States, there appear to have been only two adjudicated cases involving the right of an accused to a public trial. The first was the case of *United States* v. *Buck* (24 Fed. Cas. No. 14680) tried in the District Court of the United States for the Eastern District of Pennsylvania, in 1860. This was an indictment against Jeremiah Buck for an attempt to rescue from the custody of the United States marshal a fugitive slave. It appears that during the trial of Buck there was considerable excitement among the colored residents of Philadelphia, many of whom crowded the corridors leading to the court room and clamored for admission into the court room. By reason of the bad temper of the crowd and the fear of a disturbance or attempted rescue by them the marshal took steps to see that colored people were refused admission to the court room during the trial. This action being made known to the court, the court repealed the orders

of the marshal and directed that all persons, white or colored, [P. 19] who properly conducted themselves were to be admitted into the court room. The judge in the case laid down the proposition that a court of the United States ought never to sit with its doors of entrance closed, so as to prevent publicity in its proceedings. He emphasized the fact, however, that the court can, if necessary, in order to preserve the dignity and decorum of its proceedings, exclude any persons threatening the security of the administration of justice.

In *Reagan* v. *United States* (202 Fed. 488) there was an appeal from an order of the District Court of the United States for the Fourth Division of Alaska, one of the grounds of the appeal being that the accused was not given a public trial because of an order of the court excluding all spectators from the court room, although said order allowed court officers, members of the bar, witnesses, and other persons interested in the trial to remain. The United States Circuit Court of Appeals for the Ninth Circuit affirmed the judgement of the district court and, with reference to the above-mentioned assignment of error, said:

> "The trial was not by the order of the court rendered a secret trial. In a sense it was still a public trial. In addition to the court and jury there were present in the court room the officers of the court, the witnesses for the Government and for the defendant, and counsel for the respective parties, and no members of the bar were excluded. These constituted a sufficient number of the public to see that the plaintiff in error was fairly dealt with and not unjustly condemned. * * * We think the better doctrine is that it is not reversible error to exclude the spectators, as was done by the order of the court in the case at bar, when there is no showing whatever that the defendant was prejudiced thereby or deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him. The constitutional provision for a public trial should be construed in a reasonable sense and in view of the object thereby intended to be subserved. The mere denial of the literal right should not be held ground for reversing a judgment unless it can be perceived that the defendant has been deprived of some benefit or advantage thereby."

Admitting the constitutional right of the accused to a public trial, the second question arising under this point is whether he may expressly waive such right, and whether the court may close its doors to the public at the request of the accused, without thereby rendering its proceedings invalid. It has been held in some State cases that the accused can waive his right to a public trial by failure to object or by himself requesting the order (*Benedict* v. *People*, 23 Colo. 126, 46 Pac. 638; *Carter* v. *State*, 99 Miss. 435, 54 So. 734; but there are no Federal cases in which this point has been decided). In *State of Montana* v. *Keeler* (156 Pac. 1080, L. R. A. 1916 E, p. 476) the court said:

> "The courts quite generally, though not uniformly, hold that this provision for a public trial is so far for the personal [P. 20] benefit of the accused that he may waive it, and that he does waive it by failing to object to the order of exclusion (*People* v. *Swafford*, 65 Cal. 223, 3 Pac. 809; *Benedict* v. *People*, 23 Colo. 126, 46 Pac. 637; *Dutton* v. *State*, 123 Md. 373, 91 Atl. 417; *State* v. *Nyhus*, 19 N. D. 326, 124 N. W. 71), or by requesting the order himself (*Carter* v. *State*, 99 Miss. 435, 54 So. 734). The provision is to be given a reasonable construction. It is not to be assumed that it was intended to impose senseless or impossible conditions. When the authorities have made reasonable provision for a court room complaint cannot be made that it has not seating capacity sufficient to accommodate the entire population of the county; nor can complaint be made of an order which closes the doors after the court room is filled (*Myers* v. *State*, 97 Ga. 76, 25 S. E. 252; *State* v. *Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *Jackson* v. *Com.*, 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091; *Kugadt* v. *State*, 38 Tex. Crim. Rep. 681, 44 S. W. 989).

But in *State of Montana* v. *Keeler*, supra, the defendant did not waive his right to a public trial or request the order of the court excluding the public. On the contrary, counsel for the defendant objected to the order at the trial. The Supreme Court of Montana, "because of the error committed in denying the accused a public trial," reversed the judgment and remanded the case for a

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new trial. The court in its opinion held that "the right to have the courts open is the right of the public (*State* v. *Copp*, 15 N. H. 212)," and said:

> "But the public is interested in every criminal trial, that court officers and jurors are kept keenly alive to a sense of their responsibility and the importance of their functions, and interested spectators by their presence are the most potent influence to accomplish this desired end. Cooley, Const. Lim., 2d ed. 441. To the credit of our courts it may be said that the question before us has seldom arisen, but, when it has, the authorities with singular unanimity have upheld the right guaranteed by the Constitution, and have given such construction to the guaranty as vitalizes it and makes it of practical, not merely theoretical, value (*People* v. *Murray*, 89 Mich. 276, 14 L. R. A. 809, 28 Am. St. Rep. 294, 50 N. W. 995, 9 Am. Crim. Rep. 719, followed in *People* v. *Yeager*, 113 Mich. 228, 71 N. W. 491; *State* v. *Osborne*, above; *State* v. *Hensley*, 75 Ohio St. 255, 9 L. R. A. (N. S.), 277, 116 Am. St. Rep. 734, 79 N. E. 462, 9 Ann. Cas. 108; *Tilton* v. *State*, 5 Ga. App. 59, 62 S. E. 651; *People* v. *Hartman*, 103 Cal. 242, 42 Am. St. Rep. 108, 37 Pac. 153; *Williamson* v. *Lacey*, 86 Me. 80, 25 L. R. A. 506, 29 Atl. 943."

The foregoing, it is believed, fairly outlines the adjudicated cases on the subject of "public trials." In them we find very respectable authority for the proposition that publicity of the proceedings should be subordinated to the orderly and proper manner in which they are conducted; that a court must preserve its dignity and decorum, even to the extent of excluding the general public, if necessary; that in cases where the evidence is [P. 21] of an indecent or obscene character the court may exclude persons not connected with the case (although there are decisions to the contrary); and in practically all the cases in which the order of the court has been sustained it was sustained on the ground that the defendant was not prejudiced, nor deprived of the presence, aid, or counsel of any person whose presence might be of advantage to him. Also, that the accused might expressly waive his right to a public trial; and that there are no cases holding expressly that the right cannot be waived by him.

In the instant case the record shows that the accused himself requested that the court sit behind closed doors and the order of the court was entirely in the interest and at the request of the accused. There is nothing in the record or out of it to show that the accused was prejudiced by the order, nor is there any contention that he did not receive a fair trial as a result of such order, or that he was denied the presence or aid of anyone whom he desired to have admitted. On the contrary, it may properly be assumed that the order, having been made in the interest of the accused, would have been modified by the court at his request in order to admit anyone whose presence he desired. It does not lie in his mouth to complain of the order which was made at his request, and which he could have terminated at any time by signifying a desire to have the public admitted to the trial. (See *U. S.* v. *Davis*, 25 Fed. Cas. No. 14923.)

It was held by the Supreme Court of the United States in *Mullan* v. *U. S.* (212 U. S. 519, 520) that an accused in a criminal case may waive the right guaranteed him by the sixth amendment to be confronted by the witnesses against him. Mr. Justice Day, speaking the opinion of the court in that case, said:

> "But we are of the opinion that this was a right which he might waive. In *Schick* v. *United States*, 195 U. S. 65, it was held that a party might, in the case then before the court, waive the right to a trial by jury; and in the course of the opinion Mr. Justice Brewer, speaking for the court, said (p. 71):
>
> "'Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him further right to be confronted with the witnesses against him and to have the assistance of counsel. Is it possible that an accused cannot admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional nor statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.'"

In *Schick* v. *United States* (195 U. S. 65), cited by the court in *Mullan* v. *U. S.*, supra, it was held that the defendant may waive his right to trial by jury in a "petty criminal case" or "misdemeanor"; and that "when there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy." The [P. 22] Supreme Court, in *Schick* v. *United States*, supra, cited with approval *Commonwealth* v. *Dailey*, 12 Cush. 80, in which the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by 11 jurors, and this action was sustained by the Supreme Court of Massachusetts. Chief Justice Shaw, delivering the opinion of the Supreme Court of Massachusetts, said (p. 83):

> "He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court."

If the decision of the Supreme Court in *Schick* v. *United States*, supra, is limited to "petty crimes or misdemeanors," the same cannot be said of the decision of the same court in the case of *Diaz* v. *United States* (223 U. S. 442). In that case the Supreme Court held that an accused on trial for a felony, not capital, and who is not in custody, may waive the right which he is entitled to enjoy under the sixth amendment to be present at the trial and his waiver "leaves the court free to proceed with the trial in like manner and with like effect as if he were present" (p. 455).

The foregoing decisions of the Supreme Court lead inevitably to the conclusion that the right to a public trial, being primarily for the benefit of the accused, may be expressly waived by him, and, if waived, his waiver "leaves the court free to proceed with the trial in like manner and with like effect as if" the proceedings were open to the public. (*Diaz* v. *United States*, supra.) I am of the opinion, therefore, that the error of the court sitting behind closed doors was not, under the circumstances, such as to invalidate the proceedings, findings, or sentence. The error of the court did not result in a secret trial, for the reason that all persons whose presence was desired by the accused were admitted, and a complete record of the proceedings were kept and reduced to writing and a copy of the record furnished to the accused. It was not, however, a public trial within the meaning of the Constitution of the United States and the regulations of the department.

In regard to the second point raised by counsel for the accused, it is urged in the memorandum of law that the court having been composed of three retired officers and two active officers it was not legally constituted, and its judgment was therefore coram non judice. In support of this contention counsel for the accused cites the decision of Judge Pollock in re petition of David A. Henkes for a writ of habeas corpus in the District Court of the United States for the District of Kansas, first division, decided November 28, 1919. In the Henkes case the point was raised that the Army general court martial by which the petitioner was tried and sentenced to dismissal and 25 years' imprisonment at hard labor was without jurisdiction to try him and impose such a sentence, for the reason inter alia that it was composed entirely of retired officers who were disqualified to sit in judgment on his case. The contention of the petitioner was that as a court martial is a court of special and limited jurisdiction, the record of the proceedings of such tribunal [P. 23] must disclose on its face that the court was legally constituted as provided by law and empowered to try the case and render judgment and impose sentence thereon. In support of this contention the petitioner cited the Manual for Courts Martial issued by the Judge Advocate General of the Army, under authority of the Secretary of War, which provides that—

> "A retired officer may be assigned with his consent to active duty upon courts martial in time of peace (act of Apr. 23, 1904, 33 Stat. 264), and if employed on active duty in time of war, in the discretion of the President (sec. 24, act of June 3, 1916, 39 Stat. 183), he is eligible for court-martial duty. At other times he is not available for such duty, except that when placed in command of a post under the act of August 29, 1916 (39 Stat. 627), or when assigned to recruiting duty he may act as summary court martial when he is the only officer present" (Clause 9, section 2, subdivision (B), p. 7, Manual for Courts Martial).

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The court, in sustaining the petitioner's demurrer to the response to the petition, held that, inasmuch as the record made at the trial did not on its face disclose that the members of the court were at the time it was convened "employed in active duty in the discretion of the President" under the act of June 3, 1916, or otherwise qualified to sit on a general court martial, it followed, on the face of the record made, that the court was not constituted as by law provided, unless said record may be supplemented by evidence aliunde to show the fact, if it be a fact, that the members of the court, although retired officers, were at the time in the discretion of the President on active duty. The Government insisted that evidence aliunde could be produced to show this fact. The petitioner denied this contention, and the court sustained the contention of the petitioner that the record itself must show that such retired officers were duly authorized to act. Otherwise the court was without jurisdiction of the case. The court said:

> "A reading and consideration of the record made by the general court martial trying petitioner found in this case disclosed it was composed of ten members, each, at the time, being a retired Army officer. That two of said members were excused from sitting. Hence, the trial was actually proceeded with by eight retired Army officers by the law disqualified to be a member of said court unless theretofore 'in the discretion of the President employed in active duty.' Whether so employed, however, the record made in this case is utterly silent. As it is a record of a court of special and limited jurisdiction, it seems to be conclusively settled its jurisdiction must affirmatively appear on the face of the record, and in the absence of such affirmative showing its judgment is a nullity.
>
> "As from the record made by such a court it must affirmatively disclose on its face the jurisdiction and power of the court, it follows, when the record made discloses want of jurisdiction in the court as composed evidence de hors the record may not be admitted to supplement the same. It follows, on this ground, the demurrer to the response must be sustained."

[P. 24] It is submitted that the decision of the court in the Henkes case has no application to the proceedings of a naval court martial for the reasons—

(1) There is no rule of law or regulation disqualifying retired commissioned officers of the Navy and Marine Corps for duty as members of naval courts martial. Retired commissioned officers are still "commissioned officers of the Navy and Marine Corps." They are themselves subject to trial by court martial, and they are not by any law or regulation prohibited from sitting as members of courts.

(2) In cases where the court is convened by the Secretary of the Navy, as was done in the X case, the record itself shows that the retired officers on the court were so employed on active duty in the manner provided by law, the Secretary of the Navy having authority to order such officers to active duty and the precept itself constituting such orders; and a copy of the precept being attached to the record.

It was provided by section 1462 of the Revised Statutes that no officer on the retired list of the Navy should be employed on active duty except in time of war. It was later provided that a naval officer on the retired list may, with his consent, in the discretion of the Secretary of the Navy, be ordered to active duty in time of peace (act of Aug. 22, 1912, chap. 335, 37 Stat. 329). It was provided by the act of July 1, 1918, that any retired commissioned officer of the Navy or Marine Corps could be ordered to active duty at sea or on shore in the discretion of the Secretary of the Navy (40 Stat. 717) in time of war or national emergency.

There nowhere appears in the laws or regulations relating to the Navy any prohibition against retired commissioned officers sitting on general courts martial. Even if such officers are not employed on active duty, it is doubtful if the point could properly be raised that they are disqualified from sitting on naval courts martial. After retirement they remain commissioned officers of the Navy and are themselves subject to trial by naval courts martial (sec. 1457, R. S.).

It is provided by article 39 of the Articles for the Government of the Navy (sec 1624, R. S.) that:

> "A general court martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not

exceeding thirteen, as can be convened without injury to the service shall be summoned on every such court. But in no case where it can be avoided without injury to the service shall more than one-half, exclusive of the president, be junior to the officer to be tried. The senior officer shall always preside, and the others shall take place according to their rank."

This article does not provide, nor is it provided anywhere in the laws or regulations for the Government of the naval service, that the members of the naval general court martial must be commissioned officers on active duty.

It is conceded that, under the practice of the department, retired officers not on active duty are never employed as members [P. 25] of naval courts martial. It is submitted, however, that a precept signed by the Secretary of the Navy convening a court and designating certain retired commissioned officers as members thereof is in itself sufficient order to active duty, for membership on naval courts martial is active duty. Although additional orders are in practice issued by the Bureau of Navigation and Marine Corps Headquarters, such orders are not necessary to the jurisdiction of the court. It has been heretofore held that the precept is all that is necessary to authorize the officers to act as members of a court (C. M. O. 28, 1910, 5; 33, 1912, 3; 155, 1897; 74, 1899; 103, 1899; 26, 1910, 8). In time of war, when his consent to perform active duty is unnecessary, the precept itself contains all the necessary authority empowering a retired commissioned officer to act as a member of a naval court martial; it is itself an order to him directing him to report for active duty, and further orders are superfluous as far as showing the jurisdiction of the court is concerned (Naval Digest, 1916, p. 465).

In the X case there is a true copy of a precept attached to the record. The precept is dated October 30, 1919, directed to Commodore _____, United States Navy, Retired, Navy Yard, New York, and signed by _____, Acting Secretary of the Navy. This precept orders a general court martial to convene, designating the time and place, for the trial of such persons as may legally be brought before it. The precept states that "the court is composed of the following members, any five of whom are empowered to act, viz"; and then follows the names of eight officers, six of whom are on the retired list. Then follows the provisions: "Detachment of an officer from his ship or station does not of itself relieve him from duty as a member or judge advocate of a court. Specific orders for such relief are necessary." "This employment on shore duty is required by the public interests." At no time was the personnel of the court reduced below five members during the trial of any case. It is submitted that this precept, a true copy of which is attached to the record, constitutes sufficient orders to the retired officers named therein to authorize them to act as members of a naval general court martial, and the precept itself shows the jurisdiction of the court and such officers to act as members thereof. In view of the foregoing I am clearly of the opinion that the record of the proceedings in this case shows upon its face that the court was lawfully constituted, and the second point raised by the accused is without merit.

With regard to the third point raised by counsel for the accused it is stated in the memorandum of law submitted that the accused, being a member of the Naval Reserve Force, and having been relieved from active duty, could not be recalled to active duty solely for the purpose of being tried by court martial for a crime alleged to have been committed prior to the time when he was relieved from such active duty. In support of this point the defense relies upon the decision of Judge Thomas, sitting in [P. 26] the United States District Court for the Eastern District of New York, in the case of *United States of America ex rel. Michael V. Santantonio* v. *Warden or Keeper of the Naval Prison in the Navy Yard, Brooklyn, New York.* It is stated in said memorandum that—

> "It is respectfully submitted that this decision is conclusive on this point, having been rendered in a case in which the facts were identical with the facts in this case."

But the facts in the *Santantonio case* were not identical with the facts in the X case. X was released from active duty in December 1918 before the investigation was instituted which led to his arrest and trial. After his release the evidence of his guilt was discovered and he was ordered back to active

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duty. There is no evidence that he offered any objection to complying with said order, but, tacitly at least, consented thereto. On the other hand, the court in the *Santantonio case* apparently based its decision entirely upon the facts that Santantonio had been previously placed under arrest while on active duty with the Navy, charged with the same offense for which he was afterward placed on trial; that he was later released from arrest by the naval authorities and restored to duty; that after such release from arrest and restoration to duty he was released from active duty with the Navy and given a certificate of honorable service; and that after his release from active duty with the Navy he was arrested, charges preferred against him, and he was confined in the naval prison at the navy yard, New York, to await trial by general court martial. He was not recalled to active duty with the Navy, but was arrested and returned to naval jurisdiction for trial over his protest and against his will. Thereafter he petitioned for a writ of habeas corpus and was released on said writ by Judge Thomas, who held that the Navy Department, having relinquished jurisdiction over the man by releasing him from arrest and restoring him to duty, and thereafter releasing him from active duty, could not of its own volition obtain jurisdiction over him for the purpose of trial by general court martial.

It will be seen from the foregoing that the facts of the two cases are not identical, nor are they controlled by the same laws or the same reasoning. X was recalled to active duty with the Navy by authority of the act of August 29, 1916 (39 Stat. 587), which provides that members of the Naval Reserve Force may be ordered into active service with the Navy in time of war or national emergency. X was ordered into active service by the Navy Department on July 14, 1919, at which time the country was still at war with the Imperial German Government.

Attention is also called to the fact that on July 11, 1919, the naval appropriation act for the fiscal year ending June 30, 1920, was enacted, containing the provision that—

> "The Secretary of the Navy is hereby authorized to call to or continue on active service on strictly naval duties, with their consent, such members of the male members and nurses [P. 27] of the Naval Reserve Force in enlisted ratings as may be necessary to supply deficiencies to maintain the total authorized strength for the periods herein authorized";

and—

> "That during the fiscal year ending June 30, 1920, no member of the Naval Reserve Force shall be called to active duty for training or any other purpose except as hereinbefore provided."

No reference has been made to this statute by counsel for the defendant, but a proper regard for the rights of the accused leads me to call attention to it. It was enacted by Congress after X's recall to active duty was requested by this office, but prior to his actual recall. This act is very specific in its requirement that members of the Naval Reserve Force in enlisted ratings can be called to or continued on active duty only "on strictly naval duties, with their consent," and that "no member of the Naval Reserve Force shall be recalled to active duty for training or any other purpose except as hereinbefore provided." The only purpose "hereintobefore provided" is for "strictly naval duties" and "to supply deficiencies to maintain the total authorized strength for the period herein authorized." Deficiencies existed in the total authorized enlisted strength of the Navy at the time of X's recall, but there is no disguising the fact he was recalled solely for the purpose of trial by naval court martial for the offenses committed by him while on active duty.

Immediately upon reporting for active duty in compliance with the orders issued him in July 1919, X was placed under arrest and held for the trial by naval general court martial. By such arrest the court obtained jurisdiction over his person and, having such jurisdiction, it was, in my opinion, authorized to proceed to try and punish him for offenses against naval justice committed within two years prior to his arrest. (*In re Bird*, 3 Fed. Cas. 1438; *Walker* v. *Morris*. 3 Am. Jur. 281; Case of Lord George Sackville, as reported in Tytler's Military Law, p. 113). It is my opinion, therefore, that the court had jurisdiction to proceed with the trial and to sentence the accused, regardless of whether the Navy Department had authority to recall him to active duty. With reference to

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the Santantonio case cited by counsel for the accused, the department does not accept the decision of the district court as final and has noted an appeal therefrom.

The fourth point raised by the counsel for the accused in the above-mentioned memorandum is that the evidence presented at the trial of the accused raises a reasonable doubt as to his guilt. All questions as to the sufficiency of the evidence, the weight of the evidence, and the credibility of the witnesses are primarily for the court to determine. It is true, as stated by counsel for the accused, that there was some conflict in the evidence and that one of the witnesses for the Government acknowledged participation in several illegal transactions. This office, however, will not, in a doubtful case attempt to decide as to the weight of the evidence or credibility of the witnesses and [P. 28] thereby usurp the functions of the court. The court hears the witnesses, observes their demeanor on the stand, and draws its own conclusions as to the weight to be given to the testimony and the credibility of the witnesses. It does not follow as a matter of course that because a man is a confirmed crook or grafter that he cannot and will not tell the truth. Under certain circumstances the court may have every reason to believe his story and to disbelieve the stories of reputable citizens. It is the privilege of the court to reject or accept any testimony offered by any witness. They are not bound to believe a man because he bears a good reputation or to disbelieve a man because he bears a bad reputation.

In the instant case the accused was convicted on the testimony of four witnesses, all but one of whom were apparently reputable. The accused took the stand in his own defense, denied categorically the charges against him, and contradicted statements made by witnesses for the Government. Admitting that the accused is a man who has heretofore borne a good reputation for truth and veracity, and that one of the principal witnesses for the Government was a self-confessed grafter, it does not follow that the court was bound to believe the defendant and disbelieve the less reputable witness. The accused was undoubtedly testifying in his own interest. There is nothing to show that the witnesses for the Government were at all prejudiced or otherwise interested in securing the conviction of the accused. On the contrary, the witness whose character is assailed was testifying under an unconditional promise of immunity. Consequently, he had nothing at stake, no matter what the verdict of the court might be. Suffice it to say that the testimony offered by the prosecution, if believed by the court, was sufficient to justify their findings. Under such circumstances it is not conceived to be the duty of the department to question or disturb the finding of the court.

The Judge Advocate General was of opinion that, subject to the foregoing remarks, the proceedings, findings, and sentence were legal, and therefore recommended that they be approved, which recommendation was approved by the Secretary of the Navy (File 26251–21558, J. A. G., Feb. 26, 1920, G. C. M. Rec. No. 45913).

DESERTER: CAN AN APPLICANT WHO HAS COMPLETED THE SHIPPING ARTICLES EXCEPT AS TO OATH OF ALLEGIANCE, AND REFUSED TO TAKE THE OATH, BE DECLARED A DESERTER?

In answering the above question the Judge Advocate General expressed the view, which was approved by the Secretary of the Navy, that a man who signs the shipping articles, accepts and is furnished transportation, is passed by a medical officer, is furnished and accepts clothing and subsistence, and is actually assigned to duty, becomes legally, and for all purposes, an enlisted man of the Navy despite his refusal to take the oath of allegiance (C. M. O. 32, 1917, p. 6). Therefore, if upon fulfillment [P. 29] of the above conditions a man fails to report for duty when properly ordered to do so, and does not report for a period of 10 days he shall, at the end of such period, be declared a deserter (art. 3632 (2) Navy Regulations, 1913).

On the other hand, however, the mere signing of the shipping articles by an applicant for enlistment without the fulfillment on the part of the naval authorities of the other conditions above set forth would not make such applicant an enlisted man in the Navy, nor could he, under such circumstances, be

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declared a deserter for failure to report in order that the naval authorities might fulfill the conditions mentioned (File 26516–338, J. A. G., Feb. 23, 1920).

EVIDENCE, DOCUMENTARY: IRRELEVANT.

An accused being tried for desertion, the judge advocate took the stand for the purpose of introducing into evidence the current service record of the accused, and he read therefrom that part of the record which related to the offense for which the accused was on trial; but he also read into evidence a copy of a letter from the Bureau of Navigation placing the accused on probation and directing that the accused be not tried, which letter was attached to the service record. The judge advocate at the time of introducing this letter into evidence stated that it was his purpose to show that the accused was on probation at the time of the commission of the offense for which he was now on trial.

The introduction of this letter was clearly in error. The letter was improper and irrelevant testimony. Its introduction could in no way aid the court in determining the guilt or innocence of the accused of the offense for which he was on trial, and the nature of this evidence was such as possibly to prejudice the court. This testimony would also have been improper if introduced after the finding of the court had been made, as at that time only conviction of offenses approved by the proper authority are admissible (sec. 327, Naval Courts and Boards, 1917).

In the introduction of evidence at the trial it is the duty of the judge advocate to limit himself to facts which tend to prove the allegations in the specification, and aggravating circumstances. Facts not relating to an offense for which the accused is on trial are entirely irrelevant and prejudicial; hence their admission as evidence is improper.

Section 255, Naval Courts and Boards, 1917, not only states that the judge advocate "shall not fail to advise the accused against advancing anything which may tend to criminate him or prejudice his cause," but also that "he shall see that no illegal evidence is brought against the accused."

Subject to the foregoing remarks, the Judge Advocate General recommended that the proceedings, findings, and sentence be approved, which recommendation was approved by the Secretary of the Navy (File 26251–22350, J. A. G., Feb. 9, 1920; G. C. M. Rec. No. 46566).

[P. 30] JUDGES ADVOCATE: IMPROPER CONDUCT OF, PRELIMINARY TO TRIAL.

An accused was brought to trial upon the charge of desertion. The judge advocate, while on the stand as a witness, having failed to establish, by means of the service record, the absence of the accused, stated: "As a witness on the stand and under oath, I will state to the court that the accused, in conversation with myself previous to the trial, voluntarily stated to me that his name is _____ _____, apprentice seaman, U. S. Navy; that on or about August 26, 1919, he was stationed on board the U. S. S. _____ at _____, _____, and that he left the ship on or about that date. He also stated that he was delivered on board the said ship at _____, _____, on or about _____." The counsel for the accused then brought out in cross-examination the fact that the judge advocate had obtained all of these admissions from the accused before he had asked the accused if he desired counsel.

From the above it appears that the judge advocate was laboring under a misconception, both as to his duties preliminary to trial and as to the admissibility of admissions or confessions. In Naval Courts and Boards, page 189, section 253, it is laid down that "the judge advocate shall confer with the accused as soon as practicable after the latter has received a copy of the charges and specifications. The judge advocate should scrupulously avoid even the slightest suggestion to the accused that he plead guilty to anything charged against him. He should inform the accused that he is entitled to counsel; that he may have a reasonable time in which to prepare his defense; and all his rights in regard to having witnesses summoned for the defense." The duties of the judge advocate, preliminary to trial, are thus clearly indicated in their proper order. It is further stated in the same paragraph of Naval Courts and Boards that "when-

ever an accused has secured counsel, all negotiations by the judge advocate should be conducted through that counsel." In the Naval Digest, 1916, page 312, section 119, it is stated: "Except under certain unusual circumstances, it is not proper for the judge advocate to testify as to statements made to him out of court during his preliminary examination of prospective witnesses." Also (ib., p. 307, sec. 36): "Where the accused is without counsel the judge advocate should show particular care not to find himself in the position of asking leading questions improperly."

In this case no foundation was laid for the admission in evidence of the confessions of the accused made to the judge advocate preliminary to trial, and the court's ruling upon the motion to strike out all of the testimony of the judge advocate was perfectly proper.

The Judge Advocate General therefore recommended that the acquittal of the aforesaid _____ _____ in this case be approved, which recommendation was approved by the Secretary of the Navy (file 26251–22522, J. A. G., Feb. 5, 1920; G. C. M. Rec. No. 46554).

[P. 31] LINE OF DUTY: NAVY DEPARTMENT RECORDS SHOULD NOT BE CHANGED TO CONFORM TO THOSE OF THE BUREAU OF WAR RISK INSURANCE WHERE THE LATTER IS CONTRA.

X, while a member of the Naval Militia of the State of New York and a member of the National Naval Volunteers, not on active duty with the Navy, sustained an injury to his right ankle on about July 2, 1916, on board the U. S. S. _____, through the fall of a motor dory from its davits. In April 1917, the Naval Militia of New York, of which he was a member, was mobilized, and he performed active duty with his battalion until April 16, 1917, when he was released from the Federal service, but not discharged from the State militia. He was discharged November 22, 1918, upon the recommendation of a board of medical survey for physical disability, origin not in the line of duty, disability not the result of his own misconduct. It now appears that X is receiving compensation from the Bureau of War Risk Insurance as though his disability had been incurred in the line of duty. The question presented is whether the Navy Department should change its records so as to indicate that X's disability was incurred in the line of duty.

The findings of the Bureau of War Risk Insurance that the disability was incurred in line of duty and granting of compensation by said bureau for the injury is in conformity with section 300 of the war-risk insurance act (40 Stat. 611), which provides in part—

> "That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service: *Provided further*, That this section as amended shall be deemed to become effective as of October sixth, nineteen hundred and seventeen."

The foregoing provision is binding upon the Bureau of War Risk Insurance, but not upon the Navy Department, which has always held that where the evidence showed the disability to have been incurred prior to the time the person entered the Navy, such disability could not properly be regarded as having been incurred in the line of duty. The Judge Advocate General therefore was of the opinion, which was approved by the Secretary of the Navy, that the injury having been incurred prior to the time that X entered on duty with the Navy, either as a National Naval Volunteer or a member of the Naval Reserve Force, it was not incurred in the line of duty, and that the records of the department should not be changed to show that it was in the line of duty (File 7657–390: 33, J. A. G., Feb. 27, 1920).

MIDSHIPMEN: ELIGIBILITY OF CANDIDATES FOR, TERMINATES ON LAST DAY OF THEIR 20TH YEAR.

A candidate for midshipman was born April 1, 1900. The question presented was whether his eligibility terminated on March 31, 1920, or April 1, 1920.

[P. 32] The act of May 14, 1918, provides:

> "That hereafter all candidates for admission to the Naval Academy must be not less than sixteen years of age nor more than twenty years of age

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on April first of the calendar year in which they enter the Academy: *Provided*, That the foregoing shall not apply to candidates for midshipmen designated for entrance to the Academy in nineteen hundred and eighteen."

To ascertain at what time a person is legally of a certain age reference must be made to the common law and to those legal decisions which from time immemorial have settled this matter with regard to all the important affairs of life. For instance, the question as to when a man is legally "of the age of twenty-one years," in order that under the common law he could make a valid will, execute a deed for land, make any contract, or do any act which a man could do, and an infant could not do, has been treated by text writers and made a matter for judicial determination in various jurisdictions, a summary of which appears in the editor's note to the case of *Ross* v. *Morrow*, 16 L. R. A., 542.

The following extracts of said editor's note are pertinent to the question involved in this case:

"On these questions the law is well established; it admits of no doubt. A person is 'of the age of twenty-one years' the day before the twenty-first anniversary of his birthday. It is not necessary that he shall have entered upon his birthday, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth, and as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday, and upon any and every moment of that day may do any act which any man may lawfully do (*State* v. *Clarke*, 3 Harr. (Del.) 557; *Hamlin* v. *Stevenson*, 4 Dana, 597; *Wells* v. *Wells*, 6 Ind. 447; *Bardwell* v. *Purrington*, 107 Mass. 419; *Phelan* v. *Douglass*, 11 How. Pr. 193; *Herbert* v. *Torball*, 1 Sid. 162, 1 Keb. 589; *Grant* v. *Grant*, 4 Younge & Co. 256).

"The rule is so laid down in Swinburne (pt. 2, sec. 2, pl. 7); in Blackstone's Commentaries (vol. 1, p. 463); in Kent's Commentaries (vol. 2, p. 233); in Bingham on Infancy (p. 2); and by Mr. Justice Metcalf, in his valuable commentaries upon Contracts (20 Am. Jurist, 252; Met. Cont. 38). In addition to this great weight of authority, the same rule has been adopted by some of the American courts (*State* v. *Clarke*, 3 Harr. (Del.) 557; *Hamlin* v. *Stevenson*, 4 Dana, 597). To this we may add that the same rule is promulgated in the latest English edition of Mr. Jarman's valuable treatise upon wills (1 Jarman, Wills, ed. 1861, 39).

"Full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth. If he is born on the first of January, he is of age to do any legal act on the morning of the last day of December, though he may not have lived twenty-one years by nearly [P. 33] forty-eight hours; the reason assigned is that in law there is no fraction of a day, and if the birth were on the first second of one day and the act on the last second of the other, then the twenty-one years would be complete, and in law it is the same thing whether a thing is done upon one moment of the day or another (1 Bl. Com. 463; Metcalf, Cont., p. 38)."

The Judge Advocate General therefore expressed the opinion, which was approved by the Secretary of the Navy, that the candidate's eligibility terminated with March 31, 1920, and not April 1, 1920 (File 26509-229:5, J. A. G., Feb. 5, 1920).

NAVAL RESERVISTS: TRANSFERRED TO NAVY: MAY THEY EXTEND ENLISTMENT UNDER ACT JULY 11, 1919?

In order that enlisted men may become entitled to extend their enlistments under the provisions of the act of July 11, 1919, they must have enlisted for the period of the war, or, if enlisted for a period of four years between February 3, 1917, and November 11, 1918, and otherwise entitled to an honorable discharge, they must, on or before September 1, 1919, have had their status changed to that of men who enlisted for the period of the war.

As to members of the Naval Reserve Force transferred to the Navy: The act of August 29, 1916, provides that enrollments in the Naval Reserve Force shall be for terms of four years. Under the provisions of the act of July 11, 1919, such members of the Naval Reserve Force may, upon their own application, be

transferred to the Regular Navy to serve the unexpired term of their enrollments, provided that the men so transferred shall have at least one year to serve before the expiration of their current enlistment, and shall be entitled to and receive the same pay, rights, privileges, and allowances in all respects as now provided by existing law for men regularly discharged on expiration of their full four-year enlistment and immediately reenlisted. The terms "enrollment" and "enlistment," as above used, refer to the same identical four-year contract of service, so that even though a man is enrolled in the Naval Reserve Force for four years he, upon transfer to the Regular Navy to serve the unexpired term of his enrollment, is regarded as serving in a four-year enlistment in the Regular Navy within the meaning of the act of July 11, 1919.

Therefore, in order that such transferred enlisted men may have their four-year enlistment changed to duration of the war, and thus be eligible to extend such enlistment, they must have made application therefor to the Secretary of the Navy on or before September 1, 1919. Unless such application has been made on or before that date the provisions of the act of July 11, 1919, regarding extensions of enlistments do not apply to members of the Naval Reserve Force who have been transferred to the Regular Navy.

[P. 34] Such transferred enlisted men may, however, extend their existing enlistment to take effect upon the expiration thereof under the following provision of the act of August 22, 1912 (37 Stat. 331.):

> "The term of enlistment of any enlisted man in the Navy may, by his voluntary written agreement, under such regulations as may be prescribed by the Secretary of the Navy with the approval of the President, be extended for a period of either one, two, three, or four full years from the date of expiration of the then existing four-year term of enlistment" (File 26254–2881: 76, Sec. Nav. Feb. 13, 1920).

OFFICERS: NOT REQUIRED TO BE RETIRED ON JUNE 30, 1920, BECAUSE OF INELIGIBILITY FOR PROMOTION ON ACCOUNT OF AGE, WHERE SUCH OFFICERS HOLD TEMPORARY COMMISSIONS IN NEXT HIGHER GRADE.

The Secretary of the Navy has approved an opinion of the Judge Advocate General to the following effect:

The act of August 29, 1916 (39 Stat. 579), does not require that officers holding the permanent grade of captain, commander, or lieutenant commander, be retired on June 30, 1920, because of ineligibility for promotion on account of the ages specified therein, where such officers on said date hold temporary commissions in the next higher grade; but such officers may continue to serve under their temporary commissions after said date. Unless otherwise directed by Congress, temporary appointments in the grades mentioned may legally continue in force "until a sufficient number of officers shall be available for regular appointment or promotion in accordance with existing law," but "not later than six months after the termination of the present war."

Under the act of July 11, 1919 (Pub., No. 8, p. 11). the age limit for promotion of officers in the permanent grade of commander as prescribed by the act of August 29, 1916, does not become effective until June 30, 1921.

With reference to officers in the permanent grade of captain or lieutenant commander, holding temporary appointments in the next higher grade, such officers are just as fully officers in the grade of rear admiral or commander, rsepectively, as officers permanently commissioned in those grades, the only difference being one of tenure. Hence they may serve under such temporary commissions, although beyond the maximum age limits prescribed for officers of their permanent grades.

Although the officers mentioned above may continue to serve under their temporary appointments notwithstanding the age limits prescribed in the act of August 29, 1916, such officers are not eligible for permanent promotion to the grades temporarily held by them except in conformity with the statutory provisions governing the permanent promotion of other officers. Thus an officer in the permanent grade of captain cannot be promoted [P. 35] to the permanent grade of rear admiral if above the age limit fixed by law for such permanent promotion, notwithstanding that he may hold a temporary commission in the grade of rear admiral.

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In the case of an officer holding a temporary commission as rear admiral or commander becoming ineligible for permanent promotion thereto by reason of age on June 30, 1920, when the age requirements in the act of August 29, 1916, become effective, confirmation by the Senate prior to that date would not be necessary provided he had been nominated by the President before June 30, 1920; if afterward confirmed he might legally be commissioned (10 Op. Atty. Gen. 308; see also 10 Op. Atty. Gen. 324). Further than this, the officer might legally be nominated after June 30, 1920, provided that he had been recommended for promotion by the selection board, that said recommendation had been approved by the President, and that a vacancy existed to which he might legally be promoted, all before June 30, 1920. Upon such a state of facts he might legally be examined after June 30, 1920, and, if found qualified, be nominated, confirmed, and commissioned, notwithstanding the age requirements becoming effective on said date (File 11130–47; J. A. G., Feb. 10, 1920).

PROPERTY: PERSONAL; TAKEN FROM PERSONS IN THE NAVY ABOUT TO BE CONFINED, SHOULD BE RETURNED TO THEM UPON THE TERMINATION OF THEIR SENTENCE.

On May 11, 1919, Lieutenant _____, U. S. Naval Reserve Force, was received at the receiving ship, New York, for further transfer to a naval prison to be confined in accordance with the sentence of a general court martial. In searching the effects of the said _____ incident to transferring him to the naval prison, a revolver was found and confiscated by officers of the receiving ship. Ex-Lieutenant _____, having been released from the naval prison, requested the said revolver, which he stated is his personal property. The Judge Advocate General expressed the opinion, which was approved by the Secretary of the Navy, that, under the circumstances, the revolver was properly taken from the said _____, but, inasmuch as the jurisdiction of the Navy with regard to the said _____ has ceased, there is no law or regulation under which it would be justified in retaining the private property of an individual no longer lawfully under its jurisdiction.

The fact that the laws of the State of New York prohibit the carrying or possession of a revolver or other concealed weapon can in no wise justify officers of the naval service, who derive their authority to act wholly from the Federal laws, in retaining the personal property of an individual no longer under their jurisdiction.

The said _____ was therefore entitled to have returned to him the aforesaid revolver (File 26251–18007:11; J. A. G., Feb. 20, 1920).

[P. 36] RETIRED OFFICER: EMPLOYMENT OF BY DEPARTMENT OF JUSTICE OR THE MISSISSIPPI WARRIOR WATERWAYS COMMISSION.

A retired naval officer whose retired pay amounts to $2,160 per annum presents the question whether he may be appointed special agent of the Department of Justice or be employed by the Mississippi Warrior Waterways Committee without sacrificing his retired pay.

In his opinion of August 12, 1912 (29 Op. Atty. Gen. 503), the Attorney General held that a retired officer of the Navy holds an office with a salary or annual compensation within the meaning of the act of July 31, 1894 (23 Stat. 205), even if the express language of the exception be not considered.

The Judge Advocate General expressed the opinion, which was approved by the Secretary of the Navy, that under the provisions of the above-cited law the said officer is ineligible to be appointed to or to hold the office of special agent, Department of Justice, only if said office carries with it a compensation of $2,500 or more per annum. If the compensation attached to said office is less than $2,500 per annum, there is no statutory prohibition against his being appointed to or holding it, and at the same time drawing his retired pay.

The same answer applies to the Mississippi Warrior Waterways Committee only if it is an instrumentality of the Federal Government. In any other event there is no Federal law prohibiting his appointment to an office or restricting the amount of compensation received therefor (File 9736–85, J. A. G., February 14, 1920).

[C. M. O. 54—1920]

COAST GUARD: ENLISTED MEN HONORABLY DISCHARGED FROM, DURING THE PERIOD THE COAST GUARD SERVED WITH THE NAVY ARE "SAILORS" WITHIN THE MEANING OF THE ACT OF JULY 11, 1919.

The question being presented as to whether enlisted men of the Coast Guard who were honorably discharged therefrom at a time when the Coast Guard was operating as a part of the Navy pursuant to law are honorably discharged "sailors" under the act of July 11, 1919, with respect to preferences in civil-service appointments granted to "honorably discharged soldiers, sailors, and marines," the Judge Advocate General expressed the following views thereon: The act of February 28, 1919, section 3 (40 Stat. 1203), providing for the payment of mileage to any "enlisted man honorably discharged from the Army, Navy, or Marine Corps," was held by this office to be broad enough to include men honorably discharged from the Coast Guard at any [P. 37] time when the Coast Guard operates, pursuant to law, as a part of the Navy (C. M. O. 114, 1919, p. 16).

It was also held by this office November 23, 1918 (C. M. O. 174, 1918, pp. 21, 22), that a registrant under the selective draft law who has served in the Coast Guard in time of war should be considered as having "served in the Navy of the United States," so as to bring him within the purview of the act of August 31, 1918, section 3, providing—

> "That men registered under the provisions of this act who have served in the Navy of the United States shall, upon their own application, be permitted to reenlist in the naval or marine service of the United States with and by the approval of the Secretary of the Navy."

The Judge Advocate General was, therefore, of the opinion that enlisted men of the Coast Guard honorably discharged therefrom under the conditions above set forth are honorably discharged "sailors" under the provisions of the act of July 11, 1919. (See also 3 Comp. Dec. 543; 5 Comp. Dec. 671, and 28 Op. Atty. Gen. 543; File 28762-649; J. A. G., Feb. 17, 1920).

C. M. O. 54—1920

[P. 1] Lieutenant Robert S. Wood, M. C., U. S. Navy, was tried by general court martial on December 3, 1919, at the Marine Barracks, Puerto Plata, Dominican Republic, by order of the Brigade Commander, Second Brigade, U. S. Marine Corps, Santo Domingo, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (five specifications).

Charge II.—Conduct unbecoming an officer and a gentleman (one specification).

Findings

The court found the accused guilty of the first charge; not guilty of the second charge, and acquitted the accused of the second charge.

Sentence

"The court therefore sentences him, Lieutenant Robert S. Wood, Medical Corps, U. S. Navy, to be dismissed from the United States naval service."

Action of the Convening Authority

On December 22, 1919, the convening authority approved the proceedings, findings, and sentence, and, in conformity with article 53 of the Articles for the Government of the Navy, referred the record to the Secretary of the Navy for transmission to the President.

Opinion and Recommendation of the Judge Advocate General

On February 24, 1920, the Judge Advocate General placed the following endorsement upon the record:

> "Respectfully referred to the Chief of the Bureau of Navigation for comment as to disciplinary features with the information that, in the

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opinion of this office, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Robert S. Wood, Medical Corps, U. S. Navy, are [P. 2] legal. In consideration, however, of the circumstances, hereinafter set down, surrounding this case, it is believed that the sentence herein should not be made effective.

"It transpires that accused was arraigned and tried upon two charges, the first being supported by five specifications and the second by a single specification, these specifications, stated in general terms, involving the making by accused, in his capacity as provincial chief sanitary officer in the Dominican Republic, of proposals for sexual intercourse with, and conducting improper physical examinations of, each of three native women of known and recognized immoral character and way of living, and the having of sexual intercourse with one of these women. The court found the specifications involving the making of the aforesaid proposals to Victoria Gomez, one of the aforesaid women, and the having of sexual intercourse with Juanita Roman, another of these women, proved, and accused guilty of first charge, all other specifications not proved and accused not guilty of second charge.

"It further transpires that each of the women with whom the accused is alleged to have had improper relations, or to whom he is alleged to have made improper proposals, is of immoral character, engaged at the time of testifying and for a long time theretofore in the practice of immorality; that each such woman admitted freely having been procured to bring the instant charges against accused by one Mrs. Mears, who had been prevented by police interference instituted at the instance of accused, from the unlawful practice of medicine and midwifery; and that each of aforesaid women witnesses resented bitterly being required by accused, in the exercise of his lawful functions, to appear for venereal examination. It seems difficult to conceive a situation wherein more motive to falsify could exist on the part of witnesses; it seems equally difficult to picture witnesses and circumstances surrounding the giving of testimony, as to which there would exist slighter grounds for belief. Were one minded to arrange a 'frame-up' better human material could not have been drafted into service, nor a more propitious stage setting have been provided.

"In connection with the specification involving the Roman woman, the affidavit of ex-First Lieutenant Robert Edward Hutchinson, U. S. M. C., hereto attached, who had been discharged from the Marine Corps after the time of the alleged [P. 3] incident with the Roman woman and prior to the trial, and who was therefore not available as a witness for accused at the trial, tends to exonerate the accused as to the incident involving Juanita Roman.

"There is then left the single specification involving accused's conduct toward Victoria Gomez. Although, in accordance with its established policy, this office does not approve interference with a finding of fact which has been arrived at by a court martial, and accordingly holds the findings in this case legal, as they unquestionably are, yet in the exercise of a broad discretion and from the inherent dangers of the situation it is not regarded as wise or advisable to approve a conviction of a medical officer when the same has been arrived at upon testimony of witnesses of the character of those testifying in this case, animated by the motives admitted by them, as to incidents occurring under the conditions herein depicted.

"In consideration of the foregoing and of all the circumstances in this case, it is recommended that the proceedings and the findings on specifications one, two, and three of charge one, and on charge two, and the specification thereof, in the foregoing case of Lieutenant Robert S. Wood, Medical Corps, U. S. Navy, be approved, and that the findings on specifications four and five of charge one and the sentence be disapproved, and that the accused be released from arrest and restored to duty."

Recommendation of the Bureau of Navigation

On March 2, 1920, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence as amended by the action of the Judge Advocate General thereon.

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ACTION OF THE SECRETARY OF THE NAVY

On March 6, 1920, the Secretary of the Navy approved the foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, and directed that Lieutenant Robert S. Wood (M. C.), U. S. Navy, be released from arrest and restored to duty.

C. M. O. 57—1920

[P. 1] Second Lieutenant Edward G. MacFayden, U. S. Marine Corps, was tried by general court martial on December 15, 1919, at the Marine Barracks, Port Au Prince, Republic of Haiti, by order of the Brigade Commander, First Provisional Brigade, U. S. Marine Corps, and acquitted of the following charges:

Charge I.—Falsehood (one specification).

Charge II.—Disobeying the lawful order of the Secretary of the Navy (one specification).

Charge III.—Disobeying the lawful order of his superior officer (one specification).

Charge IV.—Neglect of duty (one specification).

ACTION OF THE CONVENING AUTHORITY

On February 21, 1920, the convening authority placed the following endorsement upon the record:

"The proceedings in the foregoing case of Second Lieutenant Edward G. MacFayden, U. S. Marine Corps, and the finding of charge I are approved, the finding of charges II, III, and IV are disapproved for the following reasons: The convening authority, after careful consideration, does not consider the findings are in accord with the evidence adduced, in that, referring particularly to charge II, the testimony appears to be conclusive that the accused gave permission to Mr. Freeman Lang to fly the plane when he used the words 'go ahead,' which expression, no matter in what tone or manner spoken, is an affirmative and could not be given any other interpretation. This permission, in connection with the fact that no emergency existed for such action on his part and that property of the United States was thereby hazarded, together with his admitted knowledge that it was not customary for civilians, not in Government employ, to operate, fly, or ride in Government airplanes, even though he had not been personally conversant with all orders covering this subject, furnishes a fair presumption of the intent necessary to prove the charge.

"Referring to charge III: The following points have in the opinion of the convening authority been established beyond a [P. 2] reasonable doubt: A land plane, with the accused as pilot and Private Moris as observer, made a forced landing about three to five miles from Maissade, at about 4:30 p. m., November 3, 1919; the accused, at once, deserted his plane, leaving it in charge of the observer, and walked to the town of Hinche, arriving there the following morning at seven o'clock. As one reason for the desertion of the plane by the accused it is stated that the accused, being an officer, was more apt to orient himself and find his way to the nearest town. Setting aside the question of whether or not the accused should have remained by his plane, the result shows that the accused was not properly oriented, as, instead of going to the nearest town, Maissade, where assistance was at hand, he went to the distant town of Hinche, and had finally to obtain a guide for that purpose. To the incompetency of this officer, as stated above, may be directly attributed the death of Private Moris, the observer.

"Notwithstanding that the evidence shows a sad laxity in imparting orders to members of Squadron 'E,' Marine Aviation Force, at the time in question and an extremely poor wording of Post Order No. 32, allowing various interpretations to be placed upon it by the members of the command, it would appear that an officer of the U. S. Marine Corps would have a sufficient sense of duty never to abandon or place in jeopardy government property, especially so valuable a property as an airplane, for even

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a short period, or at least until all other efforts had failed to permit a continuation of the flight or to obtain proper relief or assistance.

"Referring to charge IV, the convening authority fails to understand how the court could logically have found otherwise than 'guilty' on this charge, as the specification is supported by the evidence of practically every witness testifying as to the facts mentioned therein, and the court in its finding is limited to a consideration of the evidence offered, both for the prosecution and defense.

"The accused, Second Lieutenant Edward G. MacFayden, U. S. Marine Corps, will be released from arrest and restored to duty."

C. M. O. 59—1920

[P. 1] Pharmacist George G. Strott, U. S. Navy, was tried by general court martial on February 9, 1920, at the Marine Barracks, Port Au Prince, Republic of Haiti, by order of the Brigade Commander, First Provisional Brigade, U. S. Marine Corps, and found guilty of the following charge, proved by plea:

Charge.—Drunkenness (one specification).

Sentence

"The court therefore sentences him, Pharmacist George G. Strott, U. S. Navy, to lose twenty-five dollars ($25) per month of his pay for a period of six (6) months."

Recommendation to Clemency

The following unanimous recommendation to clemency was spread upon the record:

"On account of previous good character and efficiency in the manner of performing his duties, we, the members of the court, unanimously recommend him to the clemency of the convening authority."

Action of the Convening Authority

On February 21, 1920, the convening authority placed the following endorsement upon the record:

"The proceedings and findings in the foregoing case of Pharmacist George G. Strott, U. S. Navy, are approved; the sentence is disapproved for the following reasons: The convening authority, after careful consideration, does not consider that the sentence is commensurate with the charge and specification, in that the accused is charged with 'Drunkenness' to which serious charge he pleaded guilty. The degree of drunkenness and the circumstances, if any, attendant thereto consequently did not come before the court.

"The court, if it so desired, could have, in conformity with Naval Courts and Boards, page 178, paragraph 212, instructed the Judge Advocate to introduce evidence in order that the court might determine whether or not there were mitigating circumstances that should be brought to the attention of the convening authority. The court did not desire to have evidence introduced, and consequently no evidence except as to previous good character and military history was brought in.

[P. 2] "In view of the fact that the court was in nowise conversant with the attending circumstances in this case, the excessively light sentence imposed can only be accounted for by the court's having considered the record of the accused as to previous good character.

"By law, the court, if it finds the accused guilty, has no discretionary power, but must adjudge a sentence adequate to the offense committed. This is plainly set forth in the U. S. Navy Regulations and in Naval Courts and Boards, page 207, paragraph 335. The power of mitigation lies entirely within the hands of the convening and reviewing authorities. The court can, in view of extenuating circumstances or for previous good character, recommend the accused to the clemency of the convening authority.

"In our service it is demanded that an officer set an example in every way to those placed under him, and uphold the dignity and honor of the

uniform he wears. To relax the high standard set for all officers of the service by a court imposing a sentence that is merely nominal, and then recommending the accused to clemency, is to strike at the very foundation stone of military efficiency, discipline, and to usurp the powers vested solely in the convening and reviewing authorities. It is to be regretted that a majority of the members of this court, consisting of officers of rank and experience, have so light a conception of their responsibilities as members of a court martial and of the future welfare and discipline of the services to which they belong as to adjudge a sentence that is obviously ridiculously inadequate and cannot be but a travesty on justice.

"The accused, Pharmacist George G. Strott, U. S. Navy, will be released from arrest and restored to duty."

CONCURRENCE OF THE JUDGE ADVOCATE GENERAL

On March 8, 1920, the Judge Advocate General concurred in the remarks of the convening authority as to the inadequacy of the sentence and the usurpation of mitigating power.

CONCURRENCE OF THE BUREAU OF NAVIGATION

On March 12, 1920, the Bureau of Navigation concurred in the remarks made hereon.

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[P. 14] DISMISSAL: OF OFFICER, PURSUANT TO SENTENCE OF COURT MARTIAL, NOT EFFECTIVE WHERE SAID OFFICER DESERTS PRIOR TO RECEIPT OF LETTER PROMULGATING CONFIRMATION OF SENTENCE OR PUBLICATION OF COURT-MARTIAL ORDER.

Lieutenant ------, U. S. Naval Reserve Force, was tried by general court martial and sentenced to be dismissed from the United States naval service, which dismissal was confirmed by the President on February 26, 1919. On March 4, 1919, the Department forwarded the promulgating letter in this case, dated March 1, 1919, to Lieutenant ------ via the Chief of the Bureau of Navigation, notifying him that he accordingly ceased to be an officer of the United States naval service. This promulgating letter, however, was not delivered to Lieutenant ------, because it transpired that he had been absent without leave from proper authority while under arrest, awaiting sentence of general court martial, since February 25, 1919. On April 16, 1919, the Judge Advocate General advised the Chief of the Bureau of Navigation that the publishing of the court-martial order in the case of Lieutenant ------ had been suspended indefinitely pending further developments. Held, that Lieutenant ------ is still an officer of the United States naval service and is now a deserter at large, subject to apprehension and trial by general court martial; that he remains an officer until delivery of the promulgating letter or due publication of the court-martial order in his case. It is well established that due notice of the confirmation of dismissal is necessary to consummate the dismissal and such dismissal does not become effective legally until the officer receives due notice of the confirmation thereof. The foregoing opinion of the Judge Advocate General was approved by the Secretary of the Navy (File 26262–5629:3, Sec. Nav., Mar. 18, 1920).

EVIDENCE: OF OPINION OF A WITNESS NOT AN EXPERT, THAT TWO WRITINGS WERE EXECUTED BY SAME MAN AND TWO FINGERPRINT RECORDS WERE THOSE OF THE SAME PERSON, IS INADMISSABLE.

An accused was being tried on the charges of fraudulent enlistment and desertion, to which he pleaded not guilty. The judge advocate, the only witness for the prosecution, took the stand and introduced into evidence the current service record of the accused and other papers referring to his enlistment in the Navy. In identifying the papers the judge advocate stated, "I have two official service record books, forwarded through official channels for use in connection with this trial, both referring to the accused, one showing that the accused enlisted as Fred ------, Jr., on ------." At this point the counsel for

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the accused objected to the introduction of extracts from the service record in the form of oral argument or statement by the judge advocate, and requested that he restrict [P. 15] himself to the reading of the documents in evidence. There is no ruling of the court on this action, but the witness continued to testify, as follows: "I will state to the court that the signature of Frederick _____ and Fred _____, Jr., and Frederick _____, appearing on the two service record books and the enlistment paper forwarded therewith are in the same handwriting and apparently written by the same person. * * * The statement also applies to the fingerprints shown in the two service record books."

The accused's counsel moved that the testimony of the judge advocate as referred to handwriting and fingerprints be stricken from the record as the judge advocate had not qualified as a handwriting expert or as a fingerprint expert. The court did not sustain the motion of the counsel. In so doing, the court erred. "Whether two instruments were written by the same person is a proper subject for expert evidence" (144 Ill. 652; 32 N. E. 393; 20 American Digest 3551). Thus, in this case the counsel's objection to the testimony of the judge advocate relative to the fact that the signatures in the service records and enlistment paper were the same and that the fingerprints were the same, was well founded. "The testimony of experts is admissible on such subjects as persons without previous habit or study would probably be unable to judge of correctly" (20 American Digest 3343).

Under cross-examination the judge advocate admitted that he had never taken a course in the study of fingerprints, that he had never made a study of fingerprints in the nature of a profession or anything of that kind except as to qualifying as a recruiting officer of the Marine Corps, that he knew nothing of the classification of fingerprints or the scientific names for any of the markings that a fingerprint usually shows. When questioned as to his handwriting experience he stated that he did not represent himself as being a handwriting expert and in reference to the signatures on the papers in evidence he was asked, "You do not know that they were made by the same person?" He replied, "They were apparently so, from my testimony." He was then asked, "Do you know that they were made by the same person?" He replied, "I do not."

"Testimony of a witness, offered to prove the handwriting of a person, that he cannot swear decisively that it is his, or testimony that it has a close resemblance to his, or that he sees nothing different from the character of his writing, is not admissible as implying the opinion or belief of the witness that it is genuine" (31 New Hampshire 251; 20 American Digest 3253). In view of the foregoing the Judge Advocate General recommended that the proceedings, findings, and sentence in this case be disapproved, which recommendation was approved by the Secretary of the Navy (File 26251–22755, J. A. G. Mar. 8, 1920; G. C. M. Rec. No. 46784).

[P. 16] FINDINGS: EXCEPTIONS AND SUBSTITUTIONS IN.

An accused was tried and found guilty of the charge of theft, the specification alleging that at a certain specified time and place he did "* * * feloniously take, steal, and carry away * * * a jumper * * * $5.25 in value, the property of _____ _____, seaman, second class, U. S. Navy, * * *." The court found the specification proved except the words "the property of _____ _____, seaman, second class, U. S. Navy * * *," and did not substitute an allegation stating in whom the property right of the jumper was vested. The court fatally erred in its findings in excepting the words "the property of _____ _____, seaman, second class, U. S. Navy, * * *" and not substituting therefor an allegation that the jumper was the property of a certain person or a person unknown. "In an indictment for larceny the ownership of the property must be alleged * * *" (25 Cyc. 88). The purpose of this is to negative any right to possession on the part of the accused and to describe the property as definitely as possible so as to effectually protect the accused against a second prosecution based upon the same transaction. Winthrop's Military Law and Precedents, page 580, under "Finding with exceptions and substitutions," states:

> "The authority of a court martial to make a partial finding is not limited to the mere making of exceptions. Where, while the allegations in a specification are substantially made out, certain items therein are not precisely

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proved as averred, the court, in excepting the same may substitute the true facts or details as established by the evidence. As, for example, where sums of money, numbers of things, kinds or quantities of articles, species of military stores, etc., words spoken, names of persons, dates, or places have been incorrectly set forth in the specification, and the true particulars have been disclosed in the course of the testimony on the trial; in such cases the court, in its finding of guilty, may and properly will except the erroneous and substitute for them the correct statements or words of description. The authority to make substitutions is subject to the same conditions as the authority to make exceptions, viz, that the specification shall not be rendered legally defective, or the nature of the offense so modified that the finding upon the specification will not support a conviction upon the charge."

Also see section 320, Naval Courts and Boards, 1917. From the foregoing it is apparent that while the court is authorized to find a specification proved with exceptions, in so doing it must make substitutions based upon the evidence adduced which sets forth a cause of action. In view of the foregoing, the Judge Advocate General recommended that the proceedings be approved, but that the findings and sentence of the accused in this case be disapproved, which recommendation was approved by the Secretary of the Navy (File 26262–7209, J. A. G., Feb. 25, 1920, G. C. M. Rec. No. 46600).

[P. 17] JUSTIFIABLE CAUSE: AS AFFECTING CHARGE OF ASSAULT.

An accused was tried on the charge of "Assaulting with a deadly weapon and wounding another person in the Navy," the specification alleging inter alia that the accused did "willfully, maliciously, and without justifiable cause assault and strike with a stick or other blunt weapon, Y, mess attendant, U. S. Navy."

From the evidence adduced it appears that previous to the assault alleged Y twice knocked a cigarette from the mouth of the accused, that he did so in a threatening manner, and that he struck the accused on the jaw two or more blows with his fist. The accused stated he would report Y and later, after the accused had been to the chief master at arms' quarters, Y used threatening language to the accused. Shortly thereafter Y assumed a threatening attitude and raised his fist with the apparent intention of again striking the accused. According to the accused's testimony he feared injury. Y was a much larger man than the accused, who chose the only means open of defending himself by grasping a stick which was on the deck and striking Y.

The court found the accused guilty of the charge and sentenced him accordingly. The Judge Advocate General was of opinion that the court erred in its findings, for, by the every testimony of the prosecution's witnesses, no offense was proven. An assault means an unlawful act, so if one strikees in self-defense he has committed no assault. "A person who is unlawfully attacked by another in such a manner as to incite in him a reasonable belief that he is in danger of losing his life, or receiving some great bodily injury, may use such force to repel the attack as at the time appears to him to be reasonably necessary" (*Barr* v. *State*, 45 Nebraska 458; 63 N. W. 856). So, in this case, it appears that the accused under the immediate stress of the circumstances and facing a situation which he considered required immediate action resorted to the only means which he considered adequate to withstand the impending assault and used a stick which was at hand. "To authorize a person to use a weapon in self-defense it is sufficient to show a reasonable ground for apprehending a design to take his life or to do him some great bodily harm, and that the danger was imminent that such design would be accomplished, although it might afterwards turn out that such appearances were false and there was not, in fact, any such design or any danger that it would be accomplished" (*Evers* v. *People*, 3 Hun 716; N. Y. 1875).

The Judge Advocate General therefore recommended that the proceedings in the foregoing case be approved, but that the findings and sentence be disapproved and that the accused be released from arrest and restored to duty, which recommendation was approved by the Secretary of the Navy (File 26262–7266, J. A. G., Mar. 6, 1920, G. C. M. Rec. No. 46857).

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[P. 18] PAY: SUPPLY OFFICERS ARE NOT JUSTIFIED IN WITHHOLDING, BY REASON OF ILLEGAL EMPLOYMENT OF RECIPIENT IN ANOTHER BRANCH OF THE GOVERNMENT SERVICE.

An officer of the Supply Corps of the Navy carrying the accounts of an officer on the retired list of the Navy presents the question as to whether he, the supply officer, is responsible for and can be checked the amount paid by him to the retired officer whom he alleges is illegally employed by the Shipping Board, inasmuch as the retired officer's pay as such from the Government is $2,700 a year and therefore is a case within the provisions of section 1763 of the Revised Statutes, which provides that:

> "No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law."

and also within the provisions of the act of July 31, 1894, 28 Stat. 205, which provides that:

> "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office, or whenever the President shall appoint them to office by and with the advice and consent of the Senate."

The Judge Advocate General expressed the view that the employment of a retired officer by the Shipping Board is not sufficient to justify the supply officer of the Navy in refusing to make payments to him as a retired officer of the Navy. If such officer's employment by the Shipping Board is illegal, the illegality is not one for which the supply officer is responsible, and if illegal payments have been made to such retired officer by reason of such employment they were made by the Shipping Board and not by the supply officer. The foregoing opinion of the Judge Advocate General was approved by the Secretary of the Navy (File 9736–90, J. A. G., Mar. 15, 1920).

PRECEDENCE: MAJOR GENERALS AND REAR ADMIRALS.

The date of Y's temporary commission as major general is August 5, 1917; that of his permanent commission as brigadier general is May 12, 1912. The date of M's commission as permanent rear admiral is August 6, 1915, and he entered the upper half of the list of rear admirals September 1, 1917. The question presented is who is entitled to precedence as between Y and M, and whether it is true that rear admirals do not rank with major generals until they have entered the upper half of the grade of rear admiral.

It is too well understood to require either argument or comment that there is no distinction among rear admirals with regard to rank except such as flows from the fact that some commissions are of [P. 19] earlier date than others. There is no distinction between rear admirals of the upper half and rear admirals of the lower half with regard to rank. All are rear admirals and all rank with major generals of the Army and major generals of the Marine Corps according to their respective dates of commission. The division between the upper and lower half of rear admirals is one for pay purposes only. As between rear admirals of the Navy and major generals of the Army such officers take precedence according to the dates of their commissions, the senior in commission ranking the junior. As stated by the Attorney General (25 Op. Atty. Gen. 517):

> "This has become a well-understood rule of action and practice, which, in fact, governs and controls officers of the Army and Navy with the same force and precision as if embodied in statute or regulation." (See also 26 Op. Atty. Gen. 16; 29 Op. Atty. Gen. 264; 23 Op. Atty. Gen. 156; 14 Comp. Dec. 471; 6 Comp. Dec. 960; 11 Comp. Dec. 547; *Gibson* v. *U. S.*, 194 U. S. 182; *Rodgers* v. *U. S.*, 185 U. S. 83.)

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The Navy personnel act of March 3, 1899, (30 Stat. 1005), in effect abolished the rank of commodore, at least so far as respects the active list of the line of the Navy and lifted those in that rank to the rank of rear admiral. Prior to the act of 1899 the corresponding ranks of officers of the Navy and Army were rear admiral and major general, commodore and brigadier general, captain and colonel. By that act the rank of commodore was abolished on the active list of the Navy although the rank of brigadier general was left undisturbed. No change was made in the relative rank of captain and colonel or of rear admiral and major general, but the legislation left one rank in the Army to which there was no corresponding rank in the active list of the Navy.

In the case of *Rodgers* v. *United States*, *supra*, it was stated by the Supreme Court with reference to the act of March 3, 1899, that—

> "The statute in effect lifted the rank in the Navy which was corresponding to that of brigadier general in the Army to that of rear admiral, and corresponding with that of major general in the Army."

The Supreme Court was speaking of the active list of the Navy (File 5980–1402, Oct. 31, 1917).

The act of October 6, 1917, section 3 (40 Stat. 411), provides that "brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half of the grade." This is materially different from stating, conversely, that "rear admirals of the lower half of the grade shall hereafter rank relatively with brigadier generals of the Army." In the past the rank of rear admirals of the lower half has been higher than that of brigadier general, viz, it has been the same in all respects as that of major general. Under these circumstances Congress did not provide that hereafter the rank of rear admiral in the lower half shall be the same as that of brigadier general, which would have resulted in reducing the rank [P. 20] previously enjoyed by such rear admirals, but on the contrary it provided that hereafter the rank of brigadier generals shall be the same as that of rear admirals of the lower half, thereby elevating the rank of brigadier generals while leaving the rank of rear admirals of the lower half the same as it previously had been. In other words, rear admirals of the lower half continue by law to rank with major generals in the Army, the only change being that now brigadier generals of the Army rank with rear admirals of the lower half. Unless this were so, rear admirals of the lower half who prior to the act of October 6, 1917, ranked ahead of all major generals of a later date of commission would now be required to take rank behind all major generals, including those of a later date of commission who they had previously outranked. This would amount to nothing more nor less than a reduction in the rank of rear admirals of the lower half, and that without any corresponding advantage to brigadier generals for whose benefit the amendment of October 6, 1917, was enacted (File 3980–1402, October 31, 1917).

If it be true that brigadier generals under the law rank with rear admirals according to dates of commission, then it must necessarily follow that brigadier generals likewise rank with major generals according to dates of commission, because there is no escape from the plain mandate of the law that rear admirals, whether of the upper or lower half, rank with major generals. It lies with the War Department to give effect to the law by advancing brigadier generals to equal rank with major generals, making the two grades in effect one for purposes of rank and precedence. This the War Department has not done, and in the absence of such action by that Department the Navy Department cannot recognize brigadier generals as the equal in rank of rear admirals, entitled to precedence with the latter according to dates of commission. It is hardly to be expected that the Navy Department will recognize officers of the Army as having higher rank and being entitled to greater privileges than those recognized and sanctioned by the War Department, to whose jurisdiction such officers are subject. The rank to which an officer of the United States military service, Army or Navy, is entitled by law is indicated by the insignia which he is authorized by his department to wear. So long as the War Department restricts brigadier generals to the wearing of one star as the insignia of their rank, such officers cannot claim to rank with or ahead of rear admirals in the Navy who are authorized by the Navy Department to wear two stars, the insignia of major generals with whom they rank under the law. The Judge Advocate General therefore held that Rear Admiral M took precedence over

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Major General Y by virtue of the fact that his commission as a rear admiral is of earlier date than Y's commission as a major general, which opinion was approved by the Secretary of the Navy (File 11130-68, J. A. G., Mar. 9, 1920; see also C. M. O. 35, 1920, p. 21).

[P. 21] RETIREMENT: WITH RELATIVE RANK OF COMMODORE, AFTER 45 YEARS' SERVICE; FORMER OFFICERS OF ENGINEER CORPS, U. S. NAVY.

An officer of the line of the Navy, formerly of the Engineer Corps, who has completed 45 years' faithful service, presents the question as to whether he is eligible for retirement under section 1481 of the Revised Statutes, which provides that:

> "Officers of the Medical, Pay, and Engineer Corps, chaplains, professors of mathematics, and constructors, who shall have served faithfully for forty-five years, shall, when retired, have the relative rank of commodore; and officers of these several corps who have been or shall be retired at the age of sixty-two years, before having served for forty-five years, but who shall have served faithfully until retired, shall, on the completion of forty years from their entry into the service, have the relative rank of commodore."

The Judge Advocate General held that he was not eligible for the reason that the Engineer Corps referred to in the above provision of law was abolished by the Navy personnel act of March 3, 1899 (30 Stat. 1004), and officers of said corps were transferred to the line of the Navy; that the applicant is not an officer in the Engineer Corps, nor was he such at the time he completed forty-five years' service. The Secretary of the Navy approved the foregoing opinion (File 27231–141:1, Sec. Nav., Mar. 11, 1920).

TRIALS: MULTIPLICITY OF, IS IMPROPER WHERE THE ACCUSED COULD HAVE BEEN TRIED ON ALL OF THE OFFENSES IN ONE TRIAL.

An enlisted man was tried three times by the same deck court on the same date and the specifications for each trial were for a separate and distinct offense committed by the accused on different dates. In setting aside the proceedings, findings, and sentences the Judge Advocate General expressed the view, which was approved by the Secretary of the Navy, that if an offense is committed, action thereon should be promptly taken, and if a court martial is determined upon the accused should be accorded a speedy trial. Offenses should not be allowed to accumulate and then each offense made the subject of a separate trial. Multiplicity of trials is undesirable and the accused should only be tried once with separate specifications preferred against him for each separate offense as is provided in Naval Courts and Boards, page 250. If, however, the accused commits an offense after the convening authority has directed his trial for an offense but prior to the convening of the court, the proper procedure for the convening authority then is, in preferring specifications for the subsequent offenses, to word the caption thus:

> "Lieutenant ------, U. S. Navy, is hereby ordered as deck court to try the above-named man for the following offense, intelligence of which did not reach the convening authority until the ------ [P. 22] instant, at the same time the accused is tried on the specification preferred ------.
> "Specification: ------."

It is then the duty of the court to proceed with but one trial upon all of the specifications.

To permit the same court on the same date in separate trials to try an accused for separate offenses has the effect of increasing the punishment that the court can by law adjudge. If the offenses committed are of such gravity that the limitation of punishment that the court may impose is inadequate, then resort should be had to a higher court with greater powers (file 27217–4139, Sec. Nav., March 31, 1920).

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AVIATORS: NAVAL OR STUDENT; DATE FROM WHICH DESIGNATION AS, IS EFFECTIVE.

The question presented was as to the date from which designation as naval aviator or student aviator is effective. The department held such designation was effective from the date it was issued by the commanding officer of a naval air station or such other officer as is authorized to issue such designation, and upon approval by the Bureau of Navigation entitles an officer to the benefits conferred upon officers receiving such designation, from the date it was issued by the commanding officer (File No. 26254–2215: 67, Sec. Nav., Mar. 3, 1920; see also File No. 26254–2215: 45 of May 14, 1919).

RETIRED ENLISTED MEN: JURISDICTION OVER, FOR PURPOSES OF TRIAL BY GENERAL COURT MARTIAL.

An enlisted man on the retired list of the Navy and employed in a civil capacity at a navy yard was recently tried by general court martial on a charge of stealing property of the United States intended for the naval service thereof, and acquitted of the said charge. The question presented is whether a retired enlisted man is amenable to trial by court martial for violation of article 14 of the Articles for the Government of the Navy, under which the above charge is laid. This question depends upon whether he may be properly construed a "person in the naval service of the United States" within the meaning of said article. It has heretofore been held by the office of the Judge Advocate General that a retired enlisted man is not a person in the naval service of the United States (16 Op. J. A. G. 136, File 7657–123, December 29, 1911; File 7657–57, August 29, 1909; see also *Murphy* v. *U. S.*, 38 Ct. Cls. 511 and 39 Ct. Cls. 178).

[P. 23] In the Army retired enlisted men are made a part of the Army by statute, acts of March 2, 1899, and February 2, 1901, 30 Stat. 977, and 31 Stat. 748, by which it is provided that the "Army of the United States shall consist of * * * the officers and enlisted men on the retired list."

There is no statute specifically providing that retired enlisted men shall constitute a part of the Navy or that retired enlisted men of the Navy shall be amenable to trial by naval court martial although it is provided by statute that retired officers of the Navy shall be amenable to trial by general court martial (section 1457, Revised Statutes).

Naval courts martial being courts of special and limited jurisdiction have no power to proceed except in cases where they are specially empowered by statute. As stated by Judge Sanborn in the Circuit Court of Appeals of the Eighth Circuit in the case of *Deming* v. *McClaughry* (113 Fed. Cas. 639):

> "The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgments are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown. A court martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it."

While it would appear from the previous departmental holdings in the matter that a retired enlisted man is not subject to trial by court martial when not employed on active duty, it should be noted that such holdings were made prior to the act of March 3, 1915 (38 Stat. 941) which provides that—

> "The Secretary of the Navy is authorized in time of war, or when, in the opinion of the President, war is threatened, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. * * *."

It would appear from the act of March 3, 1915, that Congress regards retired enlisted men as "persons in the naval service of the United States," otherwise they would not be subject to call in time of war, they being bound

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by no obligation so to serve as in the case of a naval reservist. It should also be noted in this connection that enlisted men when placed on the retired list at the expiration of thirty years' service are not discharged from their enlistments, but they are transferred to the retired list and regarded as continuing in the service on the retired list (art. 3672 (2) U. S. Navy Regulations).

Under the present laws it is very doubtful whether an enlisted man on the retired list, who is not employed on active duty, is subject to trial by naval court martial. It was unnecessary, however, [P. 24] to decide this question in the present case, the accused having been acquitted and released from arrest. The Judge Advocate General, therefore, recommended that the proceedings, findings, and acquittal in the foregoing case be approved, which recommendation was proved by the Secretary of the Navy (File 26251–22500, J. A. G. Mar. 9, 1920).

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[P. 1] Lieutenant Commander Solomon H. Geer, U. S. Navy, was tried by general court martial on January 16, 1920, on board the U. S. S. *South Dakota*, by order of the Commander in Chief, U. S. Asiatic Fleet, on the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (two specifications).

Charge II.—Assault (one specification).

The court found the accused guilty of the first specification of the first charge, and acquitted him of the second specification of the first charge and of the second charge and the specification thereof, and sentenced him to lose ten numbers in his temporary grade of lieutenant commander and ten numbers in his permanent grade of lieutenant, junior grade. One of the seven members of the court recommended the accused to clemency.

Returned For Revision

The convening authority returned the record to the court directing it to reconvene for the purpose inter alia of reconsidering its sentence, which, in the opinion of the convening authority, was entirely inadequate for the offenses found proved; and for the further purpose of reconsidering its findings on the second specification of the first charge and the specification of the second charge, which, in the opinion of the convening authority, were not in accordance with the evidence adduced.

The court revoked its former findings on the second specification of the first charge; on the specification of the second charge; and on the second charge; and substituted therefor the findings of guilty on the second specification of the first charge and on the second charge and specification. The court also revoked its former sentence and thereupon sentenced the accused to the loss of fifty numbers in his temporary grade of lieutenant commander and the loss of fifty numbers in his permanent grade of lieutenant, junior grade.

Action of the Convening Authority

On January 24, 1920, the convening authority approved the proceedings, findings on the first specification of the first charge and the first charge, the findings in revision, on the second specification [P. 2] of the first charge, on the specification of the second charge and the second charge, and the sentence in revision, and directed that the accused be released from arrest and restored to duty.

Opinion and Recommendation of the Judge Advocate General

On March 6, 1920, the Judge Advocate General placed the following endorsement upon the record:

> "* * * The return of a naval case to a naval court for reconsideration of an acquittal, or to impose a more severe sentence upon a conviction, is in direct contravention of the published policy of the President of the United States and of the policy of the Department, as set forth in Court-Martial Order No. 309, 1919.

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"In view of the foregoing, it is, therefore, recommended that the findings of the general court martial in the case of Lieutenant Commander Solomon H. Geer, U. S. Navy, on the second specification of the first charge, the specification of the second charge and the second charge be disapproved, and that the proceedings, proceedings in revision and findings of the court on the first specification of the first charge and the first charge, and the sentence in revision be approved. It is further recommended that the sentence be reduced so that Lieutenant Commander Solomon H. Geer will lose ten (10) numbers in his temporary grade of lieutenant commander and ten (10) months in his permanent grade of lieutenant (j. g.), this action thereby reducing the sentence of the court in revision to the sentence as given in the original trial."

CONCURRENCE OF THE BUREAU OF NAVIGATION

On March 12, 1920, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence as amended by the remarks made thereon by the Judge Advocate General.

ACTION OF THE SECRETARY OF THE NAVY

On March 20, 1920, the Secretary of the Navy approved the foregoing recommendations of the Judge Advocate General.

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[P. 12] CIVIL AUTHORITIES: OF VIRGINIA, HAVE A RIGHT TO SERVE CIVIL AND CRIMINAL PROCESSES ON CIVILIAN EMPLOYEES IN THE NAVY YARD AT NORFOLK, VA.

The question was presented as to whether the commandant of the Navy Yard, Norfolk, Va., was authorized to permit civil officers or officers of the civil courts of the State of Virginia to serve civil processes on civilian employees in that navy yard.

An act of the legislature of Virginia passed January 25, 1800, authorized the Governor of said State "to convey, transfer, assign, and make over unto the United States, all interest in, and title to, as well as all the jurisdiction which this commonwealth possesses over the public lands commonly called and known by the name of Gosport before mentioned, for the purpose of establishing a navy yard: *Provided*, That nothing herein contained shall be so construed as to prevent the officers of this State from executing any process whatever within the jurisdiction hereby directed to be ceded.

The above-mentioned land was accepted by the United States under the conditions contained in said act of the legislature of Virginia and on June 15, 1801, James Monroe, Governor of the State of Virginia, deeded the land to the United States for the consideration of $12,000, giving title and jurisdiction thereto subject to the reservation contained in the above-mentioned act of legislature of Virginia that officers of said State were not to be prevented from executing any process whatever within the jurisdiction so ceded.

It was held by the Supreme Court of the United States in the case of *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, that when the United States acquire lands within the limits of the State by purchase, with the consent of the legislature of the State for the purpose of erecting forts, etc., the Constitution confers upon them the exclusive jurisdiction of the tract so acquired. It was further held by the Supreme Court in said case that a State may for such purposes cede exclusive jurisdiction of a tract of land within its limits in a manner not provided for in the Constitution of the United States; and may prescribe conditions to the cession, if they are not inconsistent with the effective use of the property for the purposes intended.

In the above-mentioned case of *Fort Leavenworth R. R. Co.* v. *Lowe*, the Supreme Court held that where the State of Kansas in ceding to the United States exclusive jurisdiction to a tract of land within the limits of the State, reserved to itself the right to tax private property therein, and the United States did not dissent, their acceptance of the grant with the reservation would be presumed. In the present case the United States assented to the reservation made by the State of Virginia in its act of cession.

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The Judge Advocate General therefore expressed the opinion, which was approved by the Secretary of the Navy, that under the terms of cession and acceptance of jurisdiction over the land referred [P. 13] to in the above-mentioned act of January 25, 1800, the commandant of the Navy Yard at Norfolk, Va., is authorized to permit service of both civil and criminal process on civilians in that navy yard by civil officers of Virginia (File 5267–1000, J. A. G. Apr. 10, 1920).

EVIDENCE: DOCUMENTARY, SIGNATURES IN, PURPORTING TO BE THOSE OF THE ACCUSED MUST BE ESTABLISHED AS THOSE OF THE ACCUSED BEFORE THE DOCUMENTS MAY BE INTRODUCED INTO EVIDENCE AGAINST HIM.

An accused was charged with and found guilty of "Desertion" and "Fraudulent enlistment." The judge advocate in endeavoring to establish the identity of the accused testified that the signature appearing in the service record book of X purported to be that of the accused and that the signature on the shipping articles of Y appeared to have been written by the same person, but no authentication of either of these signatures as that of the accused was introduced into evidence. While it is not necessary that a witness qualify as a handwriting expert before he may express an opinion as to the genuineness of handwriting, it is essential in the absence of such qualifications that competent evidence be introduced to show that the witness is familiar with the handwriting in question, before his opinion can be accorded any weight, and the more familiar the evidence shows him to be with the handwriting in issue, the more weight the court should give his testimony. It has been held that where a witness has seen a person sign his name but once, such witness is qualified to express an opinion of the genuineness of the handwriting in question (Greenleaf on Evidence, p. 723, par. 577). In the instant case the judge advocate had not qualified in any way whatever as being familiar with the handwriting of the accused. There was, therefore, no evidence to prove that the service record of X and the shipping articles of Y were those of the accused, and until they had been shown to be his, they were irrelevant to the issue being tried. The Judge Advocate General was therefore of the opinion, which was approved by the Secretary of the Navy, that the court fatally erred in permitting to be introduced in evidence those records purporting to prove the desertion and fraudulent enlistment of the accused, when in fact it had not been established that the service record of X and the shipping articles of Y were those of the accused (File 26251–22757, J. A. G., April 1, 1920; G. C. M. Rec. No. 47076).

NOTE.—This opinion does not conflict with C. M. O. 60, page 14, 1920, inasmuch as the latter did not consider the competency of a witness who has seen the accused write, that question not having been raised.

[P. 14] EVIDENCE: STATEMENTS OF THIRD PARTY INADMISSIBLE.

Counsel for an accused sought on the authority of Naval Digest, 1916, page 180, section 125, to introduce the statement made by a guard to the provost marshal to the effect that when the guard went for the accused, the latter had been given the freedom of the town by the civil authorities who had reported him for desertion, and that he was not locked up. The court sustained a motion to strike out the evidence of the provost marshal as to such statement on the ground that the statement was such that the facts could not have been in the personal knowledge of the guard, but stated that otherwise such statement would have been admitted under the citation quoted.

In affirming the action of the court sustaining the motion to strike out the evidence in question the Judge Advocate General expressed the following views:

The citation referred to in the foregoing statement of the case is as follows:

> "Statement by third party in presence of accused—Where a witness testifies 'the police officer stated that the accused gave himself up,' and it is proved that such statement was made in the presence of the accused, it is admissible in evidence, not being hearsay (C. M. O. 214, 1902"; Naval Digest, 1916, p. 180, sec. 125).

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That citation is a correct statement of the law of evidence as applied to the case reported in C. M. O. 214, 1902. It should be noted, however, that the statement was offered by the prosecution, and objected to by the court. As stated by Rice on Evidence, vol. 3, pp. 500–501:

> "What a third person says in the presence of a person charged, is admissible against him if he remains silent. His silence must be taken as an acquiescence in its truth."

This statement in Rice is supported by the citations of a great many authorities and is generally accepted by the courts and textbook writers as the correct rule of evidence.

It does not follow that because such statements can be admitted against the accused they can be admitted in his favor.

> "Testimony of declarations made by a third person is not admissible in behalf of a defendant charged with crime, though made in his presence" (Amer. Dig., Century Ed. vol. 14; p. 1631, citing *People* v. *Foo*, 112 Calif. 17, 44 Pac. 453).

Declarations made by third persons in the presence of the accused and acquiesced in by him either by express assent or by remaining silent are admitted as exceptions to the hearsay rule on the same grounds that admissions and confessions are received in evidence (Rice on Evidence, vol. 3, p. 500, etc.).

The above mentioned rule in regard to the admission of statements by third parties made in the presence of the accused is explained in the case of *Hauger* v. *United States* (173 Fed. 55, 59) by Boyd, district judge, in the following language:

> **[P. 15]** "The rule of evidence involved in this exception is based upon the silence of the defendant when his wife made the alleged declarations to Washen. Silence of a party in presence of a statement made by another may be put in evidence against him on the ground that from his silence his assent to what is said is inferred. To give such silence, however, effect as an admission, the party charged with it must have been in a position to explain. Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or of the existence of any particular fact, it must plainly appear that the language was heard on the conduct understood. Wharton's Criminal Evidence (9th Ed.) sec. 680. In commenting on this principle, Mr. Wharton cites the cases of *Commonwealth* v. *Brailey*, 134 Mass. 530, in which Judge Morton, chief justice, says:
>
> " 'Declarations made in the presence of a party, to which he makes no reply, are sometimes competent, as equivalent to tacit admission by him. This depends on whether he heard and understood them, whether he is at liberty to reply, whether he is in custody or under any restraint or duress, and whether the statements are made by such persons and under such circumstances as naturally to call for a reply.' "

The above citation in the Naval Digest from C. M. O. 214, 1902, is not authority for the admission in evidence in favor of the accused of declarations of third parties made in his presence or out of his presence; nor is it authority for the admission of declarations of third parties against the accused if not made in his presence. Therefore, the testimony sought to be introduced in the case in question was purely hearsay and as such the court was correct in sustaining the motion to strike it from the record. This opinion was approved by the Secretary of the Navy (File 26276–393, J. A. G., April 23, 1920).

JURISDICTION: DOES NOT LIE IN A SUMMARY COURT MARTIAL TO TRY CASES REFERRED TO IT BY ANY OTHER THAN ITS CONVENING AUTHORITY.

In a recent case in which an enlisted man was tried by summary court martial it appears that the specification was preferred by the commanding officer of the vessel to which the accused was attached, but the specification was referred to a summary court martial convened by authority of an officer other than the commanding officer of the accused or his successor, namely, by the "Commander Destroyer Division 30." In approving the acquittal of the

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accused in this case the Judge Advocate General held that ordering the court to convene, preferring the specification, and referring the same to a particular court for trial, are the acts necessary to order a summary court martial upon an accused, and that article 26 of the Articles for the Government of the Navy contemplates that all these acts be performed by the same commanding officer or his [P. 16] successor in office. A summary court martial convened by the commanding officer of one vessel would therefore be without jurisdiction to try a case where the specification is preferred by the commanding officer of another vessel. The foregoing opinion was approved by the Secretary of the Navy (File 26287–6537, Sec. Nav., Apr. 5, 1920).

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1. OPINIONS: SITUATIONS MUST NOT BE CREATED WITH A VIEW TO SECURING.
2. INSTRUCTIONS: WHERE STRICT ADHERENCE TO, ISSUED BY THE DEPARTMENT, SEEMS INAPPROPRIATE, CONVENING AUTHORITIES HAVE PRIVILEGE OF REPORTING SUCH CASES FOR ACTION BY THE DEPARTMENT.

In a summary-court-martial case in which a specification alleging theft was found proved the convening authority returned the record to the court for the purpose of changing its sentence to include the discharge of the accused from the service. The convening authority stated that this apparent violation of C. M. O. 309 was for the purpose of securing a decision from the Department as to whether in such a case any sentence other than discharge from the service would be appropriate in view of the statement contained in Naval Digest, page 627, Thief, 1, to the effect that the best interests of the service demand that persons convicted of theft be discharged, and whether C. M. O. 309 should be followed in all cases regardless of circumstances.

The Department expressed the view that while a strict adherence to the procedure directed in court-martial order 309, 1919, may, in rare cases, result in a miscarriage of justice or the retention of undesirables, yet the manifest advantages of such a course so far outweigh the occasional disadvantages as to make any violations of the spirit of the order very improper; that convening authorities have always the privilege of reporting such cases as they deem proper for action by the Department; and that the Department does not approve the creation of situations with a view to securing an opinion from the Judge Advocate General on abstract questions, especially when such action involves a violation of the published policy of the President (File 26287–6572, Sec. Nav. April 22, 1920).

PRECEDENCE: OFFICERS OF THE LINE AND STAFF; DATE OF COMMISSION GOVERNS.

On reconsideration the Judge Advocate General affirmed the opinion digested in C. M. O. 280, 1919, page 19, holding that section 1485 of the Revised Statutes, under which officers of the line and staff when of the same rank took precedence with each other according to length of service, has been repealed by the act of August 29, 1916, and that officers whose cases would otherwise be governed by said section now take precedence according to date of commission. The Secretary of the Navy approved the Judge Advocate General's opinion to this effect (File 11130–63:1, J. A. G. and Sec. Nav., Mar. 16, 1920; see also 11130–67, J. A. G. and Sec. Nav., April 26, 1920).

[P. 17] CHECKAGE: AGAINST ACCOUNT OF STRAGGLER, COST OF TRANSPORTATION OF HIMSELF AND GUARD, IS NOT PROPER.

An enlisted man, Y, reported at the Receiving Ship at New York as a straggler from the U. S. S. *Shawmut*, which ship had in the meantime left New York for Pensacola, Fla. Y was delivered under guard on board the *Shawmut* at Pensacola. It was then sought to check against the account of Y, the cost of transportation of himself and his guard from New York to Pensacola.

The Department knows of no law or regulation which would authorize the checkage against the pay of Y of the expenses incurred on account of the guard who accompanied him from New York to Pensacola, Fla. It is extremely doubtful whether even the checkage of the cost of his own transportation

against his account is authorized under the circumstances of this case. In a decision of the Comptroller of the Treasury, dated March 26, 1913, it was held that the expenses incurred in returning an enlisted man from the recruiting station, Dallas, Tex., where he was delivered as a deserter by the civil authorities, to his station at Mare Island, Calif., could not be checked against the pay of the enlisted man. Y surrendered as a straggler to the Receiving Ship at New York and was accepted by the naval authorities at that place. His further disposition was in the discretion of his commanding officer or the Bureau of Navigation. (See Articles 3640–3641, Navy Regulations, and par. 182, Annual Circular, Bureau of Navigation, January 1, 1918.)

From the foregoing the Department believes that the cost of transportation of the guard who accompanied Y from New York to Pensacola should not be checked against his pay. Inasmuch as it is the duty of an enlisted man to return to his ship from liberty and as it appears to have been Y's intention to return to his ship, the checkage of the cost of transportation of himself from New York to Pensacola will not be disturbed at this time (File 26254–3145, Sec. Nav. April 3, 1920).

REVISION: ACTION IN—RECORDS OF DECK COURTS SHOULD SHOW ACTIONS IN REVISION.

The records of certain deck courts were returned to the convening authority with directions to have the sentences entered in handwriting, as directed by Naval Courts and Boards, 1917. Entirely [P. 18] new records were returned to the Department, and not the originals, with the proceedings in revision appended thereto. The Department invited attention to section 481, Naval Courts and Boards, which provides that

> "The general provisions laid down in chapter XI and the procedure as to the arrangement, pleading, and conduct of a trial by summary court martial therein prescribed, shall, in general and where not inconsistent with the present chapter, apply to deck courts."

and added that during a revision an entirely separate record shall be kept, to which the order for reassembling must be prefixed, and which shall itself be prefixed to the record of which it is a revision. Clerical errors or omissions in the original record are not to be corrected in an informal manner by erasure or interlineation, but the legal procedure is for the proper officer to reconvene the court, calling its attention, in the order for reassembling, to the error requiring correction, and for the court, on reassembling, to decide as to the correction to be made, and to incorporate it as a part of the record of proceedings in revision. (See sections 376, 377, and 456, Naval Courts and Boards; File 27217–4120:1, Sec. Nav. Apr. 22, 1920.)

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[P. 11] CHARGES AND SPECIFICATIONS: FAILING TO KEEP AND ACCOUNT FOR STORES OF POST EXCHANGES SHOULD NOT BE CHARGED AS EMBEZZLEMENT BUT AS SCANDALOUS CONDUCT.

An accused was charged and acquitted of embezzlement. The specification alleged in effect that he failed to keep and account for stores, the property of the post exchange.

The offense of embezzlement as laid down in Article 14 of the Articles for the Government of the Navy is limited to stores, etc., property of the United States, furnished and intended for the military or naval service thereof. The post exchange funds are not property of the United States (Digest of Opinions, J. A. G. of the Army, 1912, p. 638), nor was it alleged in the specification that the funds embezzled were intended for the military or naval service thereof. As they were not alleged to have been public funds, the offense does not fall within the provisions of the Criminal Code, section 85, et seq. The charge should have been "Scandalous conduct tending to the destruction of good morals," which is provided for under article 8, Articles for the Government of the Navy. The specification as laid does not support the charge, and the court therefore erred in pronouncing the charge and the specification thereunder in

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due form and correct. In view of the foregoing the Department disapproves so much of the proceedings as related to the second charge and the specification thereunder, and the finding thereon (File 26262-7385, J. A. G. May 13, 1920; G. C. M. Rec. No. 47621).

COMMAND: MAY NOT BE EXERCISED BY LINE OFFICERS RESTRICTED BY LAW TO THE PERFORMANCE OF ENGINEERING DUTIES ONLY.

Can the commanding officer of a squadron, division, or flotilla, specifically authorize a line officer, restricted by law to the performance of engineering duties only, to exercise command or succeed to the command of said squadron, division, flotilla, or ship to which he is assigned, when considered competent for such duty?

The Personnel Act of March 3, 1899 (30 Stat. 1004), provides in part as follows:

> "SEC. 4. That engineer officers transferred to the line who are below the rank of commander, and extending down to, but not including, the first engineer who entered the Naval Academy as cadet midshipman, shall perform sea or shore duty, and such duty shall be such as is performed by engineers in the Navy:"
>
> "SEC. 5. That engineer officers transferred to the line to perform engineer duty only who rank as, or above, commander, or who subsequently attain such rank, shall perform shore duty only."

It must also be borne in mind that from the date of the passage of the above personnel act engineer officers of the Navy were inhibited from the exercise of military command (sec. 1488, R. S.).

[P. 12] The act of August 29, 1916, contains the following provision:

> "Officers of the line of the Navy not below the grade of lieutenant may, upon application, and with the approval of the Secretary of the Navy, be assigned to engineering duty only, and that when so assigned and until they reach the grade of commander, they shall perform duty as prescribed in section four of the Personnel Act approved March third, eighteen hundred and ninety-nine, and thereafter shore duty only as now prescribed for officers transferred to the line from the former engineer corps, except that commanders may be assigned to duty as fleet and squadron engineers: *Provided*, That when so assigned they shall retain their place with respect to other line officers in the grades they now or may hereafter occupy, and also the right to succession to command on shore in accordance with their seniority, and shall be promoted as vacancies occur subject to physical examination and to such examination in engineering as the Secretary of the Navy may prescribe: * * *"

Thus the foregoing act of August 29, 1916, applies the provisions of section four of the Personnel Act to the duty to be performed by officers below the grade of commander who are assigned to engineering duty, that is, such officers "shall perform sea or shore duty, and such duty shall be such as is performed by engineers in the Navy," and also applies the provision of section five of the Personnel Act to the duty to be performed by such officers of the rank of commander, or above, who are assigned to engineering duty, and who "shall perform shore duty only," with the exception that commanders may be assigned to duty as fleet and squadron engineers. The duties performed by engineers in the Navy, as that term is used in section four of the Personnel Act, do not involve succession to the command of, or to the duties performed by line officers afloat, as at the time of the passage of the Personnel Act former engineer officers restricted to the performance of engineering duty only neither succeeded to command nor to the duties of any officer performing the duties of the line afloat (G. O. #524, Navy Dept., August 5, 1899; File 28441-227, of July 20, 1917).

Therefore, the inhibition by section 1488, Revised Statutes, insofar as it does not authorize officers assigned to engineering duties to exercise military command afloat has not been modified by the act of August 29, 1916, or by any other act of which I am aware.

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It is understood that the foregoing question was submitted for an opinion in view of the language of the last proviso of article R–1003 (6), of the U. S. Navy Regulations. A fair interpretation of said article would seem to be that officers restricted by law to the performance of certain duties cannot be given other duties by virtue of the above regulation, but that officers whose duties are not restricted by law may be assigned other duties thereunder if the performance of such duties by them is not inconsistent with law. As above indicated, it would be clearly inconsistent with law to authorize a line officer who is restricted by law to the performance of engineering duties only to exercise military command afloat, and [P. 13] the question submitted must, therefore, be answered in the negative. The foregoing opinion of the Judge Advocate General was approved by the Secretary of the Navy (File 20392–1124, J. A. G. May 29, 1920).

EVIDENCE: DATA FURNISHED FOR PREPARATION OF A CASE FOR TRIAL DOES NOT IPSO FACTO ATTACH TO ITSELF GREATER SIGNIFICANCE MERELY BECAUSE FURNISHED BY THE DEPARTMENT.

In a recent case an accused was being tried for desertion. The prosecution sought to introduce into evidence two letters, one from the mother of the accused to the Bureau of Navigation asking for clemency, the other from the accused while in a penitentiary in Canada to the Secretary of the Navy stating that the accused had deserted from the Navy and asking to be extradited and given another chance. The first letter was clearly inadmissible because the author was not under oath and subject to cross examination (N. C. & B., 1917, sec. 168). The only ground upon which the second letter would be competent is as a confession, but before a confession is admissible the corpus delicti must be established. In this case no proper foundation had been laid. The most vital objection to the introduction of the second letter, however, is the fact that it was not proved that the accused had actually written the letter. The court in ruling on the objection of the counsel for the accused to admitting into evidence these letters stated: "The fact that they are sent by the Department to the Judge Advocate must be accepted as prima facie reasons for admitting them in the first instance." It should be obvious that by the mere sending of letters through official channels to the Judge Advocate, the Department cannot ipso facto nullify the rules of evidence. The Department furnishes the Judge Advocate with all information available to enable him to prepare the case for prosecution. That this information must be used in a proper manner is elemental.

The prosecution introduced into evidence the current enlistment record of the accused, the Judge Advocate reading therefrom an extract as follows: "U. S. S. _____: Deserted at Halifax, signed _____ _____." The date of the alleged desertion was not entered at any place in the service record. Another witness for the prosecution testified that the accused had stated to him that he (the accused) had deserted on a certain date. When the witness was asked if this statement was voluntary he replied that it was not. This evidence should not have been admitted (sec. 120, N. C. & B.). The prosecution nowhere established the date the alleged unauthorized absence began.

The Department held that the above irregularities were prejudicial to the accused, and accordingly disapproved the proceedings, findings, and sentence (File 26251–23320, J. A. G. May 19, 1920; G. C. M. Rec. No. 47564).

[P. 14] RETIREMENT: TAKES EFFECT FROM DATE OF APPROVAL BY PRESIDENT OF THE UNITED STATES AND NOT FROM DATE APPLICANT RECEIVES NOTICE OF PRESIDENT'S ACTION.

The question was presented to the Attorney General whether, in the case of an officer who has been retired on his own application after 40 years' service pursuant to section 1443, Revised Statutes, his retirement took effect so as to create a vacancy which might be filled by the appointing power, at the date his application for retirement was approved by the President, or not until he received notice of the President's action.

The Attorney General expressed the view that while the subject is not free from doubt, for the purpose mentioned, the vacancy occurred at the prior period.

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In *Marbury* v. *Madison*, 1 Cranch 137, 161 the Supreme Court held that an appointment to office takes effect when the appointing power has done everything in regard to it required by law. This rule is not [1] settled in the law of the United States (*United States* v. *Bradley*, 10 Pet. 343, 364; *United States* v. *Linn*, 15 Pet. 290, 313; *United States* v. *Le Baron*, 19 How. 73, 78). The same principle has been applied to patents issued by the United States (*United States* v. *Schurz*, 102 U. S. 378, 397–399). This principle is applicable to the retirement of an officer of the Navy under Section 1443, R. S. By that section three facts must exist. The officer must have been forty years in the service; he must apply for retirement; and the President must act upon his application. When these three things occur, the officer's status changes from that of an active officer to that of a retired officer. It is obvious that the officer's status should be a matter of official record. If, therefore, it depends upon his receiving notice, there might be no record showing when the vacancy occurs. In the instant case the officer was in California. It would be possible in a similar case for the officer to be in any other part of the world. He is not required to advise the Navy Department that he has received the notice of his retirement, and might not do so. In the absence of such notice neither the President nor the Navy Department would know whether or when he received the notice, and, consequently, would not know whether or not there was a vacancy.

The fact that the officer might be under obligation to continue in the discharge of his duties until he is notified of the action of the President, while creating some difficulty in reaching a conclusion, does not justify a different conclusion. When the officer is absent from Washington it is inevitable that the action of the President can not be known to him at the moment it is taken. The retirement, therefore, must become effective when the official record is completed by the action of the President or when the officer receives notice of this action. One of these conclusions permits of a public record available for all public purposes, while the other would depend upon an event which may take place in some remote part of the world at a time rendered uncertain by the method and difficulties of communication and of which there might be no public [P. 15] record. The statute provides that the officer upon his application may be retired by the President, not that he may be retired by notice of the President's action. Therefore, the retirement of an officer becomes effective when the President acts upon his application (File 28687–22: 10, May 1, 1920 [2]).

REWARDS: FOR SUGGESTIONS RESULTING IN IMPROVED METHODS IN THE NAVY DEPARTMENT APPLIES TO MEMBERS OF NAVAL RESERVE FORCE ON INACTIVE STATUS.

Opinion was requested as to whether members of the U. S. Naval Reserve Force on inactive duty are "persons in civil life," within the meaning of the Act of July 1, 1918 (40 Stat. 718), for the purpose of receiving cash rewards therein provided.

The said act of July 1, 1918, provides:

> "That the Secretary of the Navy is hereby authorized, in his discretion and under such rules and regulations as he may prescribe, to pay cash rewards to civilian employees of the Navy Department or the Naval Establishment or other persons in civil life when due to a suggestion or series of suggestions by them there results an improvement or economy in manufacturing process or plant or naval material: *Provided*, That such sums as may be awarded to employees or other persons in civil life in accordance with this act shall be paid them out of current naval appropriations in addition to their usual compensation: *Provided further*, That no employee or other person in civil life shall be paid a reward under this act until he has properly executed an agreement to the effect that the use by the United States of the suggestion or series of suggestions made by him shall not form the basis of a further claim of any nature from the United States by him, his heirs, or assigns."

The act of August 29, 1916 (39 Stat. 588), as amended by the act of July 1, 1918, provides that enrolled members of the Naval Reserve Force shall be subject to the laws, regulations, and orders for the government of the Navy only during such time as they may by law be required to serve in the Navy in accord-

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[1] Should be *"now."*

[2] Op. Atty. Gen.

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ance with their obligations, when on active service at their own request, as provided in said act, and when employed in authorized travel to and from such active service in the Navy, and while wearing the uniform of their respective rank, grade, or rating. The said act further provides that:

> "No existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay." (This provision was modified by the act of July 11, 1919, so as to permit members of the Naval Reserve Force to become members of the Naval Militia of any State, Territory, or the District of Columbia.)

[P. 16] It thus clearly appears that Congress intended by the foregoing provision to grant to members of the Naval Reserve Force other than transferred members of the Fleet Naval Reserve, absolute freedom of action with regard to public or private employment while not actually employed with the Navy in time of war or national emergency or for training, or while in uniform; the restriction placed upon them being a prohibition against their serving in any other branch of the military service of the United States or any State thereof, except with the Naval Militia as hereinbefore stated.

The Judge Advocate General was therefore of opinion that at such times as above indicated, during which the members of the U. S. Naval Reserve Force on inactive duty are given freedom of action with regard to public or private employment, they should be regarded as "persons in civil life," within the meaning of the foregoing act of July 1, 1918, and that they are, therefore, eligible to receive cash rewards for beneficial suggestions made by them during such times, which opinion was approved by the Secretary of the Navy (File 28113–66, J. A. G. May 29, 1920).

SERVICE: OF AN ENLISTED MAN AS TEMPORARY BOATSWAIN, MAY BE CREDITED TO COUNT AS SERVICE OF BOATSWAIN IN COMPUTING TIME REQUIRED FOR PROMOTION TO CHIEF BOATSWAIN.

Opinion was requested as to whether in the case of an enlisted man of the Navy who is also holding an appointment as temporary boatswain, the time served as temporary boatswain should be credited to and counted as service in the grade of boatswain in computing the six years' service required for promotion to chief boatswain, under the provisions of the act of April 27, 1904 (33 Stat. 346), as follows "* * * boatswains, gunners, carpenters, and sailmakers shall be eligible for appointment as chief boatswains, chief gunners, chief carpenters, and chief sailmakers after six years from date of warrant."

The act of May 22, 1917 (40 Stat. 84), provides that temporary appointments as warrant officers of the Navy may be made by the Secretary of the Navy by temporary advancement of "* * * warrant officers, and enlisted men of the Navy * * *"; that the warrants of such officers "* * * shall not be vacated by reason of their temporary advancement or appointment, nor shall said officers be prejudiced in their relative lineal rank in regard to promotion in accordance with the act of August 29, 1916: *Provided*, That the rights, benefits, privileges, and gratuities of all enlisted men of the Navy and Marine Corps now authorized by law shall not be lost or abridged in any respect whatever by their acceptance of temporary commissions or warrants hereunder"; and that upon the termination of such temporary appointments in higher grade or rank the [P. 17] officers so advanced "including * * * warrant officers, * * * and enlisted men of the Navy * * * shall revert to the grade, rank, or rating from which temporarily advanced unless such officers or enlisted men in the meantime, in accordance with law, become entitled to promotion to a higher grade or rank in the permanent Navy or Marine Corps, in which case they shall revert to said higher grade or rank and shall, after passing the prescribed examination, be commissioned accordingly." Said act further provides:

> "SEC. 13. Nothing contained in this act shall operate to reduce the rank, pay, or allowances that would have been received by any person in the Navy, Marine Corps, or Coast Guard, except for the passage of this act."

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In construing the above provisions of the act of May 22, 1917, the Judge Advocate General, in his opinion of April 24, 1918 (File 26806–155), said:

> "The foregoing specific provisions of the act and its general tenure establish very clearly the intent of Congress that no officer of the naval service should lose either rank, emoluments, or right to promotion by reason of anything contained in this act or by reason of the acceptance of temporary promotions in accordance with its provisions. The officers and enlisted men of the regular naval service who are advanced in accordance with the act of May 22, 1917, have a dual status in the Navy, their permanent enlistment, warrant, or commissions, as the case may be, remaining dormant until the termination of their temporary commissions or warrants."

In his opinion of March 15, 1919 (File 26521–321) on the question of computation of sea service under the provisions of the act of August 29, 1916 (39 Stat. 579), of an officer holding permanent rank as commander and also the temporary rank as captain, it was held:

> "An officer holding a temporary commission as captain is serving in the grade of captain just as fully as one who holds a permanent commission in that grade, the difference being merely in the tenure of the office in the two cases. So long as the temporary commission remains in force the office indicated thereby is legally vested in the holder of such commission and his title thereto is as certain for the time being as that of any officer in the grade.
>
> "It follows that, in my opinion, sea service rendered in the grade of captain under a temporary commission should be credited to the officer for the purpose of promotion the same as service rendered under a permanent commission in that grade."

The Judge Advocate General was, therefore, of opinion that the times served by an enlisted man of the Navy under an appointment as temporary boatswain should be credited to and counted as service in the grade of boatswain in computing the six years' service required for promotion to chief boatswain, which opinion was approved by the Secretary of the Navy (File 17789–87, J. A. G. May 5, 1920).

[P. 18] EXHIBITS: IF EVIDENCE OF MATTER IN ISSUE, THEY SHOULD BE MARKED "EXHIBIT NO.—"; IF THEY ARE MATTER OF COLLATERAL INTEREST THEY SHOULD BE MARKED "A," "B," ETC.

The point was made that by reason of Changes Naval Courts and Boards No. 2, confusion exists as to the manner in which exhibits in record should be marked.

In the preparation of court-martial records, documents, and exhibits, etc., should be prefixed or appended as may be required, in the order in which introduced into evidence. All documents other than instruments of evidence should be marked with capital letters. Instruments of evidence shall be marked as exhibits 1, exhibits 2, etc. (Naval Courts and Boards, sec. 84).

To determine how properly to mark documents to be appended to the record it is necessary to ascertain whether they are matters of evidence or matters of collateral interest to the record. Everything not introduced as evidence must be marked differently from documents of evidence. "Evidence is that which tends to prove or disprove any matter in question, or to influence the belief respecting it. It includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. That which is legally submitted to a jury, to enable them to decide upon the questions in dispute, or issue, as pointed out by the pleadings, and distinguished from all comment and argument" (Bouvier's Law Dictionary). "Evidence as defined by Blackstone signifies that which demonstrates, makes clear, or ascertains the truth of the very point in issue, either on the one side or on the other. It is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact" (Words & Phrases).

Applying those definitions to the matter under consideration in Naval Courts and Boards above reference numbers "326 to 334," page 396, it is apparent that

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it is not evidence, since at that stage of the proceedings all the evidence as to the guilt or innocence of the accused is in the record and only matters of collateral interest, viz, previous convictions for the purpose of determining the degree of punishment to be awarded, are being considered. It follows that such instruments should, when appended to the record, be marked not as "Exhibit No. —," but "A," "B," or "C," etc. There exists, then, no conflict between section 84 and the matter on page 396, of Naval Courts and Boards, as amended by Changes No. 2 (File 12821–186, J. A. G., May 25, 1920).

[P. 19] PENNANT: U. S. NAVAL COMMISSION, MAY NOT BE FLOWN BY A SHIP NOT IN THE SERVICE OF THE UNITED STATES.

The question presented was whether a ship of the Navy exclusively engaged in the duty of nautical schoolship of a State of the Union may fly the U. S. naval (commission) pennant.

"*Regulations.*—The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner" (Compiled Statutes, title XV, ch. 7, sec. 2805).

"*Flag or pennant on private vessels.*—The Secretary of the Navy shall prescribe a suitable flag, or pennant, that may be flown as an insignia on private vessels or vessels of the merchant service commanded by officers of the Naval Reserve Force: *Provided*, That it shall not be flown in lieu of the national ensign" (Compiled Statutes, title XV, ch. 7, 2900½a (25)).

"The distinctive mark of a ship of the Navy in commission, other than the national ensign, is a flag or pennant at a masthead" (Navy Regulations R–1236 (1)).

"An officer of the Navy commanding a ship engaged otherwise than in the service of the United States shall not display a pennant or flag of command at the masthead or in the bow of a boat" (Navy Regulations R–1247).

From the earliest days of the Navy, the commission pennant (sometimes called the narrow pennant, or "coachwhip" pennant, in order to distinguish it from the broad pennant of a commodore or the triangular pennant (flag) of the senior officer present) has been universally recognized as the distinguishing mark of a naval vessel in commission; this means in naval commission, or in commission for naval service as differentiated from simply nautical service of a character other than naval.

It has been repeatedly and consistently held that the Navy Regulations, duly approved by the President as Commander-in-Chief of the Navy, have the force and effect of law in their application to all persons in the naval service.

It has also been held that regulations expressly approved by Congress have the same force and effect as statute law (File 26254–1451: 11, April 12, 1915).

"Regulations not approved by Congress have the force of law when not in conflict with any statute" (File 26254–1451: 11, April 12, 1915).

"The Navy Regulations have the force and effect of positive law" (23 Op. Atty. Gen. 27).

"A regulation which has been in force for many years will be sustained unless Congress has annulled it by positive enactment" (16 Op. Atty. Gen. 621).

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, **[P. 20]** the conduct of its officers and clerks, the distribution and performance of its business, and the custody and use of the records, papers, and property appertaining to it" (R. S. 161).

"The Secretary of the Navy is authorized to establish 'Regulations of the Navy,' with the approval of the President (12 Stat. 565; R. S. 1547). Such regulations have the force of law" (*Gratiot* v. *U. S.*, 4 How. 80).

"The validity of a regulation" (even when) "not expressly approved either by Congress or the President will be sustained by the Supreme Courts unless 'it is plainly and palpably inconsistent with law,' * * *" (File 26254–1451: 11, April 12, 1915). Sufficient authority has been presented to justify the conclusion that while there may be no statutory enactment defining in detail the uses to which the naval commission pennant may legally be put, this pennant is

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peculiarly a naval insignia, appropriate only to exclusively naval employment; and that the regulations governing its display properly and authoritatively emanate from the Navy Department. Such regulations are not in conflict with existing law; quite to the contrary they are in keeping with the spirit of the statutes relating to the regulations of executive departments and are supported by a long line of decisions and precedents.

It is manifest that the ship in question, although carried on the list of vessels of the Navy, is neither in naval commission nor in the service of the United States while operating as a nautical schoolship—really a part of the State educational system—of a separate State of the Union.

It is obvious that if the right to fly the naval pennant is denied to an officer of the Navy by R–1247, it is impliedly all the more positively denied to an officer not of the Navy under the same circumstances of nongovernmental service.

The Judge Advocate General was therefore of the opinion that the said ship while in service as the nautical schoolship of a State of the Union is not entitled to fly the naval commission pennant (File 8103–19: 14, J. A. G.May 14, 1920).

REDUCTION IN RATING: COMMANDING OFFICER CANNOT REDUCE AN ENLISTED MAN MORE THAN ONE RATING AT A TIME EVEN THOUGH THEY MAY HAVE BEEN SUCH AS WERE ESTABLISHED BY HIMSELF.

The question presented is whether a commanding officer can reduce an enlisted man more than one rating if they were established by himself.

As noted in article 24, Articles for the Government of the Navy, a commanding officer is authorized to inflict a punishment on a petty officer of reduction of any rating established by himself, and reduction in rating, it is noted, is singular and does not mean ratings. A summary court martial is only authorized to inflict punishment of reduction to the next inferior rating. It would be inconsistent to hold that a reduction by a commanding officer of a gunner's mate first class to a rating of seaman was within the above regulations [P. 21] inasmuch as such reduction would exceed that which a summary court martial would be authorized to inflict.

The Department held that the attempted reduction in rating of the man under consideration from gunner's mate first class to seaman by the commanding officer was illegal and of no effect, and that the man remains a gunner's mate first class until a legal reduction in rating is made (File 26254–2881: 103, Sec. Nav. May 21, 1920).

SENTENCE: SHOULD BE UNIFORM THROUGHOUT THE SERVICE AND THEREFORE COURT-MARTIAL ORDERS SHOULD BE USED AS A GUIDE TO THAT END.

An accused pleaded guilty to a charge of desertion and was sentenced to be confined for six months, then to be discharged from the U. S. naval service, etc.

The sentence adjudged, being no greater than that for absence from station and duty without leave, or after leave had expired, was manifestly inadequate for the offense for which the accused was found guilty. In view, however, of the policy of the President as expressed in C. M. O. 309, 1919, 2, it is not deemed advisable to return records for revision with a view to increasing a sentence, and it is, therefore, quite necessary and desirable that general courts martial be guided, in adjudging sentences, by the approved sentences as published in Court-Martial Orders, which "have full force and effect as regulations for the guidance of all persons in the naval establishment."

The reason for this is that it is necessary to maintain an even administration of justice throughout the service, which can only be done by the Department in equalizing sentences by mitigation, a policy which cannot be made effective unless adequate and more or less equal sentences be adjudged for like offenses.

It is not the intention of the Department to dictate to, or unduly influence courts martial in this respect, for there is a wide enough range between the maximum sentence prescribed by the President for desertion, and that for

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unauthorized absence, to enable courts to fit a punishment suitable to the degree of culpability found proved. Subject to the foregoing the Judge Advocate General was of opinion that the proceedings, findings, and sentence were legal, which opinion was approved by the Secretary of the Navy (File 26251–23517, J. A. G. May 13, 1920; G. C. M. Rec. No. 47720).

VIRGIN ISLANDS: IN REVIEWING CASES ARISING IN THOSE CIVIL COURTS THE PROPER FORM IS WRIT OF ERROR.

In a recent case arising in the civil courts of the Virgin Islands the question presented was whether a review by the U. S. Circuit Court of Appeals for the Third District could be obtained by "writ of error" or "appeal." That court in disposing of the question held that writ of error was the proper form (File 28759-504, May 5, 1920).

C. M. O. 79—1920

[P. 1] Boatswain (T) John T. Antrobus, U. S. Navy, was tried by general court martial on April 19, 1920, on board the U. S. S. *Columbia*, by order of the Commander, Train, Atlantic Fleet, and acquitted of the following charge:

Charge.—Drunkenness (one specification).

Action of the Convening Authority

On April 27, 1920, the convening authority noted that the court failed to bring out fully in the testimony of the principal witness for the prosecution the signs and indications which led him to the conclusion that Boatswain Antrobus was drunk, and that in several instances the witness under examination was asked for an opinion as to certain matters without having first been qualified as to his expertness in the same matters. The convening authority believed that the court erred in these particulers. Subject to the foregoing, the proceedings, finding, and acquittal were approved. It was directed that Boatswain Antrobus be released from arrest and restored to duty.

C. M. O. 82—1920

[P. 1] Ensign Francis J. Thomas, U. S. Navy, was tried by general court martial on April 16, 1920, on board the U. S. S. *Nevada*, by order of the Commander, U. S. Naval Forces in Cuban Waters, and found guilty of the following charges, proved by plea:

Charge I.—Negligence in obeying orders (one specification).

Charge II.—Neglect of duty (one specification).

The court sentenced him to lose 10 numbers in his grade, but in consideration of his youth and inexperience unanimously recommended him to the clemency of the reviewing authority.

Action of the Convening Authority

On April 23, 1920, the convening authority approved the proceedings, findings, and sentence, stating that this officer, by his own plea and without extenuating circumstances, stands convicted of "Negligence in obeying orders" and "Neglect of duty," which are classed as serious military offenses, and that the reviewing authority feels justified in expecting from an officer of the youth of Ensign Thomas an energetic and enthusiastic attention to all details of the duties assigned him, and in the pursuit of his profession a scrupulous observance of orders and thorough compliance therewith, upon which course only can the foundation for a successful career in the Navy be laid. The reviewing authority having full confidence in the court, and being desirous of giving due weight to their opinion as expressed by their unanimous recommendation to clemency, reduced the sentence to the loss of five numbers, and directed that Ensign Thomas be released from arrest and restored to duty.

C. M. O. 83—1920

[P. 1] Ensign John Schroeder, U. S. Navy, was tried by general court martial on January 29, 1920, at the Naval Station, St. Thomas, Virgin Islands of the United States, by order of the Commandant, U. S. Naval Station, St. Thomas, and found guilty of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (three specifications).

The court sentenced him to lose twenty-five dollars per month of his pay for a period of six months.

Action of the Convening Authority

On February 17, 1920, the convening authority approved the proceedings, findings, and sentence, and directed that Ensign Schroeder be released from arrest and restored to duty.

Opinion and Recommendation of the Judge Advocate General

On March 9, 1920, the Judge Advocate General placed the following remarks upon the record:

> "In this case, the accused was charged with 'Conduct to the prejudice of good order and discipline,' the specifications thereunder alleging as follows:
>
> "'*Specification 1.*—In that Ensign John Schroeder, U. S. Navy, serving on board U. S. S. subchaser *Number Sixty-two*, at the naval station, Saint Thomas, Virgin Islands of the United States, did at various times between 1 a. m. and 4 a. m. on January 1, 1920, unlawfully fire about ten shots from a pistol, at his quarters in Saint Thomas, in violation of paragraph six of the Police Regulations of St. Thomas.
>
> "'*Specification 2.*—In that Ensign John Schroeder, U. S. Navy, serving on board the U. S. S. subchaser *Number Sixty-two*, at the naval station, Saint Thomas, Virgin Islands of the United States, did, at various times between 1 a. m. and 4 a. m. on January 1, 1920, at his quarters in said Saint Thomas, un- [P. 2] lawfully permit Iver F. Swanson, chief yeoman, U. S. Navy, and Coy Lidie, storekeeper first class, U. S. Navy, serving at the naval station aforesaid, to fire about ten shots each from a pistol in his, the said Ensign Schroeder's quarters aforesaid, in violation of paragraph six of the Police Regulations of said Saint Thomas.'
>
> "Paragraph Six of the Police Regulations of which the court took judicial notice, is as follows:
>
> "'Nobody may shoot on or over the public streets, roads, or places with guns, pistols, popguns, bows and arrows, blowtubes, or other similar things, nor burn gunpowder, fireworks, or explosive articles of any kind whatever, nor throw such, neither throw from houses stones, dirt, water, or anything else by which damage can be done or the passers-by annoyed. The Policemaster can, however, allow exceptions from the prohibition against the letting off of fireworks. Neither is it allowed to hoist kites, play cricket or other such games in the public streets.'
>
> "The court found accused guilty of said charge and specifications, and the convening authority approved the proceedings, findings, and sentence.
>
> "This office is of the opinion that the first and second specifications of said charge are bad in substance, in that the facts alleged therein do not constitute a violation of the regulation aforesaid. It is set forth in the regulation that 'nobody may shoot on or over the public streets, roads, or places with guns, pistols, etc.,' whereas, the specifications in question allege the firing of a pistol 'at his quarters' and 'in his * * * quarters,' but do not allege that the shooting occurred on or over the public streets, roads, etc., or that said firing caused or resulted in damage to property or persons, or that 'passers-by' were annoyed. The court, therefore, erred in finding said specifications in due form and technically correct."

The Judge Advocate General, in view of the above, recommended that the proceedings and finding of not guilty of specification three be approved, and that

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the proceedings, findings, and sentence on the charge and specifications one and two thereunder in the foregoing case of Ensign John Schroeder, U. S. Navy, be disapproved.

[P. 3] RECOMMENDATION OF THE BUREAU OF NAVIGATION

On March 15, 1920, the Bureau of Navigation recommended approval of the proceedings and findings of the general court martial, as amended by the Judge Advocate General's endorsement on the record, and recommended disapproval of the sentence.

ACTION OF THE SECRETARY OF THE NAVY

On June 21, 1920, the Secretary of the Navy approved the foregoing recommendations of the Judge Advocate General.

C. M. O. 84—1920

[P. 1] Lieutenant (Junior Grade) (T) Joseph Murtagh, U. S. Navy, was tried by general court martial on April 26, 1920, on board the U. S. S. *Minneapolis*, by order of the Commander, Train, U. S. Pacific Fleet, and found guilty of the following charge, proved by plea:

Charge.—Drunkenness (one specification).

The court sentenced him to lose fifty dollars per month of his pay for a period of six months, but five of the seven members of the court recommended him to the clemency of the reviewing authority in consideration of his previous good record during the long period of his service as an enlisted man, and as testified to by his commanding and other officers, while a commissioned officer.

RETURNED FOR REVISION

On April 28, 1920, the convening authority returned the record to the court, directing the court to reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was not adequate to the offense found proved. Attention was called to article 51 of the Articles for the Government of the Navy. Where a court martial adjudges a lenient sentence it encroaches upon the prerogative of the reviewing authority by exercising clemency, as this power is vested by law, not in courts martial, but in the reviewing authority.

ACTION IN REVISION

The court decided respectfully to adhere to its former sentence.

ACTION OF THE CONVENING AUTHORITY

On April 30, 1920, the convening authority stated that the accused in this case has been charged with a grave offense and has pleaded guilty. The sentence of the court, even under circumstances most favorable to the accused, had they existed, is [P. 2] a most lenient one, and the convening authority could not but feel that, in arriving at its sentence, and in adhering to same, the court, misinterpreting its functions took into consideration those very circumstances which formed the basis of the recommendation to clemency made by five of the seven members of the court. As to what may in general be considered an adequate punishment for an offense is revealed in the limitations to punishments in time of peace prescribed by the President and the table of offenses of approved sentences published in Court-Martial Orders for the guidance of all concerned. In this case the court has adjudged a punishment so lenient that the recommendation to clemency becomes an absurdity, unless the accused is to escape all punishment. The sentence adjudged is totally inadequate for the offense found proved and should not be taken as establishing a precedent. Subject to the foregoing remarks, the convening authority approved the proceedings, findings, and, in order that the accused might not entirely

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escape punishment, the sentence in the foregoing case of Lieutenant (Junior Grade) (T) Joseph Murtagh, U. S. Navy; disapproved the recommendation to clemency; and directed that Lieutenant Murtagh be released from arrest and restored to duty.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 24, 1920, the Judge Advocate General noted that Court-Martial Order 309, December 13, 1919, reads in part as follows:

> "The President of the United States, as recently as July 14, 1919, has directed, with regard to this matter as follows:
> "'No authority will return a record of trial to any military tribunal for reconsideration of:
> "'1. (*a*) * * *.
> "'2. (*b*) * * *.
> "'3. (*c*) * * *.
> "'4. (*d*) The sentence originally imposed, with a view to increase its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.
> "'2. * * *.
> "It would appear that the return of a naval case to a naval court for reconsideration of an acquittal, or to impose a more [P. 3] severe punishment upon a conviction, would be in direct contravention to the President's established policy in the premises and of his mandate to courts of the military service."

Subject to the above, the proceedings, findings and sentence, and the proceedings in revision, of the general court martial in the foregoing case of Lieutenant (J. G.) (T) Joseph Murtagh, U. S. Navy, were legal, but, in view of all the circumstances, it was recommended that the sentence be reduced to the loss of twenty-five dollars per month for a period of six months.

ACTION OF THE SECRETARY OF THE NAVY

On June 19, 1920, the Secretary of the Navy approved the foregoing recommendations of the Judge Advocate General.

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[P. 12] "ACCESSORY" AND "PRINCIPAL": DISTINCTION BETWEEN THE TERMS—THE FORMER MUST BE ABSENT, THE LATTER PRESENT, AT THE TIME.

An enlisted man was charged, tried, and convicted of assaulting with a deadly weapon and wounding another person, the specification alleging that the accused did aid, abet, assist, and join or otherwise participate, together with another person in willfully, maliciously, and without justifiable cause, assaulting with a loaded pistol and wounding a certain person, "and, therein and thereby, and by not protesting against said willful assault and shooting of the said X, whereby the said X was wounded with a deadly weapon, * * * and by not speedily reporting the fact thereof to proper authority, he, the said Y, became and was an accomplice in the commission and compounding of a felony—to wit, assaulting with a deadly weapon and wounding another person, * * * and an accessory before and after the fact thereof; * * *."

Aside from the question of duplicity, which is obviously present in this specification, it is alleged that he was an accessory and a principal. To be guilty as a principal it is essential that the accused be present actually or constructively. "He need not be an eyewitness or earwitness to the deed. Thus, if a person intends to assist, and is sufficiently near to do so, as where one is watching outside of a house while another is committing a burglary or other felony inside, he is regarded as present. * * * A person, if present, must be a principal, if guilty at all. He cannot be an accessory, for * * * absence is essential to make one an accessory" (Clark's Criminal Law, sec. 47).

The Judge Advocate General was therefore of the opinion, which was approved by the Secretary of the Navy, that the court erred in finding this specification in

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due form and technically correct; but as the accused was represented by counsel and had ample opportunity to object thereto, considered that these defects had been cured by the verdict (File 26262–7505, J. A. G., June 28, 1920).

"ATTEMPTING" TO COMMIT CRIME: MERE ALLEGATION OF THE ATTEMPT IS NOT SUFFICIENT; SPECIFICATION MUST ALLEGE ACTS CONSTITUTING THE ATTEMPT; IT MUST ALSO ALLEGE THE ATTEMPT TO COMMIT THE OFFENSE.

An accused was charged with attempting to commit sodomy, the specification that he did forcibly and against the will of ——— attempt to commit sodomy in and upon the body of the said ———. The specification did not allege any acts constituting the attempt. In the case of *Hogan* v. *State* (50 Fla. 86) the court held that indictments for attempts to commit a crime must aver the intent and the overt act constituting the attempt. Again in *State* v. *Burris* (Del. 97, art. 427), the court held that an information under a statute relating to attempts to commit offenses, which contains no description of the act done or step taken beyond mere preparation of the accused in attempting to commit the particular crime, is insufficient.

[P. 13] For the above reasons the Judge Advocate General recommended that the proceedings, findings, and sentence with regard to this charge be disapproved, which recommendation was approved by the Secretary of the Navy (File 26262–7558, J. A. G., June 28, 1920).

DESERTION IN TIME OF WAR: CONVICTION OF, MUST CARRY WITH IT DISCHARGE.

An accused was charged, tried, and convicted of desertion and sentenced inter alia to be dishonorably discharged. The convening authority mitigated the sentence in accordance with articles 114 to 122 of the Manual for the Government of United States Naval Prisons and Detention Systems.

The Judge Advocate General expressed the view, which was approved by the Secretary of the Navy, that sections 1996 and 1998, Revised Statutes, as amended by the act of August 22, 1912 (37 Stat. 356), Navy Regulations, 1913, R. 3644, provide that persons who are convicted of "desertion" from the naval service in time of war are incapacitated from holding any office of trust or profit under the United States or from exercising any rights of citizenship thereof. It therefore follows that such a person cannot be retained in the United States naval service, and in all such cases the sentence of general courts martial should include dishonorable discharge. By virtue of the fact that a prisoner, whose sentence is mitigated in accordance with articles 114 to 122 of the Prison Manual, may usually earn his restoration to duty in the naval service, it is obvious that the action of the convening authority in so mitigating the sentence was without effect, and that that portion of his action so mitigating the sentence is a nullity (C. M. O. 114–1919, p. 14; File 26262–7558, J. A. G., June 28, 1920).

DISCHARGE: CHARACTER OF, CANNOT BE CHANGED IN THE ABSENCE OF MISTAKE OF LAW OR FACT.

A man enlisted April 3, 1917, was discharged March 13, 1920, by reason of physical disability not in line of duty, but not the result of his own misconduct, and was awarded the character of "Good," though his markings were "4.0," and under ordinary circumstances would entitle him to an honorable discharge. Had he been discharged as a "duration of war" man, as he probably would have had it not been for his illness, his discharge would have undoubtedly been honorable. It is now desired to change the character given to honorable.

Prior to the passage of the act of July 11, 1919, the Navy Regulations authorized honorable discharges only upon the expiration of an enlistment or of an extended enlistment and upon discharge for physical disability incurred in the line of duty. Honorable discharges were also authorized for men discharged within three months before the expiration of term of enlistment under the act of August 22, 1912 (37 Stat. 331); but this was regarded as an expiration of term discharge.

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[P. 14] Before it was amended on April 26, 1920, article 3607 (3), United States Navy Regulations, provided that—

> "Men discharged before the expiration of enlistment upon recommendation of a medical survey for injuries received or disabilities incurred in line of duty shall be given honorable discharges, provided their records warrant the same. * * *."

The foregoing sentence of article 3607 of the regulations was amended April 26, 1920, so as to read as follows:

> "Men discharged before the expiration of enlistment upon recommendation of a medical survey for injuries received or disabilities incurred other than as a result of their own misconduct shall be given honorable discharges, provided their records warrant same."

The foregoing amendment, however, did not become effective until the date of its approval, April 26, 1920, and it is not retroactive. Consequently it has no application to the case of the man in question, who was discharged March 13, 1920.

At the time the man was discharged his commanding officer was not authorized to give him an honorable discharge, whether his record warranted it or not; and he gave him the only kind of a discharge authorized by the regulations as they stood at the time. If a mistake of law or of fact had occurred in connection with this case—that is to say, for example, if the regulations had authorized an honorable discharge and the commanding officer misunderstood the regulations, or if the man had been given a discharge less creditable than his record warranted, assuming that the regulations authorized an honorable discharge—this office would be inclined to reconsider its opinion of April 28, 1919 (File 7657–885). From the facts, however, there has been neither mistake of law nor of fact in this case, and the man was discharged with the only kind of discharge he was entitled to under the regulations.

The act of July 11, 1919 (41 Stat. 139), provides that—

> "Any enlisted man of the Navy, Marine Corps, or Coast Guard, who, since February 3, 1917, and before November 11, 1918, enlisted for the period of four years shall upon his application made to the Secretary of the Navy on or before September 1, 1919, be held and construed to have enlisted for the duration of the war, and shall when discharged be granted an honorable discharge, and upon the taking effect of this act, shall be notified by the Secretary of the Navy of his right to file such application: *Provided*, That said enlisted man is otherwise entitled to an honorable discharge: * * *"

It does not appear whether or not the man enlisted between the dates mentioned in the above act for a period of four years, or whether or not he made application to the Secretary of the Navy to be regarded as a duration-of-the-war man; but, assuming that he did enlist during the period and made the required application, the act does not entitle him to an honorable discharge, because he was not, at the time of his discharge, "otherwise entitled to an honorable discharge" under the regulations then in force. The foregoing opinion of the Judge Advocate General was approved by the Secretary of the Navy (File 7657–885:1, J. A. G., June 21, 1920).

[P. 15] FLEET NAVAL RESERVE: MEMBERS OF CLASSES 1–C AND 1–D MAY, WHILE ON INACTIVE DUTY, ACCEPT POSITIONS IN THE CIVIL SERVICE, EVEN THOUGH THE SALARY OF SUCH POSITION AND THEIR RETAINER PAY COMBINED AMOUNT TO MORE THAN $2,000 PER ANNUM.

An opinion was requested as to whether members of the Fleet Naval Reserve, classes 1–C and 1–D on inactive duty, are, in addition to their retainer pay, amounting to approximately $60 and $95 per month, respectively, entitled to draw salaries through civil-service positions where the pay of such positions and the retainer pay amount to more than $2,000 per annum.

The Judge Advocate General expressed the view, which was approved by the Secretary of the Navy, that the aforesaid members of the Fleet Naval Reserve are eligible for appointment in the civil service to such positions as long as it in no way interferes with their duties as members of the Fleet Naval

Reserve, for the reason that Congress has expressly stated that "no existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay" (39 Stat. 521). Whether or not the duties of the civil-service positions to which members of the Fleet Naval Reserve may be appointed would interfere with their naval duties is a matter which they must settle on their own responsibilities, taking into consideration the fact that they are at all times subject to naval laws, regulations, and orders (File 28550–1358, J. A. G., June 16, 1920).

FLEET NAVAL RESERVE: TRANSFERRED MEMBERS OF, MAY SECURE THE BENEFITS OF CONTINUOUS SERVICE ON REENLISTMENT PROVIDED REENLISTMENT OCCURS WITHIN ONE YEAR FROM DATE OF SAID TRANSFER, AND PROVIDED FURTHER THAT THE YEAR EXPIRES WITHIN SIX MONTHS FROM MAY 18, 1920.

Decision was requested as to whether an enlisted man who was transferred to the Fleet Naval Reserve, class 1–C, on June 13, 1919, is entitled to the benefits of continuous service if he is now given a discharge from the Fleet Naval Reserve, class 1–C, and enlists in the Navy.

In his decision of March 28, 1917 (23 Comp. Dec. 535), the comptroller held, quoting from the syllabus:

> "An enlisted man of the Navy who, at the expiration of his term of enlistment, is not discharged therefrom, but, under the provisions of the act of August 29, 1916, is transferred to the Fleet Naval Reserve, and who, within four months after the date of expiration of such term of enlistment, is discharged from the Fleet Naval Reserve and reenlisted for four years in the regular Navy, is entitled, in an otherwise proper case, to honorable-discharge gratuity and to continuous-service pay."

Section 10 of the act of May 18, 1920, provides:

> "That any enlisted man or apprentice seaman who shall reenlist in the Navy within one year from date of his discharge therefrom shall, upon such reenlistment, be entitled to and shall receive [P. 16] the same benefits as are now authorized by law for reenlistment within four months from date of last discharge from the service: *Provided*, That this section shall become inoperative six months after the date of the approval of this act."

The clear intent of the provision of section 10 of the above act is to extend the benefits now authorized by law for reenlistment within four months of last discharge from the service to members of the Fleet Naval Reserve, class 1–C, who, upon discharge therefrom, reenlist within one year from the date of expiration of their last enlistment, provided such reenlistment occurs within six months from May 18, 1920.

The last regular enlistment of the above man expired on June 13, 1919, the date he was transferred to the Fleet Naval Reserve, and such being the case he would, upon reenlistment prior to June 13, 1920, be entitled to the same benefits as are now authorized by law or reenlistment within four months of the last discharge from the service (File 29199–5, Sec. Nav., June 5, 1920).

LINE OF DUTY: VICTIM WILL BE RESPONSIBLE FOR INTERVENING CAUSES DISCONNECTED WITH THE SERVICE.

The question of the interpretation to be given the words "line of duty" was presented to the Attorney General for an expression of opinion in five specific cases, as follows:

> "(1) A yeoman (female) in the United States Naval Reserve Force was killed by her husband while she was returning to her home upon the completion of her duty for the day. Her husband, who committed suicide, left notes from which it appeared that his action was due to the alleged unfaithfulness of his wife. The board of inquest found that the death of

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said yeoman was not the result of her own misconduct, but did not occur in the line of duty. The Attorney General in this case held that as the death resulted from jealousy on the part of the husband, and grew out of domestic relations entirely separate and distinct from her relations to the Government or the service, there was an intervening cause which had no connection with her service, and her death cannot be said to have occurred in the line of duty.

"(2) A yeoman in the United States Navy on duty at the United States naval headquarters, London, England, was killed by a motorbus in the immediate vicinity of said headquarters, but about three hours after he had completed his duty for the day. The evidence indicated that the deceased was confused by the traffic, which, according to English regulations, keeps to the left side of the road. The board of inquest found that the death of said yeoman did not occur in the line of duty and was not the result of his own misconduct. The Attorney General did not agree that the death did not occur in the line of duty. He said in effect that a soldier in camp is not always occupied in the actual performance of some military duty. During the periods of rest he is more or less free to walk around within the limits of the camp. When he is assigned to duty not in a camp but in a city, he has the same freedom during the hours that he is not [P. 17] actually engaged in performing military duties. In the former case he has the limits of the camp for recreation; in the latter case the Government furnishes no place where he is required to remain. In the case stated his duty as a soldier had taken him to a foreign city. After a day's work was done he was not required to remain in any particular place. It was contemplated, of course, that during his periods of rest he would pass more or less through the streets of London. Such an accident as is liable to happen to anyone pursuing such a course would be the logical incident of his service in London. He was in the line of duty at the time of his death just as much as if he had been walking around in a camp in which he was stationed.

"(3) An electrician in the United States Naval Reserve Force on duty at Boston, Mass., was granted liberty on Saturday until the following Monday; on Sunday afternoon he left Boston with a party bound for his home in Berlin, N. H.; returning, he left Berlin late Sunday night as a passenger in an automobile for the purpose of reporting at his station and duty in Boston on time Monday morning; he met his death the same night (Sunday) in consequence of the automobile in which he was traveling being struck by a railroad train. The board of inquest found that his death did not occur in the line of duty and was not the result of his own misconduct. The Attorney General expressed the view that, assuming that this electrician had the status of an enlisted soldier during the period of an ordinary furlough or short leave of absence, in line with what was said in his opinion of August 21, 1919, it may be said that in the case of a furlough for the purpose of engaging in some private avocation or business a soldier is for the time being not employed in active service, and while so engaged he is not, therefore, within the terms of the act. An ordinary furlough or short leave of absence, however, is a part of the disciplinary regulations of the military service, and the furloughed soldier is still, generally speaking, employed in the active service and in the line of duty, so long as he complies with the regulations and with the terms of his furlough. Such a furlough, of course, contemplates traveling by the ordinary means, and such accidents as are liable to happen to one so traveling are logical incidents of the service. In the case stated it was undoubtedly the duty of the electrician to return to his post before the expiration of his furlough. He was doing this when the accident causing his death occurred; there was no intervening cause for which he was responsible; and he was therefore in the line of duty within the meaning of the statute.

"(4) An enlisted man on authorized leave of absence from his ship at Brest, France, was injured while en route to Paris by the accidental discharge of a pistol in the hands of a soldier riding beside him on the train. The investigating officer found that the injury did not occur in the line of duty and was not the result of his own misconduct. The Attorney General

held that this man was in Europe solely because he was in the active service under the Navy Department. As a part of the disciplinary regulations of the service he was given a temporary leave of absence and permitted to visit Paris. On the way to Paris the accident occurred and he was injured, just as any other passenger on a train might have been injured. There was no intervening [P. 18] cause for which he was responsible, and he was therefore in the line of duty within the meaning of the statute.

"(5) An officer of the Naval Reserve Force while on leave of absence was injured by a pistol shot in attempting to assist a woman in distress on his return from Coney Island to his home. The injury was held by the medical department not in line of duty solely because of the officer's status on leave of absence. The Attorney General held that the officer could not be denied compensation merely because he was injured while on a temporary leave of absence. He said, in effect, that the question is whether the injury resulted from a cause intervening between his service and the accident. The injury resulted from his creditable act in going to the assistance of a woman in distress. It is assumed that he was complying with the terms of his leave of absence when he went to the place at which he received his injury. An accident which was ordinarily liable to happen to one at that place would therefore be a logical incident of his service. His injury, however, was not received as the result of his mere presence at that place. It resulted from the performance by him of a duty which he owed not as a soldier or as an incident to his military or naval duties, but as a member of society. It had no connection with his service, but was a duty which any man under the circumstances owed to society. The Attorney General, therefore, was of the opinion that there intervened in this case a cause growing out of his relation not to the service but to the public, and that he cannot be said to have been in the line of duty within the meaning of the statute."

The Attorney General further held:

"The mere fact that an injury or disease is coincident in time with service is not sufficient to class it as suffered or contracted 'in the line of duty.' It must have been caused by the presence of its victim in the line of duty when it was received or contracted. But the relation of causation is sufficiently shown when it appears that the victim was at a place and doing what was required or permitted by his duty as a soldier, and that, between his presence and conduct and the injury or disease, no adequate and sufficient cause for which he is responsible intervened.

"While in the active service and submitting to its rules and regulations he is, in general, in the line of duty, and an injury suffered or disease contracted under these circumstances is suffered or contracted in the line of duty unless it is actually caused by something for which he is responsible which intervenes between his service or performance of duty and the injury or disease. He will be responsible for an intervening cause if (1) it consists of his own willful misconduct or (2) it is something which he is doing in pursuance of some private avocation or business.

"A third intervening cause for which a soldier will be responsible is 'something which grows out of relations unconnected with the service or is not the logical incident or probable effect of duty in the service' (File 26250-1491: 1).

[P. 19] NAVAL RESERVE FORCE: MEMBERS OF ON INACTIVE DUTY MAY NOT BE COMPELLED TO SERVE ON ACTIVE DUTY WITHOUT THEIR CONSENT, AND IF THEY DO NOT PERFORM THE MINIMUM ACTIVE SERVICE PRESCRIBED BY LAW THE RETAINER PAY DUE THEM MAY BE WITHHELD.

An opinion was requested as to whether an enrolled member of the Naval Reserve Force on inactive duty is compelled by law to serve after being so placed on inactive duty, in reply to which the department expressed the following views:

"The act of July 1, 1918 (40 Stat. 710), provides:

'That the minimum active service required for maintaining the efficiency of a member of the Naval Reserve shall be two months during each term of

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enrollment, and an attendance at not less than thirty-six drills during each year, or other equivalent duty. The active service may be in one period or in periods of not less than fifteen days each.'

"The act of June 4, 1920 (Public, No. 243, 66th Cong.), making provision for the naval service for the fiscal year 1921, provides:

"'SEC. 2. That the Secretary of the Navy is hereby authorized to employ on active duty, with their own consent, members of the Naval Reserve Force in enlisted ratings, the number so employed not to exceed during any fiscal year the average of 20,000 men: * * *.'

"'SEC. 9. That hereafter the Secretary of the Navy may, in his discretion, withhold any part or all of the retainer pay which may be due to a member of the Naval Reserve Force where such members fail to perform such duty as may be prescribed by law for the maintenance of the efficiency of the Naval Reserve Force: * * *.'"

It will therefore be observed that a member of the Naval Reserve Force on inactive duty may be recalled to active duty with his own consent. If, however, any member on inactive duty does not perform the minimum active service as prescribed by law the Secretary of the Navy may withhold the retainer's pay due him (File 7657–1063, Sec. Nav., June 12, 1920).

"NOT IN LINE OF PROMOTION": THOUGH AFFECTING THE PROMOTION OF CERTAIN OFFICERS OF CERTAIN STAFF CORPS ON THE ACTIVE LIST, DOES NOT OPERATE TO PREVENT THEIR PROMOTION TO THE RANK OF COMMODORE ON THE RETIRED LIST.

An officer of a Staff Corps of the Navy having served 40 years in a civilian capacity in that Staff Corps, was by act of Congress appointed a member of that Staff Corps with the rank of lieutenant as an extra number not in the line of promotion (act of Mar. 4, 1913, ch. 148, 37 Stat. 906). On the completion of 45 years' service in the Navy he was retired. The question presented is whether he is entitled to the benefits of section 1481, R. S., which provides that officers of certain staff corps who shall have served faithfully for 45 years, shall, when retired, have the rank of commodore. It was contended that he was not, for the reason that the clause "not in the line of promotion" contained in the act of March 4, 1913, supra, forbade his promotion to a higher grade, either on the active or retired list. The Judge Advocate General held that the officer was entitled to the rank of commodore on the retired list, reversing the previous opinion of the office, dated October 16, 1917. The question was then submitted [P. 20] to the Attorney General, who sustained the Judge Advocate General holding that the officer was entitled to the rank and pay of commodore on the retired list (Op. Atty. Gen., Feb. 20, 1920; File 5552–29, J. A. G., Jan. 23, 1920).

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1. PROMOTION: BY SELECTION—EXTENSION OF AGE LIMIT IN THE CASE OF COMMANDERS IS NOT AFFECTED BY NAVAL APPROPRIATION ACT, 1920.
2. IT WILL BE NECESSARY FOR LIEUTENANT COMMANDERS AND CAPTAINS OF TEMPORARY RANK AND OVER AGE LIMIT TO REQUEST DEFERMENT OF AGE LIMIT.
3. OFFICERS OF PERMANENT RANK BUT NEAR AGE LIMIT MUST REQUEST DEFERMENT PRIOR TO DATE ON WHICH THEY REACH AGE LIMIT OR TO BE RETIRED ON JUNE 30, 1920.

Opinion was requested of the Judge Advocate General on the following questions:

1. Does the operation of section 10 of the naval personnel provisions of the naval appropriation act, 1920, limit or modify or supersede the clause in the naval appropriation act of July 11, 1919, which extends for two years the age limit for promotion by selection in the case of commanders in the line of the Navy?

2. Will it be necessary for officers who temporarily hold a higher rank but who are now or on June 30, 1920, will be over the age limit for promotion by selection to request deferment of the age limit for promotion by selection, on or prior to June 30, 1920, in order to extend their eligibility for selection until June 30, 1921?

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3. Is it correct to assume that officers who do not hold a temporary higher rank, but who now or on June 30, 1920, will exceed the age limits for promotion by selection, must request deferment prior to June 30, 1920, or else be retired upon that date?"

4. Will it be necessary for officers who during the ensuing fiscal year will reach the age limit for promotion by selection, and who either do or do not hold temporary higher rank, to request deferment of the age limits for promotion by selection prior to the date upon which they reach such age limit in order to extend in the one case their eligibility for promotion by selection until June 30, 1921, and in the second case to prevent retirement on the date on which they reach the age limit?

Section 10 of the Naval Appropriation Act, 1920, cited, reads as follows:

> "That the age limits for promotion by selection, which, under existing law, will become effective on June 30, 1920, are hereby deferred until June 30, 1921, in the cases only of those officers who may request such deferment."

Answering the first question, the above-quoted section has no effect whatsoever upon the following clause in the Naval Appropriation Act of July 11, 1919 (41 Stat. 140):

> "That the age and grade requirement prescribed by the act approved August 29, 1916, in the rank of commander, is hereby extended from June 30, 1920, to June 30, 1921."

Section 10 as quoted above affects only age limits for promotion which would otherwise become effective on June 30, 1920; the age requirement for promotion in the rank of commander having previously been deferred until June 30, 1921, is not modified by the new enactment.

[P. 21] Answering question number 2, the age limits prescribed by the act of August 29, 1916, will become effective on June 30, 1920, insofar as concerns eligibility for promotion by selection in the cases of line officers in the ranks of lieutenant commander and captain, unless such officers who are on June 30, 1920, above said age limits, request deferment prior thereto. Although such officers who hold temporarily a higher rank may continue to serve in such higher rank after June 30, 1920, so long as such temporary rank continues in force, they will not be eligible for selection and permanent promotion to such higher rank unless they request deferment prior to June 30, 1920.

Answering question number 3, in accordance with the opinion given in answer to question 2, that line officers in the ranks of lieutenant commander and captain who do not hold a temporary higher rank, but who will, on June 30, 1920, exceed the age limits for promotion by selection as prescribed in the act of August 29, 1916, must under the terms of said act, be retired upon that date, unless prior to June 30, 1920, they request deferment pursuant to the above-quoted section 10.

Answering question number 4, in the cases of line officers in the ranks of lieutenant commander and captain who, during the ensuing fiscal year, will exceed the age limit for promotion by selection as prescribed by the act of August 29, 1916, it will be necessary that they be retired on the date upon which they reach such age limit unless they are, on that date, serving temporarily in a higher rank, or unless prior to the date upon which they reach such age limit they request deferment pursuant to section 10 above quoted. In the latter event the action of such officers in requesting deferment will not only defer their retirement but will extend their eligibility for promotion by selection until June 30, 1921.

The foregoing opinion of the Judge Advocate General was approved by the Secretary of the Navy (File 27231–158:5, J. A. G., June 5, 1920).

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1. RETIREMENT: DOUBLE TIME FOR, CANNOT BE COUNTED IN COMPUTING PAY, WHERE RETIREMENT IS FOR AGE.
2. CONTINUOUS SERVICE: TIME INTERVENING BETWEEN DISCHARGE AND REENLISTMENT AS AN ENLISTED MAN CANNOT BE COUNTED AS CONTINUOUS SERVICE.

The question presented is whether an officer who is eligible for retirement by reason of age may count as double time his service as an enlisted man during the Spanish-American War, and whether he could count as continuous service

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the time that elapsed between his discharge as an enlisted man and the date of reenlistment as such. The Judge Advocate General was of the opinion, which was approved by the Secretary of the Navy, that the retirement laws governing enlisted men have no application to the officer concerned for the reason that retirement of an officer by reason of ineligibility on account of age for promotion is not retirement for length of service, the only form of retirement to which double time is applicable. Moreover, double time for war service counts solely for retirement and not for pay. It was further held that time intervening between his discharge and reenlistment as an enlisted man [P. 22] could not be counted in computing his service, even though he were being retired for length of service and as an enlisted man (File 27231–158: 4, J. A. G., June 26, 1920).

RETIREMENT: OFFICERS IN THE PERMANENT GRADES OR SERVING UNDER ORIGINAL APPOINTMENTS HOLDING TEMPORARY COMMISSIONS ARE ENTITLED TO BE RETIRED FOR PHYSICAL DISABILITY INCURRED IN LINE OF DUTY WITH THEIR TEMPORARY GRADE OR RANK HELD AT DATE OF RETIREMENT. THE PHYSICAL DISABILITY NEED NOT HAVE BEEN INCURRED IN THE TEMPORARY RANK HELD AT TIME OF RETIREMENT.

Opinion was requested of the Attorney General on the following question:

Are officers holding temporary appointments under section 4 of the act of May 22, 1917, chapter 20 (40 Stat. 84), when retired for physical disability incurred in line of duty, entitled to be retired with their temporary grade or rank?

The Attorney General answered the question in the affirmative, saying the provisions of general law would entitle these officers, if Congress did not otherwise provide in regard to them, to retire with the temporary grades or ranks held be them at time of retirement, since the act of May 22, 1917, chapter 20, confers upon them commissioned offices of definite grades or ranks, though temporary as to their duration. While Congress, by section 9 of said act, did legislate in regard to retirement generally in the case of these temporary officers, it expressly excepted retirement for physical disability incurred in line of duty, thus leaving that species of retirement to be governed by the general laws.

Are the words in section 9 of the act of May 22, 1917, "except for physical disability incurred in line of duty," limited to disability incurred while serving under the temporary appointment?

This question was answered in the negative. The effect of the exception was to leave the case subject to the provisions of general law dealing with retirement for physical disability, and those provisions made no distinction as to the grade or rank held by the officer when the disability was incurred. The only limitation fixed in them was that the disability must have been incurred in the line of naval duty and as an incident of the service. When the disability was incurred from this cause, the officer was to be retired with the grade held by him at the time of his retirement, although the disability was incurred while he was holding a lower grade. Congress evidently intended by the language used in the exception in section 9 of the act of May 22, 1917, chapter 20, to refer to the provisions of section 1453, R. S., Comp. Stats. 2632, and section 1588, R. S., Comp. Stats. 2890, and to make those sections operative as to disabilities incurred in line of duty in the temporary offices created by the act of May 22, 1917, chapter 20. An additional reason for this conclusion is that if the words in the exception be given a more restricted meaning as applied to original appointments, an original appointee, promoted from one temporary grade to another, and disabled in line of duty while holding the lower temporary grade, could not be retired at all, since he would have no permanent grade to fall back upon—a result clearly contrary to the intent of Congress (File 26253–624: 1).

[P. 23] RETIRED OFFICERS: PROMOTION OF, UNDER SECTION 1481, REVISED STATUTES, AS AMENDED BY ACT OF AUGUST 5, 1882: THE DEPARTMENT REAFFIRMS ITS DECISIONS IN REGARD THERETO.

Request being made that the question as to whether staff officers of the Navy who have been retired for age with less than 40 years' service may be promoted, after retirement, to the rank of commodore upon the expiration of 40

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years from the date of their entry into the service, the Department reaffirmed its previous decisions to the effect that by the provisions of the act of August 5, 1882, Congress denied the right to such promotion on the retired list (File 27231–141 : 2, J. A. G., June 25, 1920).

FLEET NAVAL RESERVE: AN INDEFINITE FURLOUGH BETWEEN PERIODS OF SERVICE DOES NOT BREAK CONTINUOUS SERVICE WHERE THE REST OF SERVICE HAS BEEN CONTINUOUS.

The question presented was whether an enlisted man, who had enlisted in 1904, was discharged the last time in 1916, reenlisted June 27, 1916, and on September 20, 1916, was given an indefinite furlough, was recalled to active duty on April 11, 1917, and will be discharged June 26, 1920, will be eligible for transfer to the Fleet Naval Reserve with 16 years' continuous service.

The authority for granting furloughs to enlisted men of the Navy is contained in the following provision of the act of August 29, 1916:

> "The Secretary of the Navy is hereby authorized to grant furlough without pay to enlisted men for a period covering the unexpired portion of their enlistment: *Provided*, That such furlough be granted under the same conditions and in lieu of discharge by purchase or by special order of the department. Enlisted men so furloughed shall be subject to recall in time of war or national emergency to complete the unexpired portion of their enlistment, and shall be in addition to the authorized number of enlisted men of the Navy."

In construing the above provision this office has heretofore held in its opinion of February 5, 1917, "that enlisted men furloughed under the act of August 29, 1916 (39 Stat. 580), clearly retain their status as enlisted men during the period of such furlough"(7657–411). This view was approved by the department in its endorsement of March 15, 1917, to the Chief of the Bureau of Medicine and Surgery (7657–411 :2).

In 25 Comp. Dec. 298, 299, in the case of an enlisted man who was recalled to active service while on furlough, the comptroller held:

> "His recall to duty restores him to his former status as to pay and restores him to all rights and privileges under his contract of enlistment as though no break in his enlistment service had occurred, and when discharged upon the completion of the unexpired portion [P. 24] of his enlistment he becomes entitled to all rights and privileges attached thereto, such as travel allowance and four months' gratuity upon reenlistment within four months therefrom."

The above act of August 29, 1916 (39 Stat. 589), establishing the Fleet Naval Reserve of the Naval Reserve Force, authorized the Secretary of the Navy to transfer to it at any time within his discretion, upon his voluntary application and in the rating in which then serving "* * * any enlisted man of the naval service * * * at the expiration of his term of enlistment who may be then entitled to an honorable discharge, after sixteen years' naval service * * *."

In view of the above decisions defining the status of enlisted men while on furlough, and holding that the recall from furlough to active duty restores an enlisted man to all rights and privileges under his contract of enlistment as though no break in his enlistment service had occurred, it is the opinion of the department that the man in question is eligible for transfer to the Fleet Naval Reserve upon the expiration of his present term of enlistment as of 16 years' naval service, provided he is then entitled to an honorable discharge, and that when so transferred he is entitled to continuous service pay as of 16 years' naval service (File 28550–1355, Sec. Nav. June 9, 1920).

C. M. O. 87—1920

[P. 1] Lieutenant (T) Benjamin F. Blume, U. S. Navy, was tried by general court martial on April 5, 1920, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy and acquitted of the following charge:

Charge.—Scandalous conduct tending to the destruction of good morals (one specification).

[C. M. O. 88—1920]

OPINION OF THE JUDGE ADVOCATE GENERAL

On May 25, 1920, the Judge Advocate General placed the following endorsement upon the record:

"In reviewing this case, it is noted that the court permitted the introduction of hearsay evidence over the objection of the judge advocate. The evidence objected to was a conversation the witness had had with a woman which the counsel for the accused claimed was admissible as it was a declaration against her interests. This contention was groundless. Greenleaf (16th edition, p. 232) states: 'Another exception to the Hearsay rule admits the declaration of a deceased person stating a fact against the interest of the declarant. This class of statements embraces not only entries in books but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared, or at a subsequent day. But, to render them admissible, it must appear that the declarant is deceased; that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest.' From the foregoing, it appears that it is essential that it be shown that the declarant be dead. However, more modern authorities hold that such declarations are admissible as evidence if there '* * * be affirmative proof that it is the best attainable; in other words, that the testimony of the original declarant cannot be procured because he is absent from the jurisdiction of the court, cannot be compelled to testify, is dead, or is incapacitated, physically or mentally, from attendance (16 Cyc. 1222). In this case, it had been shown that the original declarant was absent from the jurisdiction of the court. In the case of *Harriman* v. *Brown* (8 Leigh 697) the court [P. 2] held '* * * that the admissions of a person who could not be compelled to testify, and whose declarations are against his own interest, ought to be received as if he were dead.' But it still remains clearly to be shown that the declaration is against interest. In the case of *Rand* v. *Dodge* (17 N. H. 343) the court held that the declaration '* * * must have been, when made, to the knowledge of the declarant, against his obvious and real interest.' In this case, it appears that the declarant believed at the time she made the statements introduced into evidence that she was talking to an official of the allotment office, and that instead of making a declaration against interest, she was in fact intending the contrary. Under these circumstances, the entire presumption that a declaration against interest is the truth, is necessarily vitiated, and the hearsay evidence is incompetent. The court should have sustained the objection of the judge advocate.

"The court overruled the objection of the judge advocate in allowing a witness to refresh his memory from a report not made by himself. In this there was an error. The use of memoranda to refresh the memory of a witness is confined to the case where the memorandum was made by the witness himself at a time when the facts were fresh in his mind (Naval Courts and Boards, sec. 145).

"The above irregularities could not have prejudiced the rights of the accused and are not considered fatal."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On June 9, 1920, the Bureau of Navigation recommended approval of the proceedings, subject to the remarks of the Judge Advocate General, findings, and acquittal.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On June 21, 1920, the Acting Secretary of the Navy approved the proceedings, subject to the remarks of the Judge Advocate General, findings, and acquittal of the general court martial in the foregoing case of Lieutenant (T) Benjamin F. Blume, U. S. Navy.

C. M. O. 88—1920

[P. 1] Lieutenant Ira B. Talton, S. C., U. S. Navy, was tried by general court martial on May 12, 1920, at the naval operating base, Hampton Roads, Va., by order of the Secretary of the Navy, on the following charges:

Charge I.—Drunkenness (one specification).

[C. M. O. 88—1920]

Charge II.—Assault and battery (one specification).

The court found the accused guilty of the first charge, not guilty of the second charge, and acquitted him of the second charge. The court sentenced him to lose five numbers in his temporary grade of lieutenant, and to lose five numbers in his permanent grade of ensign, Supply Corps, U. S. Navy.

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL

On May 26, 1920, the Judge Advocate General placed the following endorsement upon the record:

"In this case, it is noted that the accused plead not guilty to the charges of 'Drunkenness' and 'Assault and battery,' and was found guilty only of the former offense. The specification of the second charge is as follows:

"'In that Ira B. Talton, now a lieutenant in the Supply Corps, U. S. Navy, while so serving on board the U. S. S. *Sacramento*, at the Navy Yard, Norfolk, Va., did, on or about March 31, 1920, at the Monticello Hotel, in the city of Norfolk, Va., make an assault upon one W. S. Lee, a house detective of the said hotel at the time and place aforesaid, and did then and there strike, beat, wound, and otherwise ill-treat the said Lee; the United States then being in a state of war.'

"The evidence adduced shows that the accused came into the dance hall of the Monticello Hotel and obtained a table next to one at which were seated two ladies, a gentleman, and a boy; that in a short while he approached one of the ladies, a young lady, and requested that she dance with him, and she refused; that the gentleman asked if he was in the habit of [P. 2] approaching young ladies in a dance hall when they were escorted, to which accused said he was; that this angered the gentleman, who insisted that the accused return to his table and not create a scene; that the accused attempted to approach the party a second time when the house detective intervened and asked the accused to leave the hall with him, which was done; that the accused returned and was requested a second time to leave the hall and did so, going down to the main floor of the hotel; that the accused returned to the seventh floor of the hotel, on which the ballroom was, and sat down; that the house detective came along and informed the accused the third time that he must leave the premises; that the accused refused and the house detective used force in taking the accused, via the elevator, to the main floor and out of the hotel, and finally to a police station, where charges were preferred and the accused was confined overnight; and that the accused struck the house detective, bit his finger, and endeavored to choke him by grasping his neck with both hands and squeezing same.

"Accused went on the stand and substantially admitted the facts adduced in evidence, but was of the opinion that he was justified in speaking to the young lady, and that the house detective used excessive force in making his arrest.

"The court found the accused not guilty of the second charge and the specification thereunder. This office is of the opinion that the evidence adduced shows beyond a reasonable doubt that the accused was guilty of the charge as alleged, and that it is not shown that the force exerted by the officer of the law was such as to justify the actions of the accused in assaulting the officer to the extent of striking, biting, and choking him. Such actions by the accused were nowhere in the evidence shown to be justifiable, especially in view of the fact that the officer had, on two former occasions, refrained from touching the accused, and on this occasion it appeared to be his only alternative to use force in order to perform his duties for the protection of the hotel patrons.

"In view of the above, it is recommended that the proceedings, findings, and sentence on charge I and the specification thereunder, and the proceedings on charge II and the specification thereunder, of the general court martial in the foregoing case of Lieutenant Ira B. Talton, Supply Corps, U. S. Navy, be approved; that the findings on charge II and the specification [P. 3] thereunder, be disapproved; and that said Lieutenant Talton be released from arrest and restored to duty."

[C. M. O. 92—1920]

CONCURRENCE OF THE BUREAU OF NAVIGATION

On June 1, 1920, the Bureau of Navigation concurred in the recommendation of the Judge Advocate General.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On June 23, 1920, the Acting Secretary of the Navy approved the foregoing recommendations of the Judge Advocate General in the case of Lieutenant Ira B. Talton, S. C., U. S. Navy.

C. M. O. 92—1920

[P. 1] Lieutenant (Junior Grade) David A. Cain, Supply Corps, U. S. Navy, was tried by general court martial on April 28, 1920, at the marine barracks, U. S. Naval Station, St. Thomas, Virgin Islands of the United States, by order of the Commandant, Naval Station, St. Thomas, Virgin Islands of the United States, on the following charges:

Charge I.—Embezzlement (one specification).

Charge II.—Falsehood (one specification).

The court found the accused guilty of the first charge, not guilty of the second charge, and acquitted him of the second charge. He was sentenced to be dismissed from the United States naval service, but in consideration of his previous good record and good character, his inexperience as a disbursing officer, the apparent honesty, frankness, and freedom of his evidence as a witness, and the fact that, insofar as the court could determine, he did comply with the letter of the regulations as stated in the Manual for Supply Officers, Afloat, U. S. Navy, 1917, page 346, paragraph 926, which reads "that twenty days are allowed him for the settlement of his accounts after being relieved," in that he submitted correctly balanced reports on April 15, 1920, and that within the twenty days allowed by the above quotation he did clear the "apparent unremovable difference" from his accounts by depositing five thousand dollars cash of his own personal funds to the credit of the United States, the court unanimously recommended him to the clemency of the convening and reviewing authorities.

ACTION OF THE CONVENING AUTHORITY

On May 12, 1920, the convening authority noted, inter alia, with respect to the statement in the recommendation to clemency as to what the "court" determined, that a recommendation to clemency is not an action by the court as a body but by the individual members thereof (Naval Digest, p. 82, par. 35). As the court meted out a sentence of dismissal, with no [P. 2] provision for imprisonment, after finding the accused guilty of embezzling $5,000 of Government funds, the convening authority failed to see how, when the court had already usurped a function of exercising clemency, vested by Congress in the convening authority, any further action upon the recommendation to clemency justly remained to be taken than to entirely disregard it. Subject to these remarks, the proceedings, findings, and sentence were approved, and in conformity with article 53 of the Articles for the Government of the Navy the record was referred to the Secretary of the Navy for transmission to the President.

ACTION OF THE ACTING SECRETARY OF THE NAVY

On June 24, 1920, the Acting Secretary of the Navy, in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes), submitted the record of proceedings to the President of the United States, with the recommendation that the sentence be confirmed.

ACTION OF THE PRESIDENT

On June 30, 1920, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant (J. G.) David A. Cain, Supply Corps, U. S. Navy.

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[P. 1] Lieutenant Commander Soloman H. Geer, U. S. Navy, was tried by general court martial on April 7, 1920, at the naval station, Cavite, P. I., by order of the commandant, sixteenth naval district and U. S. naval stations, Cavite and Olongapo, P. I., and acquitted of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline (one specification).

Charge II.—Falsehood (one specification).

Action of the Convening Authority

On April 20, 1920, the convening authority placed the following endorsement on the record:

> "After a careful review of the evidence adduced in this case, the reviewing authority is unable to understand how the court could arrive at the finding which it did. Six witnesses positively identified Lieutenant Commander Geer as the officer in question. There is nothing in the record tending to show that the testimony given by these witnesses was not reliable. The court is, of course, in a better position than the reviewing authority to determine what weight should be given to the testimony of a witness. The findings of the court in this case can be explained only on the ground that it did not believe the testimony given by these six witnesses, since all of the other evidence given was of a negative character with the exception of the testimony of Darley P. Dunn, who was positive that Lieutenant Commander Geer was not the officer in question. It is not perceived why the court should have accorded such surprising weight to the testimony of this witness."

Subject to the above remarks the convening authority approved the proceedings, and disapproved the findings and acquittal. The accused was released from arrest and restored to duty.

Opinion of the Judge Advocate General

On June 23, 1920, the Judge Advocate General noted that on page 53 of the record it is recorded that the judge advocate offered in evidence a letter signed by the accused. The admission [P. 2] of the document was objected to by the accused (counsel) on the ground that it had not been properly identified, and that the witness had not been shown to be the legal custodian of the document. The witness on the stand at the time was the aide to the commandant of the naval station, Cavite, and had testified that the letter in question was, to the best of his knowledge and belief, the statement he had received from the accused, submitted in accordance with an order of the commandant. But it is not shown that the witness was the legal custodian of the letter. The letter was offered in evidence by the judge advocate, who was not at the time a witness. This procedure is not in accordance with that laid down in section 187, Naval Courts and Boards. However, as the accused was acquitted, the irregularity cannot be considered as having prejudiced his rights, and the error of the court in admitting the letter into evidence over the objection of the accused was not material.

Subject to the above, in the opinion of the Judge Advocate General, the proceedings, findings, and acquittal were legal.

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[P. 14] CUSTODY: ONE MAY HAVE CUSTODY AND NOT POSSESSION, AND THEREFORE MAY BE CONVICTED OF THEFT AND NOT EMBEZZLEMENT.

An enlisted man, a member of a naval band, was charged inter alia with "Stealing property of the United States intended for the naval service thereof," and found guilty in a less degree than charged, guilty of "Conduct to the prejudice of good order and discipline." The evidence showed that the accused took a violin, the property of the United States, to a pawnshop and pawned

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it; that members of the band were allowed to take their instruments to their homes for practice. But in this case, though the accused may have had authority to take the violin to his home, the possession of the violin remained in the United States, and the accused merely had the custody. The accused when he pawned the violin took it from the constructive possession of the Government and committed a trespass in so doing (Clark's Criminal Law, p. 284). The Judge Advocate General therefore held that the court erred in not finding this charge proved, and for that reason recommended that so much of the proceedings and findings as related to this charge be disapproved (File 26251-24279, J. A. G., July 29, 1920; G. C. M. Rec. No. 48851).

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1. LEAVE: MEMBERS OF NURSE CORPS MAY BE GRANTED, BY COMMANDANTS OF NAVAL DISTRICTS, YARDS, AND STATIONS, LEAVE OF 10 DAYS, EXCLUSIVE OF TRAVEL TIME, WITHOUT REFERENCE TO BUREAU OF MEDICINE AND SURGERY.
2. NAVY REGULATIONS AND MANUAL FOR MEDICAL DEPARTMENT: ARE NOT IN CONFLICT IN THE MATTER OF POWER TO GRANT LEAVE TO MEMBERS OF THE NURSE CORPS.

Inquiry was made as to whether members of the Nurse Corps, U. S. Navy, may be granted 10 days' leave of absence and travel time without reference to the Bureau of Medicine and Surgery, and whether paragraphs 3703 (3) and 4428 (7), Navy Regulations, and paragraphs 684 (*a*), (*b*), (*c*), and (*d*), Manual for Medical Department, U. S. Navy, are in conflict in this regard. The Judge Advocate General expressed the view, which was approved by the Acting Secretary of the Navy, that articles 3703 (3) and 4428 (7) are the only provisions in the Navy Regulations and Naval Instructions for granting leave of absence to members of the Navy personnel, which includes members of the Navy Nurse Corps; and that the rights of said members of the Nurse Corps to leave of absence in a like manner as commissioned and warrant officers in the Navy being fully established by the Army Appropriation Act, July 9, 1918, and recognized in article 4428 (7) of the Navy Regulations, it is the opinion of this office that the commandant of a navy yard or station is thereby authorized to grant 10 days' leave of absence, exclusive of travel time, to members of the Navy Nurse [P. 15] Corps under his command without reference to the Bureau of Medicine and Surgery.

In the authorization of paragraph 684 (*a*), (*b*), (*c*), and (*d*), Manual for Medical Department, which is approved by the Secretary of the Navy, it is provided that nothing therein contained "shall be construed as superseding, amending, or modifying the U. S. Navy Regulations and Naval Instructions." Therefore, if full force and effect is to be given to said paragraph 684 (*a*), (*b*), (*c*), and (*d*), it must be construed as not being in conflict with Navy Regulations, articles 3703 (3) and 4428 (7).

Interpreting paragraph 684 (*a*), (*b*), (*c*), and (*d*), Manual for Medical Department, in connection with Navy Regulations, articles 3703 (3) and 4428 (7), it appears that subparagraph (*a*) of paragraph 684, Manual for Medical Department, must be construed as authorizing the commandant of a navy yard or station to grant leave of absence to members of said Nurse Corps under his command not to exceed 10 days, exclusive of travel time, otherwise it would be in conflict with Navy Regulations, articles 3703 (3) and 4428 (7), and therefore of no application. The foregoing is further supported by the general custom in the naval service of granting leave of absence for a period exclusive of travel time, by the necessity for uniformity in dealing with the various branches of the naval service, and by the exigencies of the service which would necessitate granting leave of absence to members of said corps without reference to the Bureau of Medicine and Surgery.

Although the authorization of paragraph 684 (*a*), (*b*), (*c*), and (*d*) provides "and this manual shall be subject to amendment by circulars issued by the bureau and by general orders issued hereafter by the department," such circulars as are issued by the bureau under this authority must not supersede, amend, or modify the Navy Regulations and Naval Instructions. Therefore, Bureau of Medicine and Surgery letter No. 115738 of December 11, 1918, insofar as it provides "no leave * * * shall be granted to nurses without prior approval of the bureau," is in conflict with Navy Regulations, articles 3703 (3) and 4428 (7),

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and is not binding upon such officers as are authorized by said reference to grant leave of absence to members of the naval personnel (File 26477-99, J. A. G., July 15, 1920).

LINE OF DUTY: INJURY SUSTAINED BY ENLISTED MAN THROUGH NO FAULT OF HIS OWN AND WHILE ON AUTHORIZED LEAVE OF ABSENCE IS IN LINE OF DUTY.

An enlisted man while returning from leave of absence was struck by a taxicab coming out of an alleyway. The car gave no warning nor was there anything to show that the injury was due to any misconduct or fault on the part of the victim. He [P. 16] was discharged for physical disability as the result of the injury received and was given an ordinary discharge, with character good. His marks were such as to entitle him to an excellent character had he been discharged for disability incurred in line of duty, but, by reason of the holding that his disability was incurred not in the line of duty, he was given only an ordinary discharge with good character.

It is provided by article 3607 (3), U. S. Navy Regulations, that—

> "Men discharged before the expiration of enlistment upon recommendation of a medical survey for injuries received or disabilities incurred in line of duty shall be given honorable discharges, provided their records warrant the same."

The Judge Advocate General held that the entry in this man's service record that his disability was incurred "not in the line of duty" is erroneous and contrary to the law as now construed by the Attorney General, in which construction he fully concurred. Under these circumstances, it was clearly a mistake to issue to him an ordinary discharge, with character good, if his record otherwise warranted an honorable discharge, with character excellent.

If he was otherwise entitled on his record to an honorable discharge with excellent character the records of the department should be corrected to show that his disability was incurred in the line of duty; that the character of his discharge should have been excellent; and he should be informed that the records of the department have been so corrected. The foregoing opinion was approved by the Acting Secretary of the Navy (File 7657-390: 32, J. A. G., July 20, 1920; see also C. M. O. 85, p. 16, 1920).

NAVAL RESERVE FORCE: SERVICE AS AN ENLISTED MAN IN, MAY BE COUNTED IN COMPUTING THE TIME REQUIRED FOR ELIGIBILITY FOR ENTRANCE TO THE NAVAL ACADEMY FROM THE ENLISTED PERSONNEL OF THE NAVY.

May the active service in the Naval Reserve Force of an enlisted man now in the Regular Navy be added to his enlisted service in the Regular Navy for the purpose of completing the year's service required by law for eligibility for appointment as midshipman at the Naval Academy from the enlisted personnel of the Navy?

The act of Congress approved March 4, 1917, allowed the Secretary of the Navy 100 appointments annually to the Naval Academy "to be appointed from enlisted men of the Navy who are citizens of the United States, and not more than 20 years of age on the date of entrance to the Naval Academy, and who shall have served not less than one year as enlisted men on the date of entrance" (39 Stat. 1182). This act was amended by the act of Congress approved December 20, 1917 (40 Stat. [P. 17] 430), so as to increase the number of midshipmen at the Naval Academy, but not to increase the number of appointments allowed the Secretary of the Navy from among the enlisted men of the Navy.

By the act approved July 11, 1919 (Public, No. 8, 66th Cong.), section 1 of the above-mentioned act of December 20, 1917, was amended so as to read as follows:

> "That hereafter there shall be allowed at the United States Naval Academy five midshipmen for each Senator, Representative, Delegate in Congress, and Resident Commissioner from Porto Rico, and five for the District of Columbia, fifteen appointed each year at large, and one hundred appointed annually from enlisted men of the Navy, and members of the Naval Reserve Force on active duty as now authorized by law."

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It is obvious that by the last-mentioned enactment Congress intended to authorize appointments by the Secretary of the Navy from among enrolled members of the Naval Reserve Force of enlisted ratings on active duty with the Navy under the same conditions as already authorized by law for enlisted men of the Regular Navy. One of the requirements for eligibility established by the above-mentioned act of March 4, 1917, was that the enlisted men so appointed shall have served not less than one year as enlisted man on the date of entrance. This requirement applies equally to enlisted men of the Regular Navy and enrolled members of the Naval Reserve Force of enlisted ratings on active duty. Since the requirements are the same in each case and there is no reason for holding otherwise, it is the decision of the Department that service on active duty in enlisted ratings in the Naval Reserve Force and service as an enlisted man in the Regular Navy can be combined in computing the service as an enlisted man required for appointment to the Naval Academy (File 5252–146, Sec. Nav., July 29, 1920).

RETIREMENT: TEMPORARY OFFICERS OF THE MARINE CORPS MAY BE RETIRED ONLY WITH THE RANK THEY HOLD ON RETIREMENT, AND THEY NOT BE TEMPORARILY PROMOTED TO THE RANK HELD BY THEM AT THE TIME OF INCURRING DISABILITY, FOR THE PURPOSE OF RETIREMENT.

An officer temporarily commissioned a captain in the Marine Corps under the provision of the act of May 22, 1917, received wounds in action which necessitated his retirement. But before being ordered before a retiring board he was reduced to the rank of first lieutenant by reason of a reduction in strength of the Marine Corps. May the officer legally be temporarily promoted to the rank of captain prior to the time of his being ordered before a retiring board in order that he may be retired with that rank, which rank he held when he incurred the disability? The Judge Advocate General held, which opinion was [P. 18] approved by the Acting Secretary of the Navy, that he could only be retired with the rank he held at the time of his retirement, regardless of what rank he held when the disability was incurred. It was held by this office, in an opinion dated June 14, 1917 (File 28287–22), that the requirements of law and regulation relative to promotion in the permanent Navy and Marine Corps did not apply to temporary appointments and promotions under the act of May 22, 1917, but it was stated that the President might under the law adopt any rules or regulations he desired for the purpose of determining the qualifications of appointees. It is not, however, fair to assume that Congress intended to authorize, or that the President would appoint, persons known to be physically disqualified for active service (File 27231–164, J. A. G., July 20, 1920).

CHAPLAINS: TEMPORARY ACTING ON PASSING REQUIRED EXAMINATION FOR PERMANENT SERVICE, WILL BE TRANSFERRED TO THE GRADE OF ACTING CHAPLAINS, AND THEY MUST FULFILL THE CONDITIONS PRESCRIBED BY THE ACT OF JUNE 30, 1914; BUT TIME SERVED AS TEMPORARY ACTING CHAPLAINS COULD BE COUNTED IN DETERMINING THEIR QUALIFICATIONS FOR APPOINTMENT IN THE GRADE OF CHAPLAIN.

There are now in the Navy 9 acting chaplains for temporary service having the rank of lieutenant (junior grade) and 12 Naval Reserve chaplains on active duty who have been in the service no longer than the temporary acting chaplains and who are available for transfer to the Regular Navy. The reserve chaplains, provided they pass the required examinations, will be transferred to the regular service as chaplains with rank not to exceed that of lieutenant. Information was therfore requested as to whether the nine acting chaplains for temporary service upon passing the required examinations would be transferred to the grade of acting chaplain for permanent service or to the grade of chaplain for permanent service, and it was stated that unless the temporary acting chaplains are transferred to the grade of chaplain they will never be able to secure commissions as chaplains, in view of the fact that they must not be over 35 years of age on completing three years at sea as acting chaplains.

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The further question was asked whether, if said temporary acting chaplains are appointed regular acting chaplains, they must thereafter fulfill the conditions prescribed by the act of June 30, 1914, for promotion to the grade of chaplain.

[P. 19] The Judge Advocate General expressed the view, which was approved by the Acting Secretary of the Navy, that under section 3 of the act approved June 4, 1920, no temporary or Naval Reserve officer can be transferred to and appointed in a grade or rank in the permanent Navy above the grade or rank in which he was serving at the time of transfer. Inasmuch as the grade of chaplain is a higher grade than that of acting chaplain, temporary acting chaplains cannot under the law be transferred to the permanent Navy with the grade of chaplain. They can, however, be transferred under said section of the act to the grade of acting chaplain in the permanent service with the rank of lieutenant (junior grade) and can be commissioned as such. If they are so transferred they must under existing law fulfill the requirements of the act of June 30, 1914, for promotion to the grade of chaplain. He believed, however, that time served by them as temporary acting chaplains should be allowed to count in determining their qualifications for appointment to the grade of chaplain (File 15721–29, J. A. G., July 20, 1920).

NAVAL EXAMINING BOARD: WILL DETERMINE RANK OR GRADE TO WHICH COMMISSIONED WARRANT OFFICERS OF MORE THAN 15 YEARS' SERVICE SHOULD BE TRANSFERRED; THE DEPARTMENT WILL THEN DETERMINE THEIR PRECEDENCE WHEN TRANSFERRED.

Information was requested as to whether the naval examining board convened by the Department's precept of June 26, 1920, to examine commissioned warrant officers on their records for transfer to commissioned ranks in the permanent Navy should determine the ranks or grades for which eligibles may be found qualified as established by their records. The Judge Advocate General held that under said precept it was the duty of the board to examine the records of service of eligibles as prescribed by section 4 of the naval appropriation act approved June 4, 1920, and report in the form prescribed in paragraph 6 of the department's precept what rank (or grade) each is qualified to fill.

The provision of the said act "That officers so transferred to the line of the Navy shall take rank therein in accordance with their precedence while holding temporary rank" should not conflict with the duty of the board of determining the rank for which such officers are qualified. After it is determined what officers are to be transferred and the ranks or grades to which they will be transferred, their precedence will be fixed by the department in accordance with this provision of law. It will not be necessery for the naval examining board to concern itself with the question of precedence. Its duty is to determine the rank for which the eligibles are qualified. The foregoing opinion was approved by the Acting Secretary of the Navy (File 11130–72:1, J. A. G., July 16, 1920).

[P. 20] NAVAL RESERVE FORCE: MAY WITH THEIR CONSENT BE ORDERED TO PERFORM DUTY ASHORE OF A KIND NOT ORDINARILY PERFORMED BY CIVILIANS, AND THE ACTS OF JULY 11, 1919, AND JUNE 4, 1920, ARE NOT IN CONFLICT IN THIS REGARD AND EACH IS EFFECTIVE.

Believing that the following acts were in conflict, opinion was requested as to which was binding:

> "Members of the Naval Reserve Force shall not hereafter be ordered to perform active duty on shore of a kind which is ordinarily performed by civilians, and all reservists now performing such duty shall be relieved from such duty within thirty days after the date of approval of this act" (act of July 11, 1919).
>
> "That the Secretary of the Navy is hereby authorized to employ on active duty, with their own consent, members of the Naval Reserve Force in enlisted ratings, the number so employed not to exceed during any fiscal year the average of twenty thousand men: *Provided*, That the number of

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naval reservists so employed on active duty, together with the total number of enlisted men in the Regular Navy, shall not exceed the total enlisted strength of the Navy as authorized by law: *Provided further*, That such members of the Naval Reserve Force so employed shall serve on active duty for not less than twelve nor more than eighteen months unless sooner released: *Provided further*, That hereafter no person shall be enrolled in the Naval Reserve Force except for general service" (act of June 4, 1920).

A provision more nearly in point contained in the act of June 4, 1920, reads as follows:

"*And provided further*, That until December 31, 1921, * * * officers of the Naval Reserve Force may, with their own consent, be continued on active duty ashore or afloat, including three on shore duty in the Historical Section of the Office of Naval Intelligence, who may be retained on active duty beyond the age of disenrollment, but not beyond June 30, 1922."

The Judge Advocate General was of the opinion that all of the foregoing provisions, including that quoted from the act of July 11, 1919, are in full force and effect at the present time and are, therefore, binding upon the department. Repeals by implication are never favored by the courts, and no earlier statute will be held to have been repealed by a later statute unless such repeal is expressed or is the result of necessary implication. In order to effect a repeal by implication, the provisions of the statutes in conflict must be so repugnant to one another that they cannot be read together and each given effect, and when this condition obtains the later statute will be held to have repealed the earlier statute by necessary implication. But wherever it is possible that both statutes can be read together and effect be given to both this must be done.

[P. 21] In the present case the provisions of the two statutes involved are not repugnant. The act of July 11, 1919, provides that members of the Naval Reserve Force are not thereafter to be ordered to perform active duty on shore of a kind which is ordinarily performed by civilians and that all reservists then performing such duty should be relieved in 30 days after the approval of the act. It must be assumed that the act was given effect and that the reservists so employed, if there were any such, were released within 30 days from its approval.

The act of June 4, 1920, while it authorizes the continuance of members of the Naval Reserve Force on active duty ashore or afloat, with their own consent, does not in any way modify or repeal the provision of the act of July 11, 1919, that they are not to be employed on any duty on shore of a kind which is ordinarily performed by civilians, except with reference to the three officers of the Naval Reserve Force whose retention on duty on shore in the Historical Section of the Office of Naval Intelligence is authorized, without regard to the nature of their employment.

It must be recognized, of course, that there are strictly naval duties to be performed on shore as well as at sea, and there is proper employment for naval officers on duty on shore which is not of the kind referred to in the act of July 11, 1919. It is, therefore, possible to employ members of the Naval Reserve Force on duty on shore without violating the provisions of the act of July 11, 1919, which prohibits the department from ordering them to perform active duty on shore of a kind which is ordinarily performed by civilians. The foregoing opinion was approved by the Acting Secretary of the Navy (File 29226–2, J. A. G., July 23, 1920).

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1. NAVAL RESERVE OFFICERS: MAY BE CONTINUED ON ACTIVE DUTY WITH THEIR CONSENT UNTIL JUNE 30, 1920, THEN WITHOUT THEIR CONSENT UNTIL PEACE IS DECLARED, AND THEN ONLY WITH THEIR CONSENT AND FOR TRAINING, EXCEPT THOSE CONFIRMED IN RANK MAY, WITH THEIR CONSENT, BE EMPLOYED AFLOAT. THE 500 AUTHORIZED BY THE ACT OF JUNE 4, 1920, FOR AVIATION MAY ONLY BE EMPLOYED IN TIME OF PEACE AND WITH THEIR CONSENT.
2. SAME: THE 500 AUTHORIZED BY THE ACT OF JUNE 4, 1920, FOR AVIATION AND AUXILIARY SERVICES DOES NOT SERVE TO INCREASE THE NUMBER OF STAFF OFFICERS AUTHORIZED BY LAW.
3. SAME: WHETHER ON ACTIVE OR INACTIVE DUTY ARE ELIGIBLE FOR APPOINTMENT TO THE NAVY UNDER THE ACT OF JUNE 4, 1920.

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4. OFFICERS: WHO FORMERLY HELD COMMISSIONED OR WARRANT RANK IN THE NAVY BUT WHO DO NOT NOW HOLD COMMISSIONED OR WARRANT RANK IN THE NAVY OR NAVAL RESERVE FORCE ARE NOT ELIGIBLE FOR TRANSFER AND APPOINTMENT TO THE NAVY UNDER THE ACT OF JUNE 4, 1920.

The following questions were presented to the Judge Advocate General for his opinion:

(*a*) If the actual combined permanent and temporary force of commissioned officers is less than the allowed permanent [P. 22] force of officers in the line or any staff corps, may the deficiency be made up by reserve officers serving on active duty with their own consent?

(*b*) Does the authorization of 500 additional Reserve officers, to be employed in the aviation and auxiliary service, contained in the act of June 4, 1920, serve to increase the number of staff officers authorized by law?

(*c*) Are officers who formerly held commissioned or warrant ranks in the Navy and who do not now hold commissions in the Naval Reserve Force eligible for transfer and appointment to the permanent Navy under the act of June 4, 1920?

(*d*) Are members of the Naval Reserve Force, whether or not they are on active duty, eligible for appointment to the permanent Navy?

Answering question (*a*) the Judge Advocate General held that Reserve officers may be continued on active duty with their own consent, and, after June 30, 1920, may be continued on active duty or recalled to active duty without their consent, provided peace has not been declared in the meantime, so long as the total number in the line does not exceed 4 percent of the total authorized enlisted strength of the Regular Navy, and in the Staff Corps the proportions authorized by the act of August 29, 1916. If peace is declared they may be continued on active duty only with their consent and may not be called to active duty other than for training, except that those confirmed in their ranks may be employed on duty afloat with their own consent, and the 500 additional officers of the Reserve Force, authorized by the act of June 4, 1920, to be employed in the aviation and auxiliary services, may, in time of peace, be employed only with their consent.

In disposing of question (*b*) the Judge Advocate General held that the provision of the act of June 4, 1920, "That 500 Reserve officers are also authorized to be employed in the aviation and auxiliary service," does not serve to increase the number of staff officers of the Regular Navy authorized by law. These officers are apparently intended to be additional to the "total authorized commissioned strength of the Navy." They should not count as a part of the commissioned strength of the line upon which the number of staff officers is based.

In question (*c*) the word "officer" is used. What is really meant is persons no longer having an officer status, and on this assumption it was held that such persons are not eligible under the provisions of the act of June 4, 1920, for transfer and appointment in the permanent Navy. Section 3 of the act applies only to "officers holding temporary commissioned and warrant ranks in the Navy, and members of the Naval Reserve Force of commissioned and warrant ranks." They must actually [P. 23] hold commissioned or warrant ranks in the Navy or Naval Reserve Force at the time of transfer.

Answering question (*d*) it was held that it makes no difference whether members of the Naval Reserve Force are active or inactive. They are, in either case, eligible for appointment to the permanent Navy under the provisions of the act of June 4, 1920 (File 26509–331: 4, J. A. G., June 22, 1920).

OFFICERS: EXCESS, COMMISSIONS OF, SHOULD NOT BE REVOKED, BUT THEY SHOULD BE CARRIED AS ADDITIONAL NUMBERS. BUT NO ADDITIONAL PROMOTIONS SHOULD BE MADE TO ANY RANK ALREADY FILLED TO THE LEGAL QUOTA OR ABOVE.

On completion of the computation required by law for the purpose of fixing the distribution of officers in the permanent grades and ranks of the line and Staff Corps of the Navy, there will be an excess of officers of certain ranks over that allowed by law.

With that premise the following questions were presented to the Judge Advocate General for opinion:

(1) What may be the practical disposition of these excess officers?

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(2) May the President revoke the commissions of these officers? Is he required to do so?

(3) If said permanent commissions are revoked, what would be the status of these officers?

In view of the method provided by Congress in the act of August 29, 1916, of distributing commissioned officers in certain proportions, it must be presumed that Congress knew that the actual number of officers would not always remain the same and that the actual number of officers in the lower commissioned grades was found to vary from time to time. It would be unfair to impute to Congress ignorance of this very obvious fact. Knowing that the number would vary, Congress could easily have provided a method of reducing excess numbers in the grades had it desired to do so. The fact that it did not provide any such method argues that it did not intend that they should be reduced.

Although the question was doubtful before the passage of the act of June 4, 1920, it has been made certain by the provisions of said act, from which it can readily be perceived that it was not the intention of Congress that regular permanent officers should be reduced in rank on account of the loss of officers in the total actual or authorized number or on account of the loss of officers in the lower grades. Section 2 of the act relates only to temporary appointments and authorizes their continuance, "based upon the total permanent authorized commissioned strength of the line or of any Staff Corps," until December 31, 1921. The act further provides for the transfer of officers holding [P. 24] temporary commissions and warrant ranks in the Navy to permanent ranks in the Navy, and provides in section 5—

> "That in making reductions in rank as may be required by this act, officers holding temporary appointments may be given temporary appointments in lower grades * * *."

The significance of the foregoing provisions with regard to the question here presented is that they show that Congress considered the question of reduction of the rank of officers in excess of the number authorized by law in the various grades, and authorized the continuance of those holding temporary commissions until December 31, 1921, not in excess of "the number allowed in any grade or rank based upon the total permanent authorized commissioned strength of the line or of any Staff Corps," and authorized the transfer to and appointment in the regular permanent Navy of officers holding temporary commissions only with the same or lower rank. No provision was made for the reduction of permanent officers in rank; and it being shown that Congress had the question before it for consideration and provided for the continuance of temporary officers until December 31, 1921, and their appointment in lower ranks of the permanent Navy, when it should be found necessary under the law to reduce them in rank, it must be assumed that Congress intended that permanent officers should not be reduced.

In support of the foregoing opinion, too much emphasis cannot be laid upon the fact that it is impossible under existing law to reduce commissioned officers from one commissioned rank to another. A commissioned officer can be reduced by sentence of a general court martial to ordinary seaman under article 9 of the Articles for the Government of the Navy, but neither by sentence of court martial nor otherwise can he be reduced from one commissioned grade to another. The reasons are obvious. Having been lawfully appointed by nomination, confirmation, and commission, to an office of no fixed term, he holds such office until his death, resignation, retirement, or discharge, and the revocation of his commission does not serve to make him an officer in a lower grade, but, on the contrary, is tantamount to discharge from his office and from the Navy. He cannot become an officer in a lower grade except by being again nominated, confirmed, and commissioned and by the acceptance of his commission.

Answering the questions specifically, it is my opinion (1) that the excess officers should be carried as additional numbers in grade until such time as the number is reduced by death, resignations, promotions, retirements, etc., and that no additional promotions should be made to any rank that is already filled to the legal quota or above; (2) that the President is not required or directed by law to revoke the commissions of permanent officers found to be

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in excess of the number allowed by [P. 25] law as a result of subsequent computations and distributions after they have been legally appointed (File 26521-400, J. A. G., June 19, 1920).

OFFICERS: OF MEDICAL DEPARTMENT OF NAVY; CONSTRUCTION OF THE ACT OF JUNE 4, 1920, AS AFFECTING CANDIDATES AND ELIGIBLES FOR TRANSFER AND APPOINTMENT AS.

In response to a request from the Chief of the Bureau of Medicine and Surgery for construction and interpretation of certain sections and phrases contained in the act of June 4, 1920 (Pub., No. 243, 66th Cong.), the Judge Advocate rendered an opinion, dated July 9, 1920, approved by the Acting Secretary of the Navy, July 20, 1920, in which the following points were decided.

(*a*) The phrase "total authorized enlisted strength of the Regular Navy" as used in section 2 of said act includes all enlisted men authorized in the Regular Navy in whatever status except enlisted men on the retired list.

(*b*) Insofar as the above interpretation of the phrase "total authorized enlisted strength" results in increasing the authorized number of officers of the line, the quota of officers of the staff corps of the Navy are correspondingly augmented.

(*c*) The provision "that 500 Reserve officers are also authorized to be employed in the aviation and auxiliary service," contained in section 2 of the above-mentioned act, is to be construed as authorizing the employment of such number of officers in addition to the total number of commissioned officers of the Navy already authorized by law.

(*d*) The authorization of the transfer of 1,200 officers to the line of the Navy from officers holding temporary commissions and warrant ranks in the Navy and members of the Naval Reserve Force of commissioned and warrant ranks, with proportionate numbers in all Staff Corps as authorized by law, is not to be construed so as to authorize appointments in the line or any Staff Corps in excess of the number of vacancies in the line or any Staff Corps. In other words, the appointments made under section 3 of the act are to be to existing vacancies and are not to be in addition to the total number of officers of the Navy.

(*e*) The transfers of temporary officers to the permanent Navy authorized by section 3 of the act must be effected prior to December 31, 1921, as the act authorizes existing temporary commissions to remain in force only until December 31, 1921.

(*f*) Section 3 of the act authorizes the transfer to the permanent Navy of temporary, Reserve, and Coast Guard officers, but not permanent officers of the Regular Navy who hold temporary commissioned rank, except permanent commissioned warrant, and warrant officers who are serving temporarily in higher commissioned ranks.

[P. 26] (*g*) The commissioned warrant officers of more than 15 years' service whose transfer to permanent commissioned ranks in the Navy is authorized by section 4 of the act should not be appointed to fill vacancies in the grades and ranks to which appointed but should be appointed, if otherwise eligible, without regard to whether or not there are vacancies in said grades and ranks.

(*h*) Officers of the permanent Navy appointed under section 5 of the act to the permanent grade or rank which they held temporarily during the war, whether of the line or of any Staff Corps, will take rank in accordance with existing law when so appointed, there being no contrary provision contained in the act of June 4, 1920.

(*i*) There is no reason why the Bureau of Medicine and Surgery should not proceed immediately to determine what medical and dental officers are eligible for promotion under the various provisions of the act and what ranks they are qualified to fill.

(*j*) After it is determined what officers are qualified for promotion and what ranks they are qualified to fill, the precedence board authorized by the act will determine what rank and precedence the officers so qualified shall have with reference to one another and with reference to other officers of the Navy when they are finally commissioned (File 15229–20, J. A. G., July 9, 1920).

[C. M. O. 101—1920]

1. STAFF OFFICERS: TRANSFERRED AND APPOINTED TO A PERMANENT GRADE OR RANK, THE BOARD FOR THE PURPOSE OF RECOMMENDING THEIR PRECEDENCE MAY LEGALLY BE CONVENED AT ANY TIME.
2. LINE AND STAFF: IF BOARD IS CONVENED BEFORE THE OFFICERS TO BE TRANSFERRED ARE DETERMINED, THE BOARD MAY CLASSIFY THE TEMPORARY OFFICERS OF LINE AND STAFF AND DETERMINE THEIR RELATIVE PRECEDENCE IF FOUND QUALIFIED.
3. FINAL RECOMMENDATIONS: SHOULD NOT BE MADE BY THE BOARD TO THE SECRETARY UNTIL DEFINITE CONCLUSIONS HAVE BEEN REACHED, BECAUSE WHEN APPROVED BY THE SECRETARY THE BOARD WILL HAVE EXHAUSTED ITS POWERS.
4. TEMPORARY COMMISSIONS: MAY BE ISSUED TO ONE OR MORE CLASSES OF THESE OFFICERS, BASED ON TENTATIVE DATES, WITH THE RESERVATION THAT SAID CASES BE ACTED ON BY STATUTORY BOARD; THESE TENTATIVE DATES MAY BE DETERMINED BY THE SECRETARY, BY A SPECIAL BOARD, OR BY THE STATUTORY BOARD.

Opinion was requested as to the time at which the board of naval officers provided for by the act of Congress approved June 4, 1920, for the purpose of recommending the precedence to be taken by staff officers transferred and appointed to permanent commissioned and warrant ranks under the provisions of said act, can be legally convened.

The Judge Advocate General held that the board can be convened at any time convenient to the department whether before or after the qualifications of all officers to be transferred are determined.

[P. 27] It might be considered desirable to have the board convene at once and enter upon its duty of determining the precedence to be taken by staff officers transferred and appointed to the permanent Navy under the provisions of the act. If so, there is no legal objection to their being convened at once. If they are convened before it is determined what officers are to be transferred and appointed they might properly engage in classifying all officers of the line and Staff Corps eligible for transfer under the provisions of the act, dividing them into groups and determining what precedence they will take if found qualified and appointed to a permanent grade not above that now held by them and fixed rules for determining the precedence of those who might be so transferred and appointed.

It would not be contrary to law to wait until after it is determined what officers are to be transferred and appointed under the act and require the board to pass upon each individual case and recommend the date of precedence for each staff officer so transferred and appointed. The Judge Advocate General believed, however, that the board could meet at once and lay down rules sufficiently definite to govern all cases that may arise; but they might make the further rule that all cases not governed by the general rules so laid down will be referred to the board for its consideration and recommendation.

Great care should be taken that the board should not make its final recommendations for the Secretary's approval until after the whole situation has been thoroughly studied and definite conclusions reached, for once the board makes the recommendations required by the law and they are approved by the Secretary of the Navy the board will have exhausted its powers and it cannot thereafter change its recommendations with a view to correcting errors of precedence.

If it is desired to issue commissions to one or more classes of officers before all are ready to be commissioned, or before the board has prescribed rules for determining precedence, the Secretary of the Navy may, if he desires, convene a board of naval officers to determine temporary or tentative dates for such officers so commissioned with the express reservation that their cases are to be acted upon later by the statutory board. The Secretary may employ the statutory board for this purpose, but it is not necessary that he should do so. He can appoint a board of officers to make the determinations for him or he can make them for himself. The foregoing opinion was approved by the Acting Secretary of the Navy (File 11130–72, J. A. G., July 16, 1920).

[C. M. O. 105—1920]

C. M. O. 102—1920

[P. 1] Second Lieutenant Frank I. Lamb, U. S. Marine Corps, was tried by general court martial on May 10, 1920, at the Marine Barracks, Quantico, Va., by order of the Secretary of the Navy, and found guilty of the following charge:

Charge.—Conduct unbecoming an officer and a gentleman (one specification).

The court sentenced him to be dismissed from the United States Marine Corps, and from the United States naval service.

Opinion and Recommendation of the Judge Advocate General

On July 2, 1920, the Judge Advocate General noted that two other officers were tried on the same charge as the accused in this case, the specification in each case alleging the same facts, and arising from the same incident. The two other officers were tried subsequent to this case, each before different courts, and both were acquitted. In all three cases the prosecution had the same two witnesses, and their testimony was as nearly identical in each case as could well be possible. The defense in this case had nine witnesses, of whom, with the exception of the accused, only one was not called in one or both of the other cases. In each of the cases an alleged confession by the respective accused was introduced in evidence. The evidence of the defense in each of the three cases was, in all material respects, identical. The evidence in each of these cases was conflicting, and, in the opinion of the Judge Advocate General, might well sustain either a conviction or an acquittal. Therefore, one court might very well conscientiously convict, while another court might acquit the accused upon the evidence adduced in this case.

In view of the foregoing the Judge Advocate General recommended in the interests of justice that the proceedings in this case be approved, but that the findings and sentence be disapproved.

[P. 2] Concurrence of the Major General Commandant

On July 8, 1920, the Major General Commandant concurred in the recommendation of the Judge Advocate General.

Action of the Acting Secretary of the Navy

On July 10, 1920, the Acting Secretary of the Navy approved the proceedings in the foregoing case of Second Lieutenant Frank I. Lamb, U. S. Marine Corps, but disapproved the findings and sentence.

C. M. O. 105—1920

[P. 1] Lieutenant Commander Whitley Perkins, U. S. Navy, was tried by general court martial on March 20, 1920, at the Naval Station, Cavite, P. I., by order of the Commandant, Sixteenth Naval District and U. S. Naval Stations, Cavite and Olongapo, P. I., and acquitted of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (one specification).

Action of the Convening Authority

On April 5, 1920, the convening authority observed that the counsel for the accused admitted in open court a part of the specification relating to the station of the accused, but the record does not show that the accused in any way assented to this admission. The court erred in accepting this admission of the counsel without the assent of the accused. The convening authority further believed that the court improperly permitted counsel for the accused, during the course of his argument, to read certain commendatory letters addressed to the accused from the department and other superior officers. These letters were not introduced in evidence, nor the accuracy of their contents in any way substantiated under oath. The court could not therefore properly take cognizance of them, but the reading of letters of this nature may have tended to unduly influence the court in favor of the accused.

[C. M. O. 113—1920]

Subject to the foregoing remarks the convening authority approved the proceedings, findings, and acquittal in the foregoing case of Lieutenant Commander Whitley Perkins, U. S. Navy.

C. M. O. 113—1920

[P. 1] Lieutenant (Junior Grade) Edward L. Rowse, U. S. Naval Reserve Force, was tried by general court martial on June 29, 1920, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy, on the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals (thirteen specifications).

Charge II.—Executing a fraud against the United States (two specifications).

Charge III.—Attempting a fraud against the United States (one specification).

Charge IV.—Breaking arrest (one specification).

Additional charge.—Executing a fraud against the United States (one specification).

The court found the accused guilty of the first and fourth charges, not guilty of the second, third, and additional charges, and acquitted him of those charges. The court sentenced him to be dismissed from the United States naval service, and to be imprisoned in such prison or penitentiary as the convening authority might designate for a period of five years, and to perform hard labor during said imprisonment.

Opinion and Recommendation of the Judge Advocate General

On July 21, 1920, the Judge Advocate General placed the following endorsement upon the record:

"The first charge is supported by thirteen specifications. Nolle prosequis were entered against specifications 1, 2, 3, 4, 7, 8, 9, 12, and 13. Each of the remaining specifications allege that the accused induced certain banks and companies to cash cheques drawn by him knowing that he did not have sufficient funds to provide for payment. Each of these specifications avers that the accused committed the offense while not in active service and while wearing the uniform of his rank.

"The court found specification 5 proved in part, making a substitution so that the specification as found proved reads in [P. 2] part '* * * while wearing the uniform of a senior lieutenant, U. S. Navy'; specifications 6 and 11 proved in part so that the specifications as found proved read in part '* * * while wearing part of the uniform of his rank.'

"The jurisdiction of a Navy court martial over a member of the Naval Reserve Force not in active service is conferred by that portion of the act of July 1, 1918, H. R. 10854, page 712, 40 Stat. which reads:

" 'Enrolled members of the Naval Reserve Force when in active service shall be subject to the laws, regulations, and orders for the government of the Regular Navy, and the Secretary of the Navy may, in his discretion, permit the members of the Naval Reserve Force to wear the uniform of their respective ranks, grades, or ratings while not in active service, and such members shall, for any act committed by them while wearing the uniform of their respective ranks, grades, or ratings, be subject to the laws, regulations, and orders for the government of the Regular Navy.'

"A statute penal in its nature must be strictly construed, which means in effect that the language is not to be extended so as to include persons or things not clearly within its terms (*U. S.* v. *Lacher*, 134 U. S. 624; Nav. Dig., page 604, 92). As the findings of the court on specifiactions 5, 6, and 11 of charge I do not clearly place the accused within the terms of the above-quoted act, the court did not have jurisdiction of the offenses alleged therein.

"Charge II is supported by two specifications, and the additional charge by one specification. Each of these specifications alleges that the accused presented to the supply officer a copy of false orders ordering him to duty, whereas in fact he had been relieved from active duty, and by means of these false orders and false representations drew certain advances in pay. The prosecution clearly proved all the allegations of the specifications except that the copies of orders which the accused presented were in fact false. As the judge advocate had in his possession the entire record of the

accused in this case forwarded to him by the department, it would appear that he could have very easily established this fact, and his failure so to do results in a failure of justice.

[P. 3] "In view of the above it is recommended that the proceedings be approved; that the findings on specification 10 of charge I, charges II, III, IV, and the additional charge be approved; that the findings on specifications 5, 6, and 11 of charge I be disapproved; that the sentence be approved; and that the naval prison, Portsmouth, N. H., be designated as the place of confinement."

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On July 29, 1920, the Bureau of Navigation recommended approval of the proceedings and findings as amended by the remarks of the Judge Advocate General.

The bureau considered the sentence awarded entirely inadequate considering the nature of the offense of which Lieutenant (J. G.) Rowse was found guilty, but in view of the length of time the accused had been under arrest recommended approval of the sentence.

ACTION OF THE SECRETARY OF THE NAVY

On August 10, 1920, the Secretary of the Navy approved the proceedings, findings, and sentence, as recommended by the Judge Advocate General, and in conformity with article 53 of the Articles for the Government of the Navy (section 1624 of the Revised Statutes) submitted the record of proceedings to the President of the United States with the recommendation that the sentence in this case be confirmed.

ACTION OF THE PRESIDENT

On August 13, 1920, the President of the United States confirmed the sentence of the general court martial in the foregoing case of Lieutenant (J. G.) Edward L. Rowse, U. S. Naval Reserve Force.

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[P. 13] SENTENCE: BREAD AND WATER, OR DIMINISHED RATIONS; WHERE SUCH SENTENCE IS ADJUDGED, THE CONVENING AUTHORITY SHOULD SET OUT IN HIS ACTION THE EXACT AMOUNT OF RATIONS TO BE ALLOWED.

In adjudging a sentence in the case of an enlisted man the court awarded solitary confinement on diminished rations for a period of thirty days. The department has previously expressed its disapproval of this form of punishment (Naval Digest, 1916, Bread and Water, 3). Moreover, such sentence has been so modified that it may not now be adjudged for longer period that five consecutive days (Naval Courts and Boards, 1917, sec. 353). In disapproving the sentence in the foregoing case, the department expressed the view that in cases where solitary confinement on diminished rations is adjudged the convening authority should set out in his action on the proceedings, findings, and sentence the exact amount of rations to be allowed. Otherwise the sentence is indeterminate (File 28267–6847, Sec. Nav. Aug. 5, 1920).

CHAPLAINS AND ACTING CHAPLAINS: ADVANCEMENT IN RANK, LENGTH OF SERVICE REQUIREMENT.

The Naval Appropriation Act of June 4, 1920, contains the following provision:

"That until June 30, 1923, promotions to lieutenant (junior grade) and lieutenant may be made without regard to length of service."

Held, That this provision is applicable to chaplains, who may be advanced thereunder, until June 30, 1923, from the rank of lieutenant (junior grade) to the rank of lieutenant without regard to the length of service requirement contained in the act of June 30, 1914 (38 Stat. 403).

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Held further, That the provision quoted does not apply to acting chaplains, for the following reasons: (*a*) Lieutenant (junior grade) is the lowest rank authorized by law in the Chaplain Corps, and therefore no officers of that corps can be "promoted" or advanced to said rank; (*b*) the rank of lieutenant is not authorized by law for the grade of acting chaplain, the only rank in that grade being lieutenant (junior grade), and therefore no officer can be advanced [P. 14] to the rank of lieutenant in the grade of acting chaplain; (*c*) under the act of June 30, 1914, the promotion of an acting chaplain to the grade of chaplain can be made only after three years' sea service on board ship, and such promotion does not carry with it an advancement in rank. The length of service requirement for promotion to the grade of chaplain being, therefore, a restriction upon advancement in grade and not advancement in rank, is not waived by the act of June 4, 1920. It follows that an acting chaplain in the permanent Navy, who did not serve during the war with the German Government in a temporary grade or rank, cannot be promoted to the grade of chaplain otherwise than in accordance with the act of June 30, 1914.

Held further, That the limitation in the act of June 30, 1914, that not more than seven chaplains shall be commissioned in any one year, is not waived by the clause quoted from the act of June 4, 1920.

Held further, That an acting chaplain promoted to the grade of chaplain in accordance with the act of June 30, 1914, if so promoted prior to June 30, 1923, may upon such promotion be immediately advanced to the rank of lieutenant without regard to length of service, notwithstanding that the act of June 30, 1914, requires a specified period of service in the grade of chaplain with the rank of lieutenant (junior grade) prior to advancement to the rank of lieutenant.

Held further, That acting chaplains appointed under the act of June 30, 1914, are not officers holding temporary appointments in the grade of chaplain, but are officers who have been appointed in the permanent Navy to the separate and distinct grade of acting chaplain, which is expressly "authorized and created" by said act; and they occupy a status differing from that of "temporary chaplains" whose appointments were authorized by the act of May 22, 1917 (40 Stat. 85), which latter act also authorized the appointment of "temporary acting chaplains" (File 29226–7, August 30, 1920).

COAST GUARD: TRANSFER OF OFFICERS TO THE REGULAR NAVY; RANK AND AGE RESTRICTIONS.

The naval appropriation act of June 4, 1920, section 3, authorizes the transfer of commissioned officers of the Coast Guard to the Regular Navy, "not above the rank of lieutenant commander"; section 4 of the same act provides "that no transfers or appointments made in accordance with sections 3 and 4 of this act shall be to a higher grade or rank than lieutenant in the Navy."

Held, That an officer of the Coast Guard, if otherwise qualified, may legally be transferred to the rank of lieutenant commander in the permanent Navy, in accordance with section 3 of said act, that [P. 15] being the more specific provision of the law and therefore, under settled rules of statutory construction, to be read as an exception to the conflicting provision in section 4 of the same act; the general provision in section 4 will apply to all transfers authorized by the two sections, with the exception of transfers from the Coast Guard, and both sections will thus be given effect, while a contrary construction would nullify the words in section 3 which authorize such transfers from the Coast Guard in the rank of lieutenant commander. Furthermore, the legislative history of this act shows very clearly that so far as the Coast Guard was concerned it was the intention of Congress to authorize transfers therefrom to the Navy in the rank of lieutenant commander and below.

The same act, section 5, provides "that officers appointed under any of the foregoing provisions shall be not more than thirty-five years of age when so appointed to the line of the Navy, Construction Corps, or Supply Corps, and not more than forty-three years of age when so appointed to the Corps of Chaplains, or to the Medical, Dental, or Civil Engineer Corps: *Provided*, That said age limits shall be increased in the cases of officers who have rendered prior service as paymaster's clerks, or as mates, or as warrant or commissioned

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officers in the naval service to the extent of all prior naval service." *Held*, That under this proviso in section 5, only such Coast Guard service should be counted as naval service as was rendered under the jurisdiction of the Navy Department; that is, when the Coast Guard was operating as a part of the Navy in accordance with law (File 29226–8, Aug. 26, 1920).

COURTS OF INQUIRY: MAY BE CONVENED BY ANY OFFICER EMPOWERED TO CONVENE GENERAL COURTS MARTIAL, AND SPECIFIC AUTHORITY IS NOT NECESSARY UNDER THOSE CONDITIONS.

It was requested that the commander, battleship squadron three, be given authority to convene boards of inquest when present with the commander in chief, and in granting the request the department held that specific approval is not strictly necessary by virtue of the provisions contained in the last sentence but one of section 496, Naval Courts and Boards, 1917, when read in connection with section 596 of the same book. While it is not definitely so stated, the "senior officer present" referred to in section 496 is intended to apply to an officer of lesser seniority than a "flag officer" or a "commandant." In general the department holds that any officer empowered to convene general courts martial has inherent authority to convene boards of inquest (File 26504–287, 83–B; Sec. Nav. Aug. 19, 1920).

[P. 16] ENLISTMENT: MINORITY, A MAN SERVING IN, MAY BE DISCHARGED WITHIN THREE MONTHS OF THE EXPIRATION OF HIS ENLISTMENT AND STILL BE ENTITLED TO ADDITIONAL PAY FOR CONTINUOUS SERVICE AND FOR THE PURPOSES SET FORTH IN SECTION 4427 (25), NAVY REGULATIONS.

May a man serving in a minority enlistment be discharged within three months of the date of the expiration of his enlistment, and if so discharged and reenlisted within four months, is he entitled to adidtional pay for continuous service and for the purposes set forth in section 4427 (25), Navy Regulations.

The department held that an enlisted man serving in a minority enlistment may legally be discharged within three months of the date of the expiration of his enlistment under the provisions of the act of August 22, 1912 (37 Stat. 331), and the above-mentioned regulations, and if so discharged he is entitled upon reenlistment within four months to additional pay for continuous service and for the purposes set forth in section 4427 (25), Navy Regulations (File 7657–1075, Sec. Nav., Aug. 13, 1920).

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1. NAVAL RESERVE FORCE: OFFICERS OF, WHOSE ENROLLMENT HAD EXPIRED BUT WHOSE CASES WERE HELD UP BY THE DEPARTMENT PENDING THE DETERMINATION OF THEIR RIGHTS TO RETIREMENT, ARE DE FACTO OFFICERS AND ENTITLED TO THE BENEFITS OF LEGISLATION GRANTING RIGHT OF RETIREMENT TO OFFICERS OF THE NAVAL RESERVE FORCE WHO THERETOFORE HAD INCURRED PHYSICAL DISABILITY IN THE LINE OF DUTY.
2. SAME; THE DEPARTMENT HAVING TAKEN JURISDICTION OVER THEIR CASES TO DETERMINE THE RIGHT TO RETIREMENT CAN, WITH THEIR CONSENT, RETAIN SUCH JURISDICTION UNTIL THE FINAL CONCLUSION OF THE ACTION, EVEN THOUGH THE TERMS OF THEIR ENROLLMENTS HAVE EXPIRED.

Certain officers of the U. S. Naval Reserve Force whose cases had been before a retiring board and were held up by the Department pending the settlement of their right to retirement under laws then in effect, were, on the passage of the act of June 4, 1920, returned to the Bureau of Navigation for the purpose of bringing the officers again before a retiring board to determine their right to retirement under existing law. In returning the cases the Judge Advocate General expressed the following views thereon:

It appears that the term of enrollment of X expired June 14, 1920, that of Y February 25, 1920, and that of Z May 15, 1920. X was therefore an officer of the Naval Reserve on active duty with the Navy on the date of the passage of the act of June 4, 1920, and if it is established that he was at that time permanently incapacitated for active duty by reason of disability incurred in the line of duty he clearly is entitled to retirement under the provisions of

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said act. Prior to June 4, 1920, there was some doubt as to whether or not officers of the Naval Reserve Force on active duty were entitled to retirement and for that reason these cases were held up pending the determination of the question. Although there has been no court decision on the question, the Department has decided it in favor of [P. 17] the officers by retiring certain of them for physical disability under the provisions of law existing prior to June 4, 1920.

Even if it should be held that Y and Z are not entitled to retirement under the provisions of law existing prior to June 4, 1920, it is nevertheless my opinion that they might be legally retired under said act of June 4, 1920, which provides for the retirement of officers of the Naval Reserve Force "who have heretofore incurred * * * physical disability in line of duty." Both Y and Z were at least de facto officers of the Naval Reserve Force on the date of the passage of the act of June 4, 1920, even though their terms of enrollment had expired, for they have been held in the service awaiting action on their retirement, and I believe that the above-quoted provision of the act of June 4, 1920, was intended to cover just such cases.

Even though their terms of enrollment have expired, it is my opinion that the Department, having taken jurisdiction of their cases for the purpose of determining the facts concerning their physical condition and their eligibility for retirement, can retain such jurisdiction with their consent until the investigation is completed and final action is taken. The foregoing opinion of the Judge Advocate General was approved by the Secretary of the Navy (File 26253–776; 26253–770:1; 26253–760:1, J. A. G., Aug. 12, 1920).

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1. OFFICERS: HOLDING BOTH TEMPORARY AND PERMANENT RANK IN THE MARINE CORPS CANNOT LEGALLY BE PROMOTED TO THE RANK OF CAPTAIN AND FIRST LIEUTENANT TO FILL VACANCIES WHICH OCCURRED PRIOR TO THE ACT OF JUNE 4, 1920, AND WHICH WERE EXISTING VACANCIES ON THAT DATE, EXCEPT IN THE MANNER PRESCRIBED BY THE ACT OF JUNE 4, 1920.
2. SAME: PERMANENT AND TEMPORARY, OF THE RANK OF CAPTAIN AND BELOW, ARE EQUALLY ELIGIBLE TO FILL THE VACANCIES IN THOSE GRADES OF THE PERMANENT MARINE CORPS WHICH OCCURRED PRIOR TO THE ACT OF JUNE 4, 1920, AND THOSE CREATED BY THAT ACT.

Would it be legal at the present time to promote officers holding both temporary and permanent rank in the Marine Corps to the permanent grades of first lieutenant and captain in the Marine Corps under the provisions of law existing prior to June 4, 1920, to fill vacancies which occurred prior to said date and which were "existing vacancies" on the date of said act?

The Judge Advocate General held, which opinion was approved by the Secretary of the Navy, that it would not be legal to promote the officers in question except in the manner prescribed in the act of June 4, 1920; that is to say, all officers holding temporary rank in the grade of captain and below are equally eligible under the provisions of the act of June 4, 1920, to fill the permanent vacancies in the grade of captain and below existing on the passage of said act and created by the passage of said act. Said act makes all officers of the Marine Corps holding the temporary rank of captain and below equally eligible to fill existing vacancies and vacancies created by said act in the permanent grades of captain and first lieutenant. Consequently, to fill "existing vacancies" by the [P. 18] promotion of certain permanent second lieutenants who hold higher temporary rank, even though they are eligible under laws existing prior to June 4, 1920, would take such officers out of competition with other officers equally eligible and would accordingly reduce the chances of appointment of other officers who must be promoted, if at all, under the provisions of the act of June 4, 1920.

Though under the provisions of the act of August 29, 1916, promotions to all ranks up to and including colonel are to be made from the next junior rank "in the order in which their names appear" on the common list established by said act, the act of June 4, 1920, had the effect of suspending temporarily such prescribed methods of promotion to the grade of captain and below with reference to "all officers serving temporarily in the grades of captain and below upon the date of the passage of this act," and made such officers "eligible to fill existing

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vacancies and those hereby created in the permanent authorized strength in said grades by transfer to or reappointment in the permanent Marine Corps in the grades not above that of captain."

The general effect of the above-mentioned provisions of the act of June 4, 1920, is to suspend until June 30, 1921, the "seniority rule" established by the act of August 29, 1916, for promotions to the grade of captain and below for the purpose of filling existing vacancies and those created by the act of June 4, 1920, in those grades (File 29226–6, J. A. G., Aug. 7, 1920).

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1. OFFICERS: TEMPORARY AND PERMANENT, AND THOSE WHO HELD TEMPORARY, PERMANENT, OR RESERVE COMMISSIONS, ARE ELIGIBLE FOR APPOINTMENT TO THE VACANCIES WHICH OCCURRED IN THE PERMANENT MARINE CORPS BEFORE, OR THOSE CREATED BY, THE ACT OF JUNE 4, 1920.
2. BOARD: CONVENED FOR THE PURPOSE OF SELECTING CANDIDATES TO FILL THE VACANCIES IN THE PERMANENT MARINE CORPS HAS THE AUTHORITY TO RECOMMEND TO THE SECRETARY OF THE NAVY THE PRECEDENCE OF ALL OFFICERS TRANSFERRED AND APPOINTED TO THE MARINE CORPS UNDER THE PROVISIONS OF THE ACT OF JUNE 4, 1920.

The act of June 4, 1920, provides "that all officers serving temporarily in the grades of captain and below upon the date of the passage of this act shall be eligible to fill existing vacancies and those hereby created in the permanent authorized strength in said grades, by transfer to or reappointment in the permanent Marine Corps in the grades not above that of captain."

Does the foregoing clause include officers in the grade of captain and below who have a permanent commissioned status in the Marine Corps as well as a temporary commissioned status, or does it exclude such officers? Has the board for the selection of candidates to fill those vacancies the legal authority to change the precedence of certain classes of officers; and if so, how far does its authority to change the precedence of all the officers concerned extend?

The Judge Advocate General held, which opinion was approved by the Secretary of the Navy, that said clause includes officers having a permanent commissioned status as well as those whose status is purely temporary.

[P. 19] With reference to the question of precedence of the officers so transferred to or reappointed in the permanent Marine Corps the act clearly provides that such officers "shall take precedence with each other and with other officers of the Marine Corps in such order as may be recommended by a board of Marine Corps officers and approved by the Secretary of the Navy." Under this provision the board is authorized to recommend to the Secretary of the Navy the precedence to be taken by all officers of whatsoever class transferred and appointed or reappointed under the provisions of said act. The board is not authorized to make recommendations concerning the precedence of permanent officers not reappointed under the provisions of the act, although their relative standing will be affected by the transfers and reappointment so made.

The provisions of the act of August 29, 1916, requiring that officers of the Marine Corps below the rank of colonel be placed on a common list, etc., were not repealed by the act of June 4, 1920. That act does not limit advancement to the rank of captain and below "from officers of the next junior respective rank" or "in the order in which their names appear on said list." For the purposes of the act of June 4, 1920, the provisions of the act of August 29, 1916, are waived—but they become operative after the transfers and reappointments are accomplished.

The act of June 4, 1920, authorizes appointments not only from the next lower rank, but from the rank in which the officer appointed is serving temporarily. Thus, a permanent second lieutenant holding a temporary commission as captain may, if qualified, be reappointed a permanent captain. If so reappointed, he would not necessarily take precedence in the order in which his name now appears upon the list, but as recommended by the board and approved by the Secretary of the Navy. Probationary second lieutenants appointed under the act of August 29, 1916, who in regular course would be examined at the end of two years and whose precedence would be established as prescribed by said act of August 29, 1916, will, if transferred or reappointed under the provisions of the act of June 4, 1920, take precedence in the same manner as

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other officers so transferred or reappointed, i. e., as recommended by the board provided for by the latter act and approved by the Secretary. However, the provisions of the act of August 29, 1916, providing a method of determining the precedence of probationary second lieutenants upon permanent appointment to such rank are not repealed or superseded by the act of June 4, 1920, except for the purpose of the later act. Probationary second lieutenants commissioned after two years' service under the act of August 29, 1916, and not "transferred or reappointed" under the act of June 4, 1920, will take precedence as provided in the act of August 29, 1916 (File 29226–1, J. A. G., Aug. 2, 1920).

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[P. 1] Lieutenant (T) Walter L. Hawk (B), U. S. Navy, was tried by general court martial on February 7, 1920, on board the U. S. S. *Galveston*, Constantinople, Turkey, by order of the Senior U. S. Naval Officer, Turkey, and found guilty of the following charges:

Charge I.—Improperly hazarding the vessel under his command, in consequence of which she was run upon a shoal or other submerged object and injured (one specification).

Charge II.—Culpable inefficiency in the performance of duty (one specification).

The court therefore sentenced him to lose fifty numbers in his temporary rank of lieutenant and to be placed at the foot of the permanent boatswain's list of that date, and to remain there until he shall have lost fifty numbers in his permanent rank of boatswain. In consideration of his previous good record and of his bearing before the court, the members of the court unanimously recommended him to the clemency of the reviewing authority.

Action of the Convening Authority

On May 20, 1920, the convening authority approved the proceedings, findings, and sentence, but in view of the unanimous recommendation to clemency, and also in view of the fact that the vessel concerned is small, and it has been frequently necessary to navigate in a less formal manner than obtains in the case of larger vessels; and, further, in view of the length of time that the accused has necessarily been held in suspense and the excellent manner in which he has performed his duties during that period, remitted the loss of numbers in his permanent and temporary grade.

Opinion and Recommendation of the Judge Advocate General

On July 16, 1920, the Judge Advocate General placed the following endorsement upon the record:

> "Lieutenant Hawk was on December 4, 1919, in command of the U. S. S. *Eagle One* making passage from Smyrna to [P. 2] Constantinople, Turkey. At 5:30 p. m. course was changed to enter the Dardanelles, and at about 5:40 p. m. the ship struck some object on the south side of the entrance. The convening authority preferred two charges against the accused: (I) "Improperly hazarding the vessel under his command, in consequence of which she was run upon a shoal or other submerged object and injured," and (II) "Culpable inefficiency in the performance of duty." Each charge is supported by one specification. The specification of the first charge alleges that the accused caused a course to be steered that lay close to a bank without any necessity for so doing and did suffer the vessel to be hazarded in consequence of which hazard the ship was then and there run upon said bank or other submerged object and injured. The specification of the second charge alleges that the accused caused his vessel to proceed at fifteen knots speed and failed to check his course after 5:30 p. m. and was therein and thereby culpably inefficient in the performance of his duty in consequence of which the ship was at about 5:40 p. m. run upon a shoal or other submerged object and injured.
>
> "Before pleading to the issue the accused (counsel) objected to the charges and specifications on the ground that no offense is committed in striking any submerged object, as, for instance, an uncharted wreck or

rock, and that it would be impossible for the accused to clear himself of the charge even should he prove conclusively that his ship did not touch a shoal but did strike an uncharted hulk. The court overruled the objection of the accused (counsel) and found the charges and specifications in due form and technically correct. In so doing, in the opinion of this office, there was error.

"The primary requisite of a specification is that it clearly inform the accused of the exact offense with which he is charged in order that he may properly prepare his defense (Naval Courts and Boards, 1917, sec. 63. C. M. O. 33, 1914, 6–7. C. M. O. 148, 1918, 3). A specification charging facts in the disjunctive is bad for uncertainty. Thus it has been held that an indictment is bad for uncertainty which charged that the defendant suffered a game of cards to be played 'in a house or on premises in the county aforesaid,' or that charged the sale of 'spirituous or intoxicating' liquor, or the administering [P. 3] a 'drug or poison,' or the breaking into a 'barn or stable,' etc. This rule applies in all cases except where the word 'or' is used in the sense of 'to wit' (Clark's Criminal Procedure, p. 169, 170, and cases there cited). From the above it is clear that in this case the first charge and the specification of the charge are defective, and that the interests of the accused were prejudiced by bringing him to trial upon them.

"If, however, the conclusion of the specification of charge II be discarded as surplusage, this uncertainty in the specification is removed and there remains to support the charge of 'culpable inefficiency in the performance of duty,' the allegation that the accused while approaching the entrance to the Dardanelles caused his vessel to proceed at fifteen knots speed and failed to check his course after 5:30 p. m., at which time he had ordered the ship steered on a course sixty degrees per standard compass. As the entrance to the Dardanelles has some two miles of clear water, a speed of fifteen knots does not appear excessive. The course of sixty degrees per standard compass was fifty-nine degrees true from the compass card and appears to be the proper course. The allegation that the accused failed to check his course is ambiguous, as there are a number of ways of checking a compass course. As the time alleged during which he failed to check his course was only ten minutes, and as the time was 5:30 p. m. in the month of December and there is no range shown on the chart, it would appear that the only check on the course that could be made was with the standard compass. The proof shows that a man was continually on watch on the standard compass, and that during the ten minutes from 5:30 to 5:40 p. m. the course was checked by the standard compass several times. This proof negatives the allegation that the accused failed to check his course, even though it might have been possible to check better in some other manner.

"In view of the foregoing it is recommended that the proceedings, findings, and sentence in this case be disapproved."

Recommendation of the Bureau of Navigation

On August 2, 1920, the Bureau of Navigation recommended disapproval of the proceedings, findings, and sentence. The bureau considered that Lieutenant Hawk exercised very poor [P. 4] judgment in laying his course at 5:30 p. m. to pass one-half mile outside of a bank reported as extending on a chart whose latest corrections were dated 1919, especially since the chart indicated that for a time he would have a current which would tend to set him toward this bank, and since such course was not necessary as there was sufficient clear water to have permitted him to lay a course well clear of this bank. Further, after determining the course used, he should have exercised care in seeing that the course was checked by a more reliable person than a seaman second class, and should have proceeded at such speed as would have permitted the taking of soundings or should have taken frequent bearings to determine his exact position. The bureau therefore recommended that, as an entirely separate procedure, a letter of caution be addressed to Lieutenant Hawk.

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ACTION OF THE SECRETARY OF THE NAVY

On August 10, 1920, the Secretary of the Navy approved the foregoing recommendation of the Judge Advocate General, as concurred in by the Bureau of Navigation.

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[P. 1] Lieutenant Robert B. Carney, U. S. Navy, was tried by general court martial on July 27, 1920, on board the U. S. S. *Prairie*, by order of the Commander Destroyer Squadrons, U. S. Pacific Fleet, and found guilty of the following charge:

Charge.—Conduct to the prejudice of good order and discipline (two specifications).

The court therefore sentenced him to lose five numbers in his temporary grade of lieutenant and five members in his permanent grade of lieutenant, junior grade.

ACTION OF THE CONVENING AUTHORITY

On August 3, 1920, the convening authority approved the proceedings, findings, and sentence and directed that the accused be released from arrest and restored to duty.

RECOMMENDATION OF THE BUREAU OF NAVIGATION

On August 26, 1920, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence, but in view of the following remarks, and in consideration of the excellent record of the accused and his active war service, recommended that the loss of numbers be remitted.

The Bureau was of the opinion that it has been the policy of the Department for many years to limit the trial by general court martial in offenses of the nature covered by the specifications in this case (violating the automobile speed laws) to cases where naval discipline has been directly affected, or where the publicity is of such a nature as seriously to compromise the character or reputation of the offender as an officer, or to cases that have brought reproach or scandal upon the naval service.

ACTION OF THE SECRETARY OF THE NAVY

On September 1, 1920, the Secretary of the Navy approved the proceedings, findings, and sentence of the general court [P. 2] martial in the foregoing case of Lieutenant Robert B. Carney, U. S. Navy, but, in accordance with the recommendation of the Chief of the Bureau of Navigation, remitted the loss of numbers.

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[P. 13] 1. SENTENCE: PORTIONS OF, UNCONDITIONALLY REMITTED CANNOT LEGALLY HAVE ATTACHED TO THEM CONDITIONS SUBSEQUENT.
2. REDUCTION: IN RATING DOES NOT BECOME EFFECTIVE UNTIL COMPLETION OF ACTION OF CONVENING AUTHORITY.

A convening authority in reviewing a record of a general court martial unconditionally remitted all but three months of the period of confinement adjudged and remitted the dishonorable discharge subject to a year's probation, and then stated that if the probation is broken the original sentence will be executed.

Held: Such action to be both illegal and inconsistent. A sentence cannot be unconditionally remitted in part with subsequently attached conditions to become operative as to the part unconditionally remitted, in the event of a breach of probation. The convening authority's power to affect that portion of the sentence which he unconditionally remitted ceased on the remission thereof, and a condition subsequently imposed is a nullity insofar as it attempts to revive the unconditionally remitted portion of the sentence.

In the same case the accused was arraigned and tried as a sergeant, but in the convening authority's action on the case the accused is referred to as a private. The latter is erroneous, as it was the action of the convening authority

upon the sentence of the accused which reduced the accused to a private, and until the convening authority's action is completed the accused is a sergeant and should be so designated in his action. (File 26262–7786, J. A. G., Oct. 1, 1920: G. C. M. Rec. No. 49995).

"SUPERIOR OFFICER": DOES NOT INCLUDE ARMY OFFICERS WITHIN THE PURVIEW OF ARTICLE 4, ARTICLES FOR THE GOVERNMENT OF THE NAVY, OR ARTICLE 64, NAVY REGULATIONS.

An enlisted man of the Navy was charged with assaulting and striking his superior officer, the officer in question being an Army officer, who, in his capacity as a member of the military police, had arrested the accused. In setting aside the findings and sentence the Judge Advocate General held that, though the act of the accused in assaulting an officer of the Army was an offense which would warrant disciplinary action, it is nevertheless a fact that an Army officer is not a superior officer, within the meaning of article 4 of the Articles for the Government of the Navy or article 64, U. S. Navy Regulations. The commonly accepted meaning of the words "superior officer" contemplates officers within the same service, and although the Army officer in question was a member of the military police on duty and chargeable with the maintenance of order, nevertheless he comes within the status of any civil or military official maintaining the public peace, and does not come within the meaning of "superior officer" which would support the charge of [P. 14] "assaulting and striking his superior officer," as when such assault was committed by a person of inferior rank or rating in the Navy upon another of a higher rank or rating in the same service. Therefore the offense committed in this instance was not a disorder properly chargeable under the specific charge "assaulting and striking his superior officer," but comes under the provisions of section 67, Naval Courts and Boards, which directs that when the neglect or disorder is not specifically provided for it shall be charged under one of the general or catch-all clauses, and in this case "conduct to the prejudice of good order and discipline" would have been the proper charge (File 26262–6324, May 21, 1919, G. C. M. Rec. No. 43533).

WITNESS: THE COURT MAY QUESTION, AT ANY STAGE OF THE PROCEEDINGS, BUT IT SHOULD BE DONE ONLY IN RARE INSTANCES.

Is it permissible for the court to interpose questions during the direct examination, or during any other step of the examination of a witness, other than at the time of the regular examination by the court? When a witness is sworn, the party who calls him commences the examination. A reexamination of the witness by the first party follows the cross-examination upon such points as the latter may have touched on, then a recross-examination by the opposite party if desired, and then the court puts such questions as they may deem requisite to elicit the whole truth, calling for explanation of previous portions of the testimony, or requiring a fuller statement of circumstances or facts, which had been but slightly referred to. A court martial has the right to put questions to a witness at any stage of the examination, but such a course has many undesirable features and frequently confuses the proceeding; it perplexes the mind of the party and may to some degree derange his preconceived order of examination. It is much better, therefore, that the examination by the parties should be completed before the court makes any interrogation; and thus it frequently occurs that the necessity of asking any questions is obviated by the first examinations. Members of courts martial should bear in mind that though the course and method of examination by the parties may appear defective and prolix, and, therefore, fatiguing, yet it is only just to presume that every person has a particular mode in view and is proceeding to results, which, to those who merely listen, may not, at the time, seem to have any connection with the means; and that nothing can have a more depressing effect upon the mind of the party, or give rise to more painful and embarrassing feeling, than the abrupt interruption of his plan by any manifestations of impatience on the part of the court (De Hart's Court Martial, p. 157; see also Naval Digest, 1916, witnesses, 40, quoting Winthrop's Military Law and Precedents, vol. I, pp. 429–430, [P. 15] and comparing Cyclopedia of Law and Procedure, vol. 40, pp. 2439–2442, as examples of procedure of civil courts).

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Held, That though it is permissible for the court to interpose questions during any stage of the proceedings, this practice should not be indulged in except in rare instances and then only sparingly, because it has a tendency to confuse both the party examining the witness and the witness, and the court has an opportunity to examine the witness in the prescribed method of procedure and may then, if necesary, clear up any doubtful points in the testimony of the witnesses (File 12821–186, J. A. G., Sept. 2, 1919).

DISCHARGE: AN ENLISTED MAN MAY BE DISCHARGED WITHIN THREE MONTHS OF THE DATE OF THE EXPIRATION OF HIS TERM OF ENLISTMENT PLUS ANY TIME LOST THROUGH SICKNESS OR INJURY THE RESULT OF HIS OWN MISCONDUCT.

An enlisted man has been absent during his enlistment due to injury or sickness resulting from his own misconduct, and he must therefore make up such time before his enlistment is completed. May he be discharged under the provisions of article R–3601 (1) U. S. Navy Regulations, prior to the expiration of his enlistment as extended by the time he is required to make up?

The provisions of law quoted in General Order No. 231, page 12, paragraph 3, as amended by the act of July 1, 1918 (40 Stat. 717, par. 2), has the effect of incorporating in the enlistment contract the condition that the date of the expiration of enlistment is to be postponed so many days as may be lost in excess of one day on account of injury, sickness, or disease resulting from the enlisted man's own misconduct. But an enlisted man does not lose the benefits reserved to him on an early discharge within three months prior to date of the expiration of his enlistment so postponed on account of time lost by absence due to injury, sickness, or disease due to his own misconduct.

In the case presented the date of the expiration of enlistment has been postponed from July 15, 1920, to September 1, 1920, on account of 48 days' absence due to misconduct. He might have been discharged under the above regulation any time after June 1, 1920 (File 7657–394: 29, Sec. Nav., Sept. 27, 1920).

[P. 16] ENLISTMENT: EXTENSION PRIOR TO SEPTEMBER 1, 1919, MAY BE CHANGED TO A DURATION-OF-THE-WAR ENLISTMENT IF APPLICATION THEREFOR IS MADE ON OR BEFORE THAT DATE, AND IT MAY THEN BE EXTENDED FURTHER.

A man enlisted June 30, 1912, for four years and had extended this enlistment for four years on June 29, 1917. On October 31, 1919, the status of this enlistment was changed from a four-year extension to a duration-of-the-war enlistment and he again extended his enlistment for four years from the latter date. Is this last extension legal?

The act of July 11, 1919 (Public, No. 8, p. 10), provides as follows:

> "Any enlisted man of the Navy, * * * who, since February 3, 1917, and before November 11, 1918, enlisted for the period of four years shall upon his application made to the Secretary of the Navy on or before September 1, 1919, be held and construed to have enlisted for the duration of the war and shall when discharged be granted an honorable discharge. * * *
>
> "Enlisted men of the Navy * * * who enlisted for the period of the war or enlisted for a period of four years between February 3, 1917, and November 11, 1918, and have their status changed to that of men who enlisted for the period of the war, if otherwise entitled to an honorable discharge, may, under such regulations as the Secretary of the Navy may prescribe, extend their enlistments for a period of one, two, three, or four full years. * * *."

Held: That if this man's application to have his first extension of enlistment changed from a four-year enlistment to a duration-of-the-war enlistment was made prior to September 1, 1919, as required by the act of July 11, 1919, his change in status to a duration-of-the-war enlistment on October 21, 1919, automatically terminated his first extension of enlistment and the second extension of enlistment was legally authorized by the second paragraph of the act of July 11, 1919, supra. If, however, his application to have his first extension of

enlistment changed to the duration-of-the-war enlistment was not actually made on or before September 1, 1919, then his change in status to duration-of-the-war enlistment and the subsequent second enlistment were not authorized by existing law, and are consequently illegal. In the latter event his status would revert to his first four-year extension of enlistment, and all rights, privileges, and gratuities received by him in consequence of his second extension of enlistment are void (File 26254–2881:121, Sec. Nav., Sept. 4, 1920).

LONGEVITY PAY: ACT OF MAY 18, 1920, DOES NOT REMOVE RESTRICTIONS AS PRESCRIBED IN ACT OF MARCH 4, 1913, THAT SERVICE AS A MIDSHIPMAN SHALL NOT COUNT IN COMPUTING LENGTH OF SERVICE.

Is an officer entitled to have longevity pay computed from the date he was appointed to the U. S. Naval Academy or from the date he was commissioned an ensign, in view of the following provision in the act of May 18, 1920: "*Provided*, That hereafter longevity [P. 17] pay of officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services."

Held That the provision of law in question does not repeal the act of March 4, 1913, wherein it is specifically provided that service as midshipmen should not be counted in computing longevity pay of officers in the Navy. The pay of officers of the Navy will be computed from the date they were commissioned as ensigns and not from the date they were appointed to the Naval Academy (File 29199–4:5, Sec. Nav. Sept. 27, 1920).

NATIONAL NAVAL VOLUNTEERS: ARE ENTITLED TO THE RETENTION OF ONE OUTFIT OF UNIFORM CLOTHING ON DISCHARGE.

Is a former member of the National Naval Volunteers who was discharged from active service in the Navy by special order of the Secretary of the Navy on June 16, 1917, entitled to the benefits of the act of February 28, 1919, chapter 70, section 2 (40 Stat. 1203)?

Held, That such member of the National Naval Volunteers who was discharged from active service in the Navy under honorable conditions since April 6, 1917, is entitled to the benefits of the aforesaid act.

If articles of uniform clothing were restored to the Government at the time of his discharge, they should be returned to him or there should be issued to him articles similar in kind and value (File 26254–2593:170, Sec. Nav. Sept. 27, 1920).

NAVAL RESERVE FORCE (F): WHO HAVE PERFORMED THREE MONTHS ACTIVE SERVICE AND WERE EXAMINED AND FOUND QUALIFIED FOR CONFIRMATION IN RATING PRIOR TO DECEMBER 16, 1918, HAVE BEEN LEGALLY CONFIRMED, AND NOTIFICATION OF SUCH CONFIRMATION SHOULD ACCORDINGLY BE MADE AS THEY ARE LEGALLY ENTITLED TO THE RETAINER PAY.

Should confirmation be made from the list of those reservists (F) who were examined and found qualified for confirmation in rating by the examining board which conducted their examination prior to December 16, 1918, although entries of such confirmation in rating were not made in their service records, or should such notification of confirmation be confined to those reservists (F) in whose service records the fact of confirmation was actually entered prior to December 16, 1918?

Held, That all reservists (F) who performed three months' active duty and who were examined and found qualified for confirmation in rating prior to December 16, 1918, have been legally confirmed, notwithstanding the fact that entry of such confirmation was not actually made in their service records prior to the date in question. [P. 18] Notification of confirmation in rating should accordingly be made of all such reservists (F) as they are legally entitled to the retainer pay of one holding a confirmed rating (File 28550–1373, J. A. G. Sept. 14, 1920).

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OFFICER: HOLDING TEMPORARY COMMISSION IN THE NAVY IS UNTIL JUNE 30, 1923, ELIGIBLE FOR APPOINTMENT IN THE PERMANENT NAVY, AS CHIEF WARRANT OFFICER AND MAY THEN BE APPOINTED IN THE PERMANENT NAVY AS A COMMISSIONED OFFICER.

Is an officer holding a temporary commission as a lieutenant (junior grade) eligible for appointment in the permanent Navy as a chief warrant officer under section 3 of the act approved June 4, 1920 (Public, No. 243)?

If permitted to qualify and receive such commissioned warrant rank, will the officer referred to be eligible for later examination to and appointment in the permanent Navy in the rank of lieutenant (junior grade)?

The act of June 4, 1920, provides that officers holding temporary commissioned ranks in the Navy shall be eligible for transfer to and appointment in the permanent grades or ranks in the Navy for which they may be found qualified not above that held by them on the date of transfer (sec. 3). The same act further provides that until June 30,, 1923, officers of the permanent Navy who have served satisfactorily during the war with the German Government in a temporary grade or rank shall be eligible under the provisions of existing law for selection for promotion or for promotion to the same permanent grade or rank without regard to statutory requirements other than age and professional and physical examination (sec. 5).

Held, That it is possible, under the law, to transfer a temporary officer, found qualified, to the permanent Navy as a commissioned warrant officer and that after such transfer has been effected, he can then be promoted to the rank temporarily held by him during the war, provided his service was satisfactory and he meets the requirements with reference to age and professional and physical examinations (File 29226–11, J. A. G., Sept. 11, 1920).

PROMOTION: EXAMINATION FOR, IN THE MARINE CORPS.

A mental, moral, and professional examination is required for promotion in the Marine Corps to the grades of first lieutenant, captain, major, lieutenant colonel, and colonel. A mental, moral and physical examination is required for promotion in the Marine Corps to the grade of brigadier general, and a physical examination is required for promotion to the grade of major general.

The "Classification of Officers" as established by section 24 (*b*) of the Army Reorganization Act is not applicable to the Marine [P. 19] Corps (File 26521–405:1, Sec. Nav., Sept. 15, 1920; see also File 26521–405, June 30, 1920).

VIRGIN ISLANDS: IN PRESENTING TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, FOR REVIEW, CASES ARISING IN THE CIVIL COURTS, THE ENTIRE RECORD WILL BE REVIEWED BOTH AS TO THE LAW AND THE FACTS.

Court-Martial Order 76, 1920, page 21, on the same subject is hereby revoked and the following substituted therefor:

The act of March 3, 1919, chapter 171, section 2 (39 Stat. 1132), provides for the review of the actions of the civil courts of the Virgin Islands as follows: "Local laws, continued; courts; appeals and writs of error—Until Congress shall otherwise provide, insofar as compatible with the sovereignty and not in conflict with provisions of this act, the laws regulating elections and other local laws, in force and effective in said islands on the seventeenth day of January 1917, shall remain in force and effect in said islands, and the same shall be administered by the civil officials and through the local judicial tribunals, established in said islands; and the orders, judgments and decrees of the said judicial tribunals shall be duly enforced. In all cases arising in the said West Indian Islands and now enforcible by the Courts of Denmark, the writs of error and appeals shall be to the Circuit Court of Appeals for the Third Circuit, and, except as provided in sections two hundred and thirty-nine and two hundred and forty of the Judicial Code, the judgments, orders, and decrees of such court shall be final in all such cases."

On the presentation of a case before the Circuit Court of Appeals of the Third Circuit in accordance with the above-quoted provisions of the act of March 3, 1919, the appellee contended that said court was without jurisdiction

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to review the case on "appeal," that it could only do so on "writ of error," and cited in support thereof the above quoted section of the act of March 3, 1919. *Held*, That, "if in granting the right of review to litigants in these islands and in conferring appellate jurisdiction upon this court, Congress used words, which, having a technical meaning in jurisdictions of English origin, and no meaning at all in Danish jurisprudence, we cannot hold that Congress intended thereby to impose upon their jurisprudence a legal distinction between proceedings in equity and at law to it unknown, and to change their proceedings of review from that which existed to one grounded on that distinction. Therefore, until Congress shall provide otherwise, we shall regard the appellate jurisdiction conferred by the recited act to be such as to enable this court to review on appeal all matters of fact and of law involved in the judgments brought here for review" (File 28759–504, May 5, 1920).

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[P. 12] JURISDICTION: COURT-MARTIAL RECORDS MUST SHOW AFFIRMATIVELY THAT THE COURT HAD JURISDICTION OF THE CASE.

Those who are authorized to convene general courts martial are enumerated in article 38, Articles for the Government of the Navy, but the act of August 29, 1916, provides that certain others may convene general courts martials when so empowered by the Secretary of the Navy. In every case, however, the record must affirmatively show this authority. Failure in this regard vitiates the proceedings. (See Naval Courts and Boards, 1917, sections 21 and 22; File 26262–7871, Oct. 13, 1920; G. C. M. Rec. No. 50102.)

VENEREAL DISEASE: CONTRACTION OF, IS AN OFFENSE COGNIZABLE BY A COURT MARTIAL ONLY AFTER INSTRUCTION IN ACCORDANCE WITH NAVY GENERAL ORDER NO. 530 AND FAILURE TO OBEY THOSE INSTRUCTIONS.

An accused was charged in substance with having contracted a venereal disease due to his own misconduct, and thereby incapacitating himself for the proper performance of his duties.

Held, That the contraction of a venereal disease does not necessarily constitute an offense. Navy General Order No. 530 makes it an offense under certain circumstances only, i. e., proper instructions having been given, failure to report exposure and to take prophylactic treatment, shall be regarded as disobedience of orders. Men developing venereal diseases under these circumstances have then committed an offense triable by court martial. The specification must specifically allege that the accused had been instructed in accordance with Navy General Order No. 530, and that he failed to report exposure and to take prophylactic treatment. But said order does not contemplate that if, in obedience to it a man has taken prophylactic treatment, yet contracts a venereal disease, he shall be punished (File 26287–7068, Sec. Nav. Oct. 20, 1920).

COMMISSIONS: AD INTERIM; OFFICERS SO COMMISSIONED ARE ON THE SAME FOOTING DURING THE LIFE OF SUCH COMMISSIONS AS ARE THOSE WHO HAVE BEEN CONFIRMED BY THE SENATE.

Article II, section 2, clause 3, of the Constitution of the United States provides that the President has power "to fill up all vacancies [P. 13] that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Held, That officers so appointed are on the same footing in all respects during the time they hold such recess appointments as are those who are appointed with the advice and consent of the Senate in accordance with article II, section 2, clause 2, of the Constitution of the United States, and rear admirals of the former class are just as eligible for membership on the selection board provided by the act of August 29, 1916, as are those who were confirmed by the Senate (File 28687-31, J. A. G., Oct. 11, 1920).

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MILITARY COMMISSIONS AND PROVOST COURTS: MITIGATION OF SENTENCES AFTER APPROVAL BY CONVENING AUTHORITY.

The military governor of territory occupied by naval forces of the United States has inherent power, as the representative of the President of the United States, to remit fines or parole prisoners under sentence of exceptional military courts convened by him or in his name, except insofar as his powers in this respect have been restricted by orders of superior authority. There are no rules or regulations of the department limiting the powers of a military governor in this respect.

Subordinates of the military governor, although they may be empowered by him to convene exceptional military courts in his name, do not possess the power to mitigate sentences after they have once acted thereon, such a power being personal to the military governor to whom the records of such exceptional courts must be referred in all cases after action has been taken thereon by subordinates who have been regularly authorized to convene such courts. This is the department's interpretation of the instructions contained in Naval Courts and Boards (pp. 18 and 19; File 16870-497, Sec. Nav. Oct. 22, 1920).

NAVAL RESERVE FORCE: SERVICE IN THE GEODETIC SURVEY DOES NOT COUNT IN COMPUTING CONTINUOUS SERVICE INCREASE OF RETAINER PAY IN THE NAVAL RESERVE FORCE UNLESS SERVED UNDER JURISDICTION OF THE NAVY.

"Service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia shall be counted as continuous service in the Naval Reserve Force, both for the purpose of retirement and of computing retainer pay" (act of July 1, 1918, 40 Stat. 710).

Held, That service in the United States Coast and Geodetic Survey cannot be counted in computing continuous service increase in retainer pay of members of the Naval Reserve Force, unless such service was rendered under the jurisdiction of the Navy, in which latter event it may be so counted only by virtue of its being "service in the Navy" (File 26254-2593:168, J. A. G., Oct. 6, 1920).

[P. 14] 1. RANK: PRACTICE OF DATING A PROMOTION FROM DATE OF VACANCY IS OF LONG STANDING IN ALL THE SERVICES AND APPROVED BY CONGRESS.

2. SAME: CORRECTION IN DATE OF, MAY BE LEGALLY DONE BY NEW NOMINATION AND CONFIRMATION.

The act of August 29, 1916, created vacancies in the rank of commander in a certain corps of the Navy, to which certain lieutenant commanders (X, Y, and Z) at the head of the list, became due for promotion. X was the first on the list of lieutenant commanders, so was promoted and carried in the Navy Registers of 1918 and 1919 as a commander "subject to examination and confirmation." Y then became first on the list of lieutenant commanders and was promoted July 1, 1917, to the rank of commander. Z then became first on the list of lieutenant commanders and was promoted to the rank of commander February 1, 1918. Subsequently X failed to qualify for the rank of commander, and it is now contended by Z that Y is entitled to the date of commission that X would have received—that is, August 29, 1916—and that he, Z, is entitled to the vacancy that Y was promoted to fill—that is, July 1, 1917.

(1) *Held*, That the custom of giving officers rank from the dates of the vacancies they are promoted to fill is one of long standing in all branches of the service and has received the approval of Congress in various enactments, either expressly or by implication. Nevertheless, where the filling of vacancies is discretionary with the President, the commissions need not be made to date from the occurrence of the vacancy unless the appointing power so decides (File 28687-7, J. A. G., Oct. 7, 1916). In the instant case the promotions have already been made and the dates of precedence stated in the commissions issued to Y and Z. Y has passed out of the grade of commander and is now a captain. It is therefore difficult to see how he would benefit by any change in the date of his commission as a commander.

(2) With reference to the question of changing the date of commission of Z, *held*, that such change can be legally accomplished by a new nomination and

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confirmation made for the express purpose of correcting the date of rank. If confirmed by the Senate a new commission can be issued to Z with rank as of July 1, 1917 (File 28687–30, J. A. G., Oct. 11, 1920).

REDUCTION IN RATING: AS A PUNISHMENT IS GOVERNED BY ARTICLES 24, ARTICLES FOR THE GOVERNMENT OF THE NAVY; FOR LACK OF QUALIFICATION IS GOVERNED BY ARTICLE 3552, NAVY REGULATIONS.

An enlisted man with rating of chief yeoman was disrated to yeoman first class and awarded 30 days' restriction for neglect of duty by the commanding officer of the vessel. His rating of chief yeoman was a permanent one, and had not been established by the commanding officer in question.

[P. 15] Article 24, Navy Regulations, 1913, provides:

> "No commander of a vessel shall inflict * * * or cause to be inflicted upon any petty officer, or person of inferior rating, or marine, for a single offense, or at any one time, any other than one of the following punishments, namely:
>
> "(1) Reduction of any rating established by himself.
>
> * * * * * * *
>
> "(5) Deprivation of liberty on shore.
>
> * * * * * * *
>
> "No other punishment shall be permitted on board of vessels belonging to the Navy, except by sentence of a general or summary court martial. All punishments inflicted by the commander, or by his order, except reprimands, shall be fully entered upon the ship's log."

Article 3552, Navy Regulations, provides:

> "When a man is selected for the position of a petty officer, the commanding officer shall issue to him an appointment, which may be revoked at any time by the commanding officer of the ship on board which he is serving, should the petty officer prove not qualified for the position he may be holding."

Held, That the action of the commanding officer in reducing the chief yeoman in question was illegal and of no effect. Reduction in rating by a commanding officer as a punishment for an offense is wholly governed by article 24, Articles for the Government of the Navy, and is a specific limitation upon the powers of commanding officers. Reductions in rating under article 3552, Navy Regulations, can only be made by a commanding officer where it is evident that the man is unqualified for the rating. It is not authority for a reduction in rating as a punishment.

It was directed that entry be made in the man's service record to that effect, and that his pay accounts be credited with the difference in pay between what he has received and the pay of a chief yeoman with permanent appointment from the date of said illegal reduction to the date of adjustment, and that he continue to receive the pay authorized for a chief yeoman with permanent appointment (File 7657–1088, Sec. Nav., Oct. 16, 1920).

WARRANT OFFICERS: WITH NONCONTINUOUS SERVICE, ARE ELIGIBLE FOR TRANSFER TO A PERMANENT COMMISSIONED GRADE IN THE NAVY IF THEIR TOTAL SERVICE AMOUNTS TO MORE THAN 15 YEARS AND THEY MEET THE OTHER REQUIREMENTS.

The act of June 4, 1920, section 4, provides:

> "That in addition to the number of transfers and appointments hereinbefore allowed, commissioned warrant officers of more than fifteen years' service since date of warrant or date of first appointment as paymaster's clerk, pharmacist, or mate, who have creditably served in the war with the German Government in temporary commissioned [P. 16] ranks or grades in the Regular Navy shall be appointed to a permanent rank or grade for which they may be qualified as established and shown by their records of service during their term of service not above the temporary rank or grade held by them at the time of transfer."

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Held, That one who was originally appointed a machinist on July 6, 1899, resigned October 1, 1903, was reappointed a machinist December 31, 1908, and served as such until December 13, 1914, when he was appointed a chief machinist, and whose service has been continuous since 1908 to date, making in all over 15 years' service as a warrant and commissioned warrant officer, counting from the date of his original warrant, is a "commissioned warrant officer of more than fifteen years' service since date of warrant" within the purview of the above-quoted act, and is eligible for transfer to the permanent Navy under the provisions of section 4 of said act, provided his record is satisfactory and he is within the specified age limit (File 29226–11:1, J. A. G., Oct. 12, 1920).

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[P. 10] (1) ARREST: PLACING UNDER, A MEMBER OF THE SERVICE BY HIS COMMANDING OFFICER, WHERE SUCH MEMBER HAS BEEN AWARDED A SUMMARY COURT MARTIAL IS DISCRETIONARY AND CANNOT BE REGULATED BY CUSTOM.

(2) HABIT: BEING SHOWN TO EXIST, THE COURT MAY CONSIDER WHETHER, UNDER SIMILAR CIRCUMSTANCES, A SIMILAR ACT SOUGHT TO BE ESTABLISHED ACTUALLY OCCURRED.

An accused was tried on two charges, "Desertion" and "Breaking arrest," and found guilty on both charges. The evidence offered by the prosecution to support the charge of breaking arrest was the testimony of the detail yeoman at the submarine base, where the offenses were alleged to have been committed, that the routine of the station was either to confine or make a prisoner at large, a man who had been awarded a summary court martial. A copy of the log of the submarine base for July 29, 1920, was then introduced into evidence to show that accused had been awarded a summary court martial, and later a copy of the log for August 17, 1920, was introduced to prove the date the accused was delivered at the base. To support the charge of breaking arrest it is necessary that the prosecution prove that a person with competent authority had the intention to place the accused under arrest: that the accused understood this intention and that he was actually placed under some physical restraint (Naval Digest 1916, p. 36, par. 10) and that he violated it (see also Naval [P. 11] Digest, 1916, p. 37, par. 38). The questions here presented are: (*a*) Whether a custom of the service to place a man under arrest who had been awarded a summary court martial was proved. (*b*) Whether a usage establishing such a practice was proved to exist at the submarine base. (*c*) Whether the entry in the log for August 17, 1920, was sufficient to prove beyond a reasonable doubt that the accused was a prisoner and broke his arrest on July 29, 1920.

(1) The principal conditions to be fulfilled in order to constitute a valid custom are as follows: (*a*) It must be long continued. (*b*) It must be certain and uniform. (*c*) It must be compulsory. (*d*) It must be consistent. (*e*) It must be general. (*f*) It must be known. (*g*) It must not be in opposition to the terms and provisions of a statute or lawful regulation or order (Naval Courts and Boards, 1917, p. 9). Concerning the matter of arrest, the Navy Regulations provide that "if upon investigation the commanding officer shall be satisfied that the charge is such as to call for judicial action, he may place the accused under suspension or in confinement, as the case may require, neither of which, however, shall be considered as a punishment" (Art. 1407 (1) Navy Regulations, 1913). "The placing of an officer or enlisted man under arrest to await trial by court martial is to insure his presence at the trial and to give him a reasonable opportunity to prepare his defense. In general, the accused shall not be placed under arrest until just prior to the trial, except when it may be advisable as a precaution against his escape, or when, owing to the nature of the offense and the character or condition of the accused, his confinement is necessary in the interests of good order and discipline. In all cases of confinement it shall be no more rigorous than the circumstances require" (Art. 1415 Navy Regulations, 1913). The foregoing regulations leave the placing of a man awarded a summary court martial under arrest to the discretion of the commanding officer. Bearing in mind that a custom cannot be contrary to regulations, and inasmuch as a custom must be compulsory, to hold that placing a man under arrest who has been awarded a summary court martial is a

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custom of the service would be making it compulsory on the part of the commanding officer to place a man awarded a summary court martial under arrest, or in other words, would take away the discretion given him by regulations. It is evident, therefore, that this cannot be a custom.

(2) "Usage consists merely of the repetition of acts" (Naval Courts and Boards, 1917, p. 9). "It refers to a general habit, mode, or course of procedure." (Words and Phrases, vol. 4, p. 1102.) It being shown in evidence that it is customary or usual for a person or persons to do a certain act under certain conditions, the jury or court can consider this as to whether or not, under similar conditions, a similar act sought to be established occurred.

(*a*) Entries in the Submarine Base log were introduced in evidence for the purpose of showing that the accused was awarded a summary court martial on July 29, 1920. The detail yeoman in the executive officer's office at the Submarine Base testified that the routine of the [P. 12] station was either to confine or make a prisoner at large a man who had been awarded a summary court martial. While the log showed that the accused had been awarded a summary court martial, it contained no entry that he had been placed under arrest. Yet the Navy Regulations require that "entries in the log regarding punishments shall include the name, rank or rating of the offender, the date and nature of the offense, and the kind and degree of punishment. The date of every suspension, arrest, confinement, and restoration to duty shall also be entered upon the log book" (art. 1433, Navy Regulations, 1913). Therefore, the evidence in the case resolves itself into a general statement by the detail yeoman that a certain practice was the routine of the station, as against the entire lack of any positive evidence in the log, which evidence is required by regulations to be entered in the log. This lack of positive evidence is in itself negative evidence to the effect that he was not placed under arrest, since "the law presumes that official duties are properly performed" (Naval Digest, 1916, p. 467, Presumptions, 4). Hence it is considered that the testimony of the detail yeoman as to the routine in connection with men awarded a summary court martial is not sufficient to rebut the presumption that the foregoing regulation would have been complied with had the commanding officer placed the accused under arrest.

The question remains as to whether the entry in the log for August 17, 1920, that the accused had left the Submarine Base Hospital while a prisoner at large was sufficient. No direct evidence that he was placed under arrest was introduced in evidence. In view of the fact that the entry in the log at the time he was awarded a summary court martial fails to mention any arrest, it is considered that the entry in the log for August 17, 1920, in and of itself is not sufficient to show beyond a reasonable doubt that the accused had ever been notified that he had been placed under arrest, was conscious of any restraint imposed upon him by lawful authority, and therefore was guilty of "Breaking arrest" (File 26251–25288, Nov. 2, 1920; G. C. M. Rec. 50017).

(*a*) But see Wigmore on Evidence, vol. I, sec. 92–99; McKelvey on Evidence, 2d ed., p. 107, sec. 57.

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(1) EVIDENCE: INADMISSIBLE—IF ADMITTED WITHOUT OBJECTION, ITS INADMISSIBILITY MUST BE DEEMED TO HAVE BEEN WAIVED.

(2) SAME: IMPROPER FOR JUDGE ADVOCATE WHO IS ACTING ALSO AS COUNSEL FOR ACCUSED TO INTRODUCE INTO EVIDENCE MATTER CLEARLY INADMISSIBLE.

An accused was tried on the charges: (I) "Desertion" and (II) "Fraudulent enlistment," and found guilty thereof. To prove the specification of charge I, the judge advocate introduced into evidence without objection an extract from the current enlistment record of the accused showing the date of the beginning of the absence, and the fact that he was declared a deserter from that date, and a letter from the Chief of the Bureau of Navigation to the Judge Advocate General recommending that the accused in this case be tried by general court martial in that "he fraudulently enlisted August 25, 1920, at the Navy Recruiting Station, New York, N. Y., [P. 13] concealing the fact that he had previously enlisted April 25, 1919, at the Navy Recruiting Station, New York, N. Y., under the name of ------, and had been declared a deserter from the U. S. S. *Utah* July 1, 1919."

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Held, that the letter of the Chief of the Bureau of Navigation was clearly inadmissible into evidence. It contained the information upon which the charges and specifications, upon which the accused was tried, were based. It would have been equally proper for the judge advocate of the court to have introduced into evidence a certified copy of the charges and specifications themselves in order to prove the latter.

(1) Following the well-established rules of the civil courts, if objectionable evidence is given without objection, its inadmissibility must be deemed to have been waived (Naval Digest, p. 223, par. 83).

(2) But in this case the accused was without counsel and it was the duty of the judge advocate to protect his interests (Naval Courts and Boards, 1917, sec. 255). It was thus highly improper for the judge advocate to introduce this letter into evidence (File 26251–25761, Nov. 11, 1920; G. C. M. Rec. No. 50273).

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(1) MOTION TO STRIKE: MATTERS OF EVIDENCE CANNOT BE AVAILED OF BY MOTION TO STRIKE OUT THE CHARGE AND SPECIFICATION.

(2) DESERTION: PLACE OF, IS NOT OF SUBSTANCE, BUT OF FORM, AND FAILURE TO PROVE DOES NOT VITIATE THE PROCEEDINGS.

An accused was charged with desertion, the specification alleging that he did "* * * * on or about May 14, 1920, desert from the U. S. S. ------ at Hampton Roads, Va., and from the U. S. Navy, and did remain a deserter until he was delivered on board the receiving ship at ------ on or about September 10, 1920 * * *."

(1) Before pleading to the issue the counsel for the accused made a motion to strike out the charge and the specification on the ground that the U. S. S. ------ as shown by official documents was not at Hampton Roads either on or about May 14, 1920. The court properly overruled the motion. The prosecution introduced extracts from the current enlistment record of the accused to show that he deserted from the U. S. S. ------ on May 14, 1920, but not showing the location of the ship at that time. The report of desertion received on board in the case of the accused was also introduced and alleged that the accused was delivered on board as a deserter from the U. S. S. ------ lying, at the time he left her, at North River, New York, N. Y. The accused as a witness in his own behalf testified that the ship, at the time he left her, was lying in the North River. Despite the fact that there was no evidence to show that the ship in question was in Hampton Roads on or about May 14, 1920, when the accused left her, and that there was evidence that she was lying in North River, the court found the specification proved.

(2) *Held* that the words "at Hampton Roads, Va." were not proved, and the court in its findings should have made the substitution justified by the evidence; that the offense of desertion consists [P. 14] of leaving a ship or station and the naval service with a certain intent, and that the location of the ship or station is immaterial, except to properly identify the offense so that the accused will not be liable to trial again for the same offense; that the above error is not such as to prejudice the rights of the accused and was merely a formal defect and within the provisions of section 1025 of the Revised Statutes (File 26251–25544, Nov. 5, 1920; G. C. M. Rec. 50211).

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(1) "SCANDALOUS CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE": NOT ONE OF THE AUTHORIZED CHARGES.

(2) DEFECTIVE CHARGE: MAY BE CURED IF SPECIFICATION INFORMS THE ACCUSED WITH CERTAINTY.

Accused was tried on the charge of "Scandalous conduct to the prejudice of good order and discipline;" pleaded guilty thereto, and was sentenced.

(1) *Held*, that the charge is not one of the authorized charges set forth in Articles for the Government of the Navy and Naval Courts and Boards. Convening authorities, whenever possible, should follow prescribed forms (Naval Digest, 1916, p. 63, par. 15). Section 67, Naval Courts and Boards, 1917, reads: "When an offense is a neglect or disorder not specially provided for, it shall be charged as 'Scandalous conduct tending to the destruction of good morals' or 'Conduct to the prejudice of good order and dicipline.'" The proper charge in

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this case for the offense set forth in the specification would be "Scandalous conduct tending to the destruction of good morals."

(2) But as the specification of the charge was definite, and informed the accused with certainty of the offense with which he was charged, it is not considered that his rights were prejudiced by the above irregularity (File 26262–7893, Nov. 3, 1920, G. C. M. Rec. 50117).

AGE LIMITS FOR APPOINTMENT UNDER ACT OF JUNE 4, 1920 (PUB., NO. 243—66TH CONG.): WHEN INCREASED BY PRIOR SERVICE SUCH SERVICE MUST HAVE BEEN ON ACTIVE DUTY WITH THE REGULAR NAVY OR IN THE NAVY OR MARINE CORPS.

The act of June 4, 1920 (Public, No. 243, 66th Cong.), authorizing the transfer to and appointment in the Regular Navy, of certain temporary and Reserve officers, establishes in section 5 certain age limits for officers so appointed with the proviso "that said age limits shall be increased in the cases of officers who have rendered prior service as paymasters' clerks, or as mates, or as warrant or commissioned officers in the naval service to the extent of all prior naval service."

[P. 15] *Held*, that service in the Naval Militia should not be included in the term "all prior naval service," unless such service was actually rendered on active duty with the Navy. *Held*, further, that no service other than service in the regular Navy or the Marine Corps should be included in said phrase unless such service was rendered on active duty with the Navy, but that all service in the Naval Militia, National Naval Volunteers, Naval Reserve Force, and Coast Guard should be counted if rendered on active duty with the Navy (File 29226–16, Nov. 6, 1920).

MIDSHIPMEN: MEMBERS OF NAVAL FORCES OF THE UNITED STATES DURING THE WAR WITH GERMANY AND AUSTRIA.

A midshipman appointed to the United States Naval Academy, July 2, 1918, and who served as such until September 9, 1920, when his resignation was accepted is considered by the Navy Department as having been a member of the naval forces of the United States during the war against Germany and Austria and entitled to the $60 war bonus allowed by the act of Congress approved February 24, 1919 (File 5252–160, dated Nov. 6, 1920).

MIDSHIPMEN: THE LAW AS TO REPORTS AGAINST MUST BE STRICTLY FOLLOWED.

Would it be legal, under section 1 of the act of April 9, 1906 (34 Stat. 104), for the Superintendent of the Naval Academy to submit his report in the first instant to the midshipman against whom charges are preferred under said section, for his comment, and then to the Secretary of the Navy, together with said comment, for final action, instead of submitting it to the Secretary of the Navy in the first instance, then to said midshipman, and again to the Secretary of the Navy, as required by the letter of the law? *Held*, that the procedure suggested would not be legal and that the letter of the law must be followed (File 5252–162, Nov. 5, 1920).

SUMMARY COURT MARTIAL: CONVENING OF—COMMANDING OFFICER OF SHIP MAY CONVENE SUMMARY COURT MARTIAL AS SUCH, BUT IF HE IS ALSO COMMANDING OFFICER OF A FLOTILLA HE MAY NOT CONVENE SUMMARY COURTS MARTIAL IN THE LATTER CAPACITY TO TRY MEMBERS OF HIS COMMAND.

An enlisted man serving on one of the vessels of Group Five (Destroyers) was brought to trial before a summary court martial convened by the commander of that group, as such, on charges preferred by the commanding officer of the man's ship. Article 26 of the Articles for the Government of the Navy provides that "summary courts martial may be ordered upon petty officers and persons or inferior ratings, by the commander of any vessel or by the commandant of any navy yard, naval station, or marine barracks to which they belong."

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[P. 16] *Held,* that the convening authority in this case is not one competent to convene a summary court martial in his capacity as commander. Group five (destroyers). If he were also actually commanding one of the vessels of that group he could convene a summary court martial as the commander of such a vessel, but only for the trial of men attached to that vessel (File 26287–7177, Nov. 17, 1920).

C. M. O. 138—1920

[P. 1] Acting Pay Clerk (T) Walter H. Barowski, U. S. Navy, was tried by general court martial on board the U. S. S. *Texas* on October 22, 1920 by order of Commander Battleship Squadron Four, United States Pacific Fleet, on the following charges:

Charge I.—Embezzlement (one specification).

Charge II.—Scandalous conduct tending to the destruction of good morals (one specification).

The court found the accused not guilty of the first charge and acquitted him of the first charge; guilty of the second charge in a less degree than charged, guilty of neglect of duty. The court sentenced him to lose $25 per month of his pay for a period of six months.

Action of the Convening Authority

On November 13, 1920, the convening authority, although considering the sentence which the court had imposed inadequate, and that the court had encroached upon the prerogative of the convening authority by exercising clemency, approved the proceedings, findings, and sentence and directed that the accused be released from arrest and restored to duty.

Opinion and Recommendation of the Judge Advocate General

On November 23, 1920, the Judge Advocate General placed the following endorsement on the record: "* * * The Department as recently as December 30, 1919, in C. M. O. 316, 1919, pages 3, 4, informed the service that substituting the charge of 'Neglect of duty' for the charge of 'Scandalous conduct tending to the destruction of good morals' is improper, as the substituted charge is not a lesser kinderd one. In this case the ignorance or neglect of the court and the failure of the judge advocate properly to advise it results in a miscarriage of justice. In view of the foregoing it is recomended that the proceedings in this case, which are legal, be approved, and that the findings and sentence be disapproved."

[P. 2] Recommendation of the Bureau of Navigation

On December 1, 1920, the Bureau of Navigation recommended the approval of the proceedings and disapproval of the findings and sentence.

Action of the Secretary of the Navy

On December 6, 1920, the Secretary of the Navy approved the proceedings and disapproved the findings and sentence in the foregoing case of Acting Pay Clerk (T) Walter H. Barowski, U. S. Navy.

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[P. 1] Commander Archibald G. Stirling, U. S. Navy, was tried by general court martial on October 5, 1920, on board the U. S. S. *Brooklyn,* by order of Commander Destroyer Flotillas, U. S. Pacific Fleet, and found guilty of the following charge:

Charge.—Through negligence suffering a vessel of the Navy to be stranded.

The court therefore sentenced him to lose five numbers in his temporary grade of commander and to lose five numbers in his permanent grade of lieutenant commander.

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ACTION OF THE CONVENING AUTHORITY

On October 15, 1920, the convening authority approved the proceedings, findings, and sentence, and directed that he be released from arrest and restored to duty.

OPINION OF THE JUDGE ADVOCATE GENERAL

On November 9, 1920, the Judge Advocate General placed the following endorsement upon the record:

"The first witness for the prosecution was the judge advocate. He testified in part as follows:

"'3. Q. If you are the legal custodian of the records of the Proceedings of the Court of Inquiry convened by the Commander of Squadron Four, U. S. Pacific Fleet, on board the U. S. S. *Thornton* at San Pedro, Calif., July 26, 1920, to inquire into the grounding of the U. S. S. *Thornton* on July 22, 1920, produce it.

"'A. I am; here it is.'

"The witness then produced the document in question and it was submitted to the counsel for the accused and by the court, and by the judge advocate offered in evidence. There being no objection, it was so received.

"'4. Q. Refer to the document and produce as evidence, exhibit F, Coast and Geodetic Survey Chart No. 5202, on [P. 2] which the U. S. S. *Thornton* was navigated from Point Conception to Anacapa Island on July 22, 1920.

"'A. Here it is.'

"The above procedure was irregular. The proper procedure for the introduction into evidence before a court martial of the record of proceedings of a court of inquiry is given in Court-Martial Order 24, 1917, since added to Naval Courts and Boards, 1917, as section 187 (a). In this case the record of proceedings of the court of inquiry was not attached to and made a part of the record of the trial as an exhibit, which should have been done if the whole record was introduced (sec. 203, Naval Courts and Boards, 1917). This makes it appear that the judge advocate did not intend to offer the whole record in evidence. The general court-martial record, however, states, as quoted above, '* * * the document in question * * * was * * * offered in evidence. * * * It was so received.'

"Article 60 of the Articles for the Government of the Navy provides that the proceedings of courts of inquiry shall be admissible in evidence before courts martial under the following conditions:

"1. That such proceedings must be 'duly authenticated by the signatures of the president of the court and the judge advocate.'

2. That the case in which the proceedings are received in evidence must be one 'not capital.'

"3. That the case in which the proceedings are received in evidence must be one not 'extending to the dismissal of a commissioned or warrant officer.'

"4. That 'oral testimony cannot be obtained.'

"The second and third conditions above have been construed to apply only where the sentences therein stated are mandatory (Court-Martial Order 88, 1895, pp. 13, 14). The fourth condition has been held to be fulfilled—

"(*a*) In the cases of civilian witnesses who are beyond the reach of compulsory process which the judge advocate is authorized to issue. In such cases it should appear that subpenas intended to secure the voluntary attendance of such witnesses have been forwarded to the Secretary of the Navy as [P. 3] provided in Naval Courts and Boards, 1917, section 124, and that such action has for any reason failed to produce their appearance at the trial.

"(*b*) In the cases of persons in the naval or military service whom the judge advocate is not authorized to summon (Naval Courts and Boards, 1917, sec. 124) it should appear that summons for such witnesses have been forwarded to the Secretary of the Navy or other convening authority, as provided in Naval Courts and Boards, 1917, section 123, and that such action has for any reason failed to produce their appearance at the trial.

"(*c*) In the case where a witness has died, has become insane, or by the opposite party is kept out of the way, or is too ill or infirm to come to the court (Court-Martial Order 46, 1917, p. 14).

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"The proper foundation having been laid for the introduction of the record of proceedings of the court of inquiry into evidence under article 60 of the Articles for the Government of the Navy, as indicated above, or under the general rules of evidence relating to the introduction of documentary evidence, independent of the extension made to these rules by article 60, the judge advocate may then introduce into evidence parts of the proceedings of the court of inquiry. These parts admissible must be testimony by a witness who is not available, or evidence otherwise admissible under the general rules of evidence. Because the testimony of one or more witnesses as given before a court of inquiry is properly admissible, it by no means follows that the entire proceedings are admissible. Where a court of inquiry makes findings, opinions, and recommendations these latter are certainly not admissible. If such findings, opinions, and recommendations relate to the accused in the court-martial trial, it would be a question of grave doubt whether or not the rights of the accused were not seriously prejudiced by merely laying such findings and recommendations before the court as evidence. When under article 60 of the Articles for the Government of the Navy, the record of testimony of a witness from whom oral testimony cannot be obtained, given before a court of inquiry, is offered in evidence before a general court martial, the full document admissible in evidence is the record of the entire testimony of such witness before the court of inquiry [P. 4] and not the whole record of proceedings of such court (Naval Courts and Boards, 1917, sec. 191).

"The conditions under which parts of the proceedings of the court of inquiry may be admitted into evidence under the general rules of evidence, independent of article 60 of the Articles for the Government of the Navy, are very circumscribed. These conditions are outlined in Naval Courts and Boards, 1917, section 186 et seq. In general, such evidence will be offered under the provisions of article 60, or it will be found that the conditions under which it would be admissible under the general rules of evidence are much the same as these provisions, especially as to the qualifications that oral testimony is unobtainable.

"Summing up the preceding, the following are the proper steps in introducing a part of the proceedings of a court of inquiry into evidence:

"The judge advocate takes the stand and after the preliminary questions examines himself as follows:

" 'Q. Are you the legal custodian of the proceedings of a court of inquiry convened by the _____ on board the U. S. S. _____ at _____ to inquire into the _____? If so, produce it?

" 'A. I am. Here it is.

" 'Q. Are the proceedings duly authenticated by the signatures of the president of the court and of the judge advocate?

" 'A. They are.

" 'Q. What parts of these proceedings do you desire to introduce into evidence?

" 'A. So much thereof as contains the testimony of _____, lieutenant commander, U. S. Navy, and of _____, boatswain's mate first class, U. S. Navy.

" 'Q. Can oral testimony of these witnesses be obtained?

" 'A. It cannot. I have sent summons for these witnesses to the convening authority, and his replies, which I have here, certified copies thereof attached, marked "exhibits F and G," state that they cannot appear before this court.'

"The proceedings of the court of inquiry are then submitted to the accused and to the court, and by the judge advocate so much thereof as contains the testimony of the before-named [P. 5] witnesses is offered in evidence. There being no objection, it is so received.

"Should any other part of the proceedings of the court of inquiry subsequently be desired as evidence by either party, the judge advocate must again be called as a witness and must be examined to show that oral testimony is not available. Each witness's testimony, each exhibit, etc., in the proceedings of the court of inquiry is a separate document, and merely because bound up together with other separate documents can in nowise make these other documents admissible in evidence.

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"It is believed, from the record, that the only part of the proceedings of the court of inquiry used by the judge advocate was exhibit F, Coast and Geodetic Survey Chart No. 5202, on which the U. S. S. *Thornton* was navigated from Point Conception to Anacapa Island. But it remains a fact that insofar as it appears on the record, the entire proceedings were admitted in evidence, which therefore included an opinion that the accused 'was negligent in the performance of his duty,' etc., and a recommendation that the accused 'be brought to trial,' etc. In Court Martial Order No. 24, 1917, it was held that the proceedings of a general court martial were fatally defective 'owing to the fact that the court, over objection of the accused, received in evidence the entire record of proceedings of the court of inquiry which investigated the grounding of the U. S. S. _____.' It was held therein that the testimony of the accused before the court of inquiry was legally admissible in evidence before the court martial, but that this fact did not render the entire proceedings of the court of inquiry legally admissible in evidence before the court martial. 'It is impossible to learn from this record how much, if any, of the record of the court of inquiry was actually considered by the court martial beyond what was read to it by the judge advocate, but it is apparent that the accused, by his earnest and repeated objections to the introduction in evidence of the entire record of the court of inquiry, considered such procedure prejudicial to his interests and rights, as may readily have been the case. As it is impossible to say that the error of the court, in insisting upon such procedure over these objections of the accused [P. 6] and without legal authority, was not prejudicial to the accused,' the case was disapproved.

"In this case it will be noted that no objection was raised by the accused to the procedure followed relative to the introduction of the court of inquiry in evidence. The accused was represented by able counsel, so therefore it must be assumed that he was cognizant of his rights in the matter. The department recently held in a similar case that where the accused made no objection to the introduction of testimony from the record of a court of inquiry without any foundation having been laid therefore, the irregularity was held to have been waived by the accused and not to invalidate the proceedings (Court-Martial Order 174, 1918, pp. 17, 18). Failure to make objection to evidence until after conclusion of trial amounts to acquiescence. Testimony of an incompetent witness does not vitiate the proceedings necessarily. If, therefore, no objection is made during the trial to matters of evidence, any question as to its admissibility must be deemed to have been waived by the accused (Naval Digest, 1916, p. 222, par. 79). If objectionable evidence is given without objection, its admissibility must be deemed to have been waived by the accused (ibid., p. 223, par. 83). In view of the precedents of the department and of civil courts that evidence not objected to is not ground for disturbing the verdict, it must be held in this case that the accused waived his rights to have this incompetent evidence excluded and that the admission was not fatal.

"The first witness for the prosecution and the accused as a witness in his own behalf, in giving their testimony, requested permission to refresh their memories from memoranda made by themselves. This permission was in each case granted, though it was not stated that such memoranda were made at the time of the occurrence or soon thereafter. It is essential that this be shown before such use of a memorandum be allowed. (Naval Digest, 1916, p. 652, par. 95.) This error was not vital and could not have prejudiced the accused as he availed himself of it."

Subject to the above, the proceedings, findings, and sentence are legal.

[P. 7] ACTION OF THE BUREAU OF NAVIGATION

On November 17, 1920, the Bureau of Navigation recommended approval of the proceedings, findings, and sentence.

ACTION OF THE SECRETARY OF THE NAVY

On December 1, 1920, the Secretary of the Navy approved the proceedings, findings, and sentence in the foregoing case of Commander Archibald G. Stirling, U. S. Navy.

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[P. 10] DESERTION: CONVICTION OF, COMMITTED IN TIME OF WAR MUST CARRY WITH IT THE SENTENCE OF DISHONORABLE DISCHARGE.

An accused was tried for desertion, was found guilty and sentenced to be confined for a period of one year, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards, 1917.

Sections 1996 and 1998, Revised Statutes, as amended by the act of August 22, 1912, Navy Regulations, 1913, R. 3644, provide that persons who are convicted of desertion from the naval service in time of war are incapacitated from holding any office of trust or profit under the United States or from exercising any rights of citizenship thereof. It therefore follows that such a person cannot be retained in the United States naval service, and in all such cases the sentence of general courts martial should include dishonorable discharge. The sentence of the court in the case in question makes it possible for the accused to be restored to duty, contrary to the provisions of the act of Congress set forth above, and to be discharged from the naval service in a status of honor, so far as his punishment for desertion is concerned. (In this connection, see Naval Digest, p. 187, pars. 8 to 12, inclusive.)

Recommended, that the proceedings and findings be approved, that the sentence be disapproved, and that as an entirely separate and distinct procedure, the accused be immediately discharged from the naval service as undesirable (File 26251–25364, Nov. 1, 1920; G. C. M. Rec. No. 49933).

JURISDICTION: AN ENLISTED MAN HAVING BEEN DISCHARGED, A NAVAL COURT MARTIAL HAS NO JURISDICTION OF HIS PERSON, EXCEPT FOR OFFENSES COMMITTED IN VIOLATION OF ARTICLE 14, A. G. N., AND EXCEPT FOR DESERTON IN TIME OF PEACE AS PROVIDED IN ARTICLE 62, A. G. N.

An accused was charged with: (I) "Stealing property of the United States intended for the naval service thereof"; (II) "Drunkenness"; (III) "Perjury." He was convicted of charges I and II and acquitted of charge III, and sentenced inter alia to be dishonorably discharged. Specifications of charges I and II alleged the offenses set forth therein to have been committed on or about August 28, 1920; that of charge III to have been committed on or about September 1, 1920; the order for his trial is dated October 4, 1920, and his trial began November 4, 1920. Counsel for the accused pleaded lack of jurisdiction of the court on all the charges and specifications on the ground that on September 15, 1920, the accused was given a discharge from the United States Navy and paid off on that date, which facts he supported by proper evidence.

The evidence also shows that the accused was a prisoner at large awaiting action on the charges on which he was tried in this case; that he was handed his discharge, but before he left the station the discharge certificate was taken from him and canceled. The evidence did not show that the accused had obtained his discharge by [P. 11] fraud. The court overruled the objection of the counsel for the accused.

Held, that the court did not have jurisdiction of the person of the accused except as to the offenses alleged under charge I, which is one of the offenses set forth in article 14, A. G. N., and that it erred in not sustaining the objections of counsel for the accused as to charges II and III. Where an honorable discharge has once duly taken effect by the delivery of the formal certificate, it is final and cannot be revoked unless obtained by fraud (Winthrop's Digest of Opinion of the Judge Advocate General of the Army, 1896, p. 355). A soldier honorably discharged in the usual form at the end of his term is no longer subject to military discipline or control. Having become a civilian he is entitled to be restored at once, or as soon as the exigencies of the service will permit, to the rights and status of a citizen (ibid, pp. 356, 357). A person discharged from the naval service before proceedings are instituted against him for violation of the Articles for the Government of the Navy, excepting article 14, cannot thereafter be brought to trial before a court martial for such violations, though committed while he was in the service (31 Op. Atty. Gen., p. 521).

So much of the proceedings are findings as related to charge I and the specification thereof were approved; so much thereof as related to charges II and III

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and the specifications thereof were disapproved; and so much of the sentence as involved confinement with corresponding accessories was approved; and so much thereof as involved dishonorable discharge was disapproved as being a nullity, there being nothing upon which it could take effect (File 26251–25789, Dec. 3, 1920; G. C. M. Rec. No. 50679).

JURISDICTION: NAVAL COURT MARTIAL HAS NO JURISDICTION TO TRY AN ENLISTED MAN, WHOSE ENLISTMENT HAS EXPIRED, FOR DESERTION IN TIME OF WAR.

Private George H. Runyan, United States Marine Corps, was found guilty of "Desertion." The specification of the charge alleged that the accused "did, on or about November 23, 1919, desert * * * and did remain a deserter until the expiration of his enlistment, on or about March 21, 1920; the United States then being in a state of war." The Attorney General has held that an enlistment expires with the last day of the term, and that with the expiration of the enlistment the obligation to serve, thereby imposed, it at an end, and that this results notwithstanding that there has been an infraction of the contract by desertion or otherwise, unless the soldier, before the term is up, consents to an extension (15 Op. Atty. Gen. 152). It follows that in this case the accused on March 21, 1920, ceased to be in the naval service.

The jurisdiction of a naval court martial is by the Articles for the Government of the Navy confined to persons in the naval service, except for offenses set forth in article 14, and for the offense of desertion in time of peace as set forth in article 62. Article 62 extends the jurisdiction of a naval court martial, but as this is criminal jurisdiction, by the well-known principles of statutory [P. 12] interpretation, it must be construed strictly and to desertion in time of peace only and cannot be construed to apply to desertion in time of war. That the offenses of desertion in time of war and desertion in time of peace are distinctly separate may also be seen from the Articles for the Government of the Navy, where the former is given under article 4, the latter under article 8.

The Attorney General has held that "article 61 provides that no person shall be tried by court martial for any offense committed more than two years before the issuing of the order for trial. This article may, with some force, be said to provide, by implication, affirmatively, viz, that any person committing an offense within two years before the issuing of the order for trial may be tried therefor, whether he has left the service or not. Article 61 was first enacted by the act of February 25, 1895 (28 Stat. 680), before which time there was no statute of limitations for violations of the Articles for the Government of the Navy. If, before that time, there was no court martial jurisdiction over persons who have left the service before order for trial had been issued, it is doubtful whether the mere fixing by Congress in 1895 of a general period of limitation should be taken to indicate an intention to extend the basic jurisdiction over a class not subject to it heretofore. It is possible that the intention of Congress was not at all engaged with the subject of such basic jurisdiction" (31 Op. Atty. Gen. 521).

Held, that the court martial in this case did not have jurisdiction over the person of the accused. Therefore the proceedings, findings, and sentence were disapproved (File 26251–26615, Dec. 20, 1920; G. C. M. Rec. No. 51150).

JURISDICTION: ONLY THE SECRETARY OF THE NAVY CAN EMPOWER COMMANDING OFFICERS OF SQUADRONS, DIVISIONS, OR FLOTILLAS TO CONVENE GENERAL COURTS MARTIAL.

A general court martial was convened by order of the Commander Air Force, Pacific Fleet, the original precept being prefixed to the record in this case and reading in part as follows: "Pursuant to the authority vested in me by the Commander in Chief, United States Pacific Fleet (File No. 86-H (O) dated Jan. 3, 1920), a general court martial is hereby ordered to convene on board the U. S. S. *Aroostook* * * *."

Article 38 of the Articles for the Government of the Navy and the act of February 16, 1909, quoted thereunder, prescribe the authorities who can convene a general court martial. The act of August 29, 1916, provides that "When empowered by the Secretary of the Navy, general courts martial may be con-

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vened by the commanding officer of a squadron, of a division, of a flotilla, or of a larger naval force afloat * * *." The precept in this case fails to show that the convening authority had been authorized by the Secretary of the Navy to convene a general court martial; but the convening authority relies on authority granted him by the Commander in Chief, United States Pacific Fleet. An examination of article 38 of the Articles for the Government of the Navy, and the two statutes quoted thereunder, shows that the Secretary of the Navy is the only authority who can empower the commanding officers of those units [P. 13] specified by Congress in the act of August 29, 1916, to convene general courts martial. As naval courts martial are courts of limited jurisdiction, their records must show affirmatively that they have authority to hear and determine cases coming before them for trial (Naval Courts and Boards, 1917, sec. 21; see also In re petition of David A. Henkes, for a writ of habeas corpus in the District Court of the United States for the District of Kansas, decided November 28, 1919).

Held, that the proceedings, findings, and sentence in the foregoing case be set aside (File 26262–8079, Dec. 22, 1920; G. C. M., Rec. No. 51057).

MEMBERS OF COURT MARTIAL: ABSENCE OF, THOUGH THEY MAY BE COMMANDERS OF VESSELS ABOUT TO SAIL, MUST BE AUTHORIZED BY CONVENING AUTHORITY.

In a recent general court martial the record shows that upon the meeting of the court, the president thereof was absent, and that the judge advocate stated that the president was unable to be present owing to the fact that the vessel he commanded was on the point of sailing. There was nothing in the record showing that the president had the authority of the convening authority to absent himself.

Held, that an officer detailed to duty on a general court martial is, while so serving, exempt from other duty, except in cases of emergency, to be judged by his commanding officer, who shall, in case he requires such officer to perform other duty, at once communicate with the convening authority, assigning the reasons for his action (sec. 241, Naval Courts and Boards, 1917). In case of absence on leave or other duty authorized by proper authority with the knowledge and approval of the convening authority, a copy of the orders permitting or directing the absence of such member must be prefixed to the record (sec. 87, ibid.). Except in cases of sickness, absence from duty by a member of a court martial is not warranted unless with the knowledge and approval of the convening authority (C. M. O. 141, 1918, p. 23).

Held, further, that the action of the president in this case was either a direct neglect of his duties as a member of the court martial or that the judge advocate was neglectful in not prefixing a copy of the convening authority's order relieving the president from duty if such existed.

Held further, that as the court was not reduced below a legal quorum and the interests of the accused were not prejudiced the above irregularity was not fatal (File 26262–7997, Dec. 13, 1920; G. C. M. Rec. No. 50654).

PERJURY: INVOLUNTARY TESTIMONY OF AN ACCUSED AGAINST HIMSELF WILL NOT SUPPORT CHARGE OF.

Willie Cook, seaman second class, United States Navy, was tried by general court martial and convicted of perjury. The offense was based on evidence given by the accused before a deck court where also he was the accused. The evidence before the general court martial disclosed the fact that the accused prior to testifying before [P. 14] the deck court had not been informed that it was voluntary with him as to whether or not he became a witness. *Held*, that if he did not know his rights and was guilty of the charge on which he was being tried he was put in the position where he must either give false testimony or help to convict himself. In the opinion of the Judge Advocate General, it is improper to hold that testimony given under such circumstances supports the charge of perjury (File 26251–25640, Dec. 22, 1920; G. C. M. Rec. No. 50949).

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REVISION: FINDINGS AND SENTENCE; C. M. O. 309, 1919, APPLIES TO SUMMARY COURTS MARTIAL AS WELL AS GENERAL COURTS MARTIAL.

An enlisted man was tried, convicted, and sentenced by summary court martial. The convening authority returned the record to the court for the purpose of reconsidering the sentence, which he considered to be inadequate. The court revoked its former sentence and substituted therefor a more severe one. In reviewing the record, the Judge Advocate General was of opinion and the department held that Court-Martial Order 309, 1919, applies with equal force to summary courts martial as it does to general courts martial, i. e., in neither case should the record be returned to the court for reconsideration of an acquittal or the imposition of a more severe sentence (File 26287–7350, Nov. 30, 1920).

BAD-CONDUCT DISCHARGE: EXEMPLARY CONDUCT SUBSEQUENT TO DOES NOT OPERATE TO EXPUNGE FROM THE RECORD THE FACT THAT IT WAS AWARDED.

John Murray, enlisted in the United States Navy on April 17, 1917. On April 7, 1919, he was given a bad-conduct discharge pursuant to the sentence of a summary court martial. On July 27, 1920, he was reenlisted in the United States Navy by proper authority and is now in the service. He produced affidavits or recommendations from reputable employers for whom he worked during the time between his bad-conduct discharge from the Navy and his reenlistment, a period of approximately one year, showing that he maintained a good character during that period. Query: Is he entitled to the bonus of $100 awarded by the State of Massachusetts to its citizens for war service?

Held, that the department would not undertake to decide questions of this kind arising under the laws of Massachusetts, but the facts hereinbefore stated would not operate to expunge from the naval records the existence of the bad-conduct discharge, and that fact still appears of record in the Bureau of Navigation. Under the [P. 15] circumstances in this case, Murray would not be entitled to the bonus of $60 provided by the act of February 24, 1919, section 1406, for performing service in the military or naval forces of the United States during the present war, inasmuch as said act provided for the payment of said bonus only when the person so serving, has, since April 6, 1917, resigned, been discharged, or placed on inactive duty under honorable conditions (File 7656–1115, Nov. 26, 1920).

COMMISSIONS: PERMANENT, ISSUED TO MARINE OFFICERS CANNOT ANTEDATE THE LAW THAT CREATED VACANCIES.

Question: Would it be legal to give officers appointed to a permanent commissioned rank in the Marine Corps, date of rank corresponding to the dates stated in the temporary commissions now held by them?

The naval appropriation act of July 11, 1919, fixed the temporary authorized enlisted strength of the Marine Corps at 27,400, which number was made permanent by the naval appropriation act of June 4, 1920. As a result, vacancies were created in the authorized commissioned strength of the Marine Corps to which officers now holding temporary commissions therein are eligible for appointment. The earliest date of rank that can be given to the officers so promoted is the date of the occurrence of the vacancies they will be promoted to fill. The presumption is that most of the vacancies involved are due to the act of June 4, 1920, which has the effect of increasing the permanent authorized commissioned strength of the Marine Corps. Therefore the date of said act is the earliest date that can be stated in the commissions issued to officers appointed to vacancies created by said act.

An officer of the Navy or Marine Corps takes rank from the date of his commission (sec. 1467, Revised Statutes; act of Aug. 29, 1916, 39 Stat. 578). The date of the commission of a naval or marine officer is only to a limited extent under the control of the Secretary of the Navy. The date stated in the commission might be the date on which the vacancy occurred, or a later date, but in no case could it properly be a date prior to the occurrence of the vacancy (File 9466–03; File 7151–03; File 5460–72:1, May 19, 1915; 16 Op. Atty. Gen. 656; File 29226–6:1, Dec. 1, 1920).

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MARINES: SERVING WITH THE ARMY—NAVAL AUTHORITIES ARE WITHOUT JURISDICTION TO REVIEW PROCEEDINGS OR OTHER ACTION OF THE ARMY IN REFERENCE TO.

Private Grucza, a member of the 13th Regiment, 5th Brigade, of the Marine Corps, died August 29, 1919, while serving with the American Forces in France. An Army Board convened September 29, 1919, reported that his death was in line of duty and not the result of his own misconduct. This report was approved by the convening authority and forwarded to the Commanding General, Headquarters American Forces in France, by whom it was transmitted [P. 16] to The Adjutant General of the Army and thence to the Major General Commandant, United States Marine Corps.

The law is well settled that members of the Marine Corps detached by the President for service with the Army are, while so serving, a part of the Army and not under naval jurisdiction.

Private Grucza at the time of his death had not been returned to the jurisdiction of the Navy, as he was still with the American Forces in France, and did not return to the United States.

General Orders, No. 96, War Department, Washington, July 30, 1919, contained the following, which is applicable to this case:

> "II. *Status of members of the Marine Corps who have been detached for service with the Army.*—By direction of the President, it is ordered that all officers and enlisted men of the Marine Corps who have heretofore been detached for service with the Army in connection with the war against Germany and her allies, and who shall hereafter arrive in the United States shall, upon reporting at any station, post, camp, garrison, hospital, office, or other unit or organization of the Navy or Marine Corps for duty, forthwith stand detached from service with the Army and shall revert to their former status of duty with the Navy. All officers and enlisted men of the Marine Corps who have been detached as aforesaid and who have heretofore arrived in the United States shall stand detached from service with the Army from this date, provided they have not already been returned to duty with the Navy.
>
> "Officers and enlisted men of the Marine Corps who are patients in Army hospitals shall not come under the provisions of this order until they shall have been discharged therefrom (045.3, A. G. O.)."

Held, that the naval authorities are without jurisdiction to review the proceedings or action of the Army authorities in this case, which falls entirely within the jurisdiction of the latter (File 26250–2335, Sec. Nav., Dec. 18, 1920).

NAVAL RESERVE FORCE: INACTIVE MEMBERS OF, WEARING UNIFORM.

Members of the Naval Reserve Force relieved from active duty are authorized to wear uniform under the circumstances and subject to the conditions prescribed by the act of July 1, 1918 (40 Stat. 712), and General Order No. 437 issued pursuant to said act.

Query: Whether section 125 of the National Defense Act, approved June 3, 1916, as amended by the act of February 28, 1919 (40 Stat. 1202), with reference to the wearing of the uniform after discharge, includes members of the Naval Reserve Force relieved from active duty under honorable conditions, said law applying in terms only to persons honorably discharged for the Army, Navy, or Marine Corps. It is not necessary to decide this question, in view of the law of 1918, supra, relating specifically to members of the Naval Reserve Force. Remarked, however, that the department has heretofore held in other connections that reservists relieved from active duty under honorable conditions are not to be regarded as honorably discharged from the naval service (File 5012–177, [P. 17] Dec. 14, 1920, citing file 4032–207:1, Aug. 25, 1919; C. M. O. 280, 1919, p. 17; 4032–207:1, Sept. 10, 1919, and 28550–1251, Nov. 5, 1919).

[C. M. O. No. 1—1921]

NAVAL RESERVE FORCE: INACTIVE—DEPARTMENT WILL NOT INVESTIGATE REPORTS CONCERNING DEATHS IN, BUT WILL MAKE RECORD OF SUCH REPORTS.

The question presented is whether a certain officer of the Naval Reserve Force on inactive duty, who was reported as missing under circumstances indicating death, should be officially determined to be dead; and if so, the date of his death. It was recommended, without expressing any opinion in the specific case submitted, that the department do not undertake to investigate and decide such cases arising in the Naval Reserve Force where the missing member was not on active duty at the time of his disappearance, as to do this in every case would involve considerable labor which the Navy Department is not called upon to perform.

Further recommended that in such cases appropriate notation be made in accordance with the known facts, and that the papers reporting the circumstances be filed with the reservist's record without any official determination by the Navy Department that the man is dead, leaving such question to be decided, if necessary, by the Bureau of War Risk Insurance and the Auditor for the Navy Department, who are required by law to make payments of amounts due in cases of death (File 28550–1386: 1. J. A. G., Dec. 30 1920).

UNIFORM: NAVY AND MARINE CORPS—MAY BE WORN BY FORMER MEMBERS THEREOF WHO WERE PARTICIPANTS IN THE RECENT WAR, SUBJECT TO CONDITIONS.

Under the provisions of section 8 of the Naval Appropriation Act approved June 4, 1920, any person who has served in the Navy or Marine Corps of the United States in the present war may, upon receiving an honorable discharge and returning to civil life, permanently retain one complete suit of outer uniform clothing, including the overcoat and such articles of personal apparel and equipment as may be authorized by the Secretary of the Navy, and wear it for a period of three months after his discharge, and thereafter on occasions of ceremony he may wear the uniform of the highest grade he has held by brevet or other commission (File 29226–21, Dec. 23, 1920).

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[P. 14] BREAKING ARREST: EVIDENCE TO SUSTAIN SUCH CHARGE MUST SHOW ACCUSED KNEW OF HIS STATUS OF ARREST.

Raymond J. Smith, fireman first class, U. S. Navy, was found guilty, inter alia, of "Breaking arrest." The only evidence introduced relating to this charge was an extract from the current enlistment record of the accused as follows:

> "Reported aboard *Florida* at 11 a. m., November 18, 1920, and made a prisoner at large. Left ship at 7 p. m., November 19, 1920, while a prisoner at large. No disciplinary action taken. /s/ P. N. Olmsted."

Held, that the above evidence was not sufficient to sustain the finding of the court in this case. It is essential to the offense of "Breaking arrest" that the accused be placed under arrest by the lawful order of his commanding officer, duly delivered to him (C. M. O. 31, 1918, p. 2). There is nothing in this extract from the current enlistment record indicating that the accused understood that he was under arrest, and if he did not so understand his status he could not be guilty of the offense charged (File 26251–26897, Jan. 24, 1921; G. C. M. Rec. No. 51574).

[P. 15] JURISDICTION: IF, NEAR THE COMPLETION OF AN ENLISTMENT, A MAN IS DESIRED TO BE HELD FOR COURT MARTIAL FOR AN OFFENSE, AFFIRMATIVE STEPS TO THAT END MUST BE TAKEN BEFORE THE EXPIRATION OF HIS ENLISTMENT.

An accused was found guilty of "Neglect of duty." He entered a plea in bar of trial on the ground that the court had not jurisdiction, due to the fact that his enlistment had expired. The evidence showed that the period of enlistment of the accused expired November 19, 1920. The charge and specification on which the accused was tried is dated December 30, 1920, and the trial was held January 6, 1921. The testimony of witnesses for the prosecution and defense show the following state of facts:

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The accused was suspected of being implicated in the escape of a prisoner which occurred on November 3, 1920. This suspicion was confirmed in the mind of the commanding officer on November 8. At that time no steps were taken to place the accused under arrest nor were charges formulated or preferred against him. When the accused's enlistment expired he asked for his discharge and was informed that it would be held up as he was to be a witness in the court martial of some third person not in any way connected with this issue. On a later date the prisoner who had escaped was apprehended and on or about November 26 explained that the accused had been instrumental in his escape. The accused was then informed of the circumstances and of the steps taken toward his trial. It was further brought out that the accused was held in the service after the expiration of his enlistment in order that he might be available as a witness in the court martial of a third man. The testimony clearly shows that the accused had no knowledge of the fact that he was suspected of being involved in the offense upon which he was tried, nor were any steps taken preparatory to bringing him to trial upon the offense prior to the expiration of his enlistment.

Held, that the court erred in overruling the plea in bar. If, before the day on which service legally terminates and the right to discharge is complete, proceedings with a view to trial are commenced, as by an arrest or the serving of charges, the military jurisdiction will fully attach, and once attached may be continued by a trial by a court martial ordered and held after the term of the enlistment of the accused has expired (Naval Digest, 1916, p. 320, par. 48). In this case it cannot be said that any proceedings with a view to trial were commenced prior to the expiration of the enlistment of the accused. Consequently the jurisdiction never attached prior to such expiration (File 26251–26957, Jan. 24, 1921; G. C. M. Rec. No. 51543).

[P. 16] WITNESS: QUESTIONS BY COURT SHOULD, IN GENERAL, BE LIMITED TO CLARIFYING TESTIMONY ALREADY GIVEN.

In a recent general court martial the court conducted a lengthy examination of the first witness for the prosecution. This examination elicited testimony that had not been brought out in the examination in chief; and the court went so far as to introduce into evidence a statement previously made by the witness also covering additional matters.

Questions by the court should in general be for the purpose of making clear the meaning of testimony already given. It should not originate evidence (C. M. O. 19, 1915). Such procedure on the part of the court, as followed in this case, lays it open to animadversion and should be scrupulously avoided (File 26251–26442–C, Jan. 14, 1921; G. C. M. Rec. No. 51467).

RETIREMENT: CIVILIANS WHO WERE FORMERLY TEMPORARY OFFICERS.

A former temporary officer who has resigned from the service is not eligible for retirement on account of physical disability incurred in the line of duty (File 29226–23, Jan. 3, 1921, citing act of June 4, 1920, 41 Stat. 834; 14 Op. Atty. Gen. 506; 17 Op. Atty. Gen. 9; 19 Op. Atty. Gen. 202, 205; *Miller* v. *United States*, 19 Ct. Cls. 338, 353).

C. M. O. 2—1921

[P. 14] CHARGES AND SPECIFICATIONS: THOSE NOT SPECIFICALLY PROVIDED FOR.

An officer was charged with "Disrespect to the President of the United States" and "Disrespect to the Secretary of the Navy." Neither of these charges being specifically provided for in the Articles for the Government of the Navy, question is presented as to whether the use of either is proper or permissible in charging as an offense an act committed or omitted by a person in the naval service. Article 22 of the Articles for the Government of the Navy provides: "All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct." The use of the word "offenses" in this article is to be noted. The word "offense" has been legally defined many times and it must be presumed that

Congress used it in its legally accepted sense in this enactment. The definitions are in effect as follows: "An offense, in its legal signification, means the transgression of a law" (*Moore* v. *Illinois*, 55 U. S. (14 How.) 13, loc. cit. 19). "An offense," says Mr. Wharton, "which may be the subject of criminal procedure, is an act committed or omitted in violation of public law, either forbidding or commanding it" (Whart. Cr. Law, ch. 1; *U. S.* v. *Chapel*, 25, Fed. Cas. 395; see also in this connection Words and Phrases Judicially Defined, "Offense," p. 4915, and cases cited).

There are no common law offenses as such against the United States (*U. S.* v. *Gibson*, 47 Fed. 834, citing *U. S.* v. *Harrall*, 2 Dall. 393; *U. S.* v. *Lancaster*, 2 McLean 431; and *U. S.* v. *Irwin*, 5 McLean 178). It therefore follows that the only acts which constitute an offense against a Federal jurisdiction are those the punishment of which Congress has duly provided for by law. The conclusion drawn from the foregoing is stated in section 21 of Naval Courts and Boards, 1917, which, referring to naval courts martial, reads in part as follows: "The jurisdiction of such courts martial is statutory and is limited to offenses created by the Articles for the Government of the Navy and by other enactments of Congress. The word "created" in the foregoing quotation, however, is too limited, and the sentence should read that the jurisdiction of naval courts martial is statutory and is limited to offenses which are provided for by or are within the purview of the Articles for the Government of the Navy or other enactments of Congress.

Congress has, by providing for the punishment by court martial of any person in the naval service who disobeys the lawful order of his superior officer, authorized a superior officer to make, by a lawful order, the improper commission or omission of an act by an inferior an offense punishable by naval court martial (art. 4, sec. 2, A. G. N.). Congress has also, by providing for the punishment by court martial of any person in the Navy who violates or refuses [P. 15] obedience to any lawful general order or regulation issued by the Secretary of the Navy, authorized the Secretary of the Navy to make by lawful general order or regulation, the improper commission or omission of an act an offense punishable by naval court martial (art. 8, sec. 20, A. G. N.).

To declare an act or omission an offense after it has been committed, and then to accuse and try a person for having committed it, or to try an accused for the commission or omission of an act which has not been made an offense in accordance with law prior to its commission or omission, would violate that part of article I, section 9, of the Constitution of the United States which provides that: "No * * * ex post facto law shall be passed."

Article 62 of the Articles of War provides inter alia for the trial by court martial of members of the Army who use contemptuous or disrespectful words against the President. No member of the naval service is, however, subject to the provisions of the Articles of War unless the act for the commission of which he is tried was committed while he was detached for service with the Army by order of the President. (See Naval Courts and Boards, 1917, p. 46, and acts cited there.) The United States Navy Regulations, 1913, article 1519, provides: "No officer shall use language which may tend to diminish the confidence in or respect due to a superior in command; and it is the duty of every officer who hears such language to endeavor to check it and to report the same immediately to his superior." Article 8 of the Articles for the Goverment of the Navy provides among other things: "Such punishment as a court martial may adjudge may be inflicted on any person in the Navy who * * * treats his superior officer with contempt, or is disrespectful to him in language or deportment, while in the execution of his office." Article 1519, aforesaid, and that part of article 8 heretofore quoted (sec. 6) would, in a proper case, apply to a person in the naval service who used disrespectful language to or concerning the President of the United States or the Secretary of the Navy; however, the proper charge for a violation of the regulation aforesaid is "Violation of a lawful regulation issued by the Secretary of the Navy," and for a violation of article 8, Articles for the Government of the Navy," is "Disrespectful in language and deportment to his superior officer while in the execution of his office." A specification in support of either of these charges would be limited by the regulation or the article which authorized the charge, and the charge and the specification would put an accused upon notice as to the regulation or law which he was alleged to have violated, thus enabling him to make his defense in accordance with its provisions. Charges are used for the purpose

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of pointing out in general terms the nature of the offense for the commission of which an accused is being tried. Specifications, however, in order to state the offense provided for, must contain sufficient statements [P. 16] of fact to allege that such act was committed by a person, and in the manner, which the wording of the order, regulation, or law forbids. Unless a charge is authorized by the Articles for the Government of the Navy, or by some other enactment of Congress, that is, unless it is based upon an offense which is provided for in, or which is made an offense pursuant to, the provisions of the Articles for the Government of the Navy, or other enactment of Congress, it is not valid. If, however, a charge is so authorized it is valid if the charge and specification taken together are sufficient to point out the law, order, or regulation which provides for the offense, even though the charge used is not stated in the same words as a charge which has been previously used for the same offense. This follows because of the obvious reason that an accused is not prejudiced by its use. In this connection, it is also to be borne in mind that every person is presumed to know the law, and that each officer and enlisted man is presumed to have knowledge of the contents of Navy Regulations and General Orders (C. M. O. 49, 1918).

Neither "Disrespect to the President of the United States" nor "Disrespect to the Secretary of the Navy" can be used as a charge for the purpose of charging the commission or omission of an act as an offense independently of an order, regulation, or law prohibiting its commission or omission. It is proper however, to use either as a charge if the specification in support of it when so used alleges an offense which is provided for in order, regulation, or law upon which it is based as a charge.

A specification written under article 8, section 6, of the Articles for the Government of the Navy would have to contain allegations showing that the accused was disrespectful to the superior officer; that is, to the superior officer in person and in his presence while in the execution of his office. A specification written under article 1519, United States Navy Regulations, 1913, would have to contain allegations showing that the accused used language which might tend to diminish the confidence in or respect due to a superior in command. The word "due" implies the duty which a subordinate owes to a superior. Also it could not logically be maintained that the accused, by using the language specified, tended to diminish the confidence or respect due from himself to a superior in command. In other words, it would be necessary to allege that the language used, whether disrespectful per se or otherwise, was used in such a way that it might tend to diminish the confidence or respect which it was the duty of a specified person other than the accused to accord to a superior (File 26262–8091, J. A. G., Jan. 21, 1921; G. C. M. Rec. 51123).

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE:
THE NECESSARY ACT TO CONSTITUTE THE OFFENSE.

An officer was charged with the above offense, the specification alleging in effect that he represented himself to be a Secret Service [P. 17] agent, said representation being made to individuals not of the naval or military services. Query: Is the alleged false representation in itself so detrimental to the good order and discipline of the naval service, in the absence of any showing of the special circumstances under which they were made, and notwithstanding the failure to allege any intent to deceive or any damage suffered by the persons to whom the representations were made through acting in reliance on the representation, as to support the charge under which it is laid? "By the term 'to the prejudice,' itself, is to be understood directly prejudicial, not indirectly or remotely merely. An irregular or improper act on the part of an officer or soldier can scarcely be conceived which may not be regarded as in some indirect or remote sense or manner prejudicing military discipline, but it is hardly to be supposed that the article contemplated such distant effects, and the same is therefore deemed properly to be confined to cases in which the prejudice is reasonably direct and palpable" (Winthrop's Military Law and Precedents, p. 1123). *Held*, That the representations alleged do not appear to be in any manner directly prejudicial to the good order and disipline of the service. They fall into the category of those remote and inconsequential acts,

the evil consequences of which cannot be definitely ascertained and in regard to which the laww will not concern itself, this practice being expressed in the maxim that the law will not take account of trifles (File 26262–8091, J. A. G., Jan. 21, 1921; G. C. M. Rec. 51123).

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN: DEFINITION OF THE OFFENSE.

An officer was charged with this offense, the specification thereof alleging that he was disorderly in his conduct, in that he pushed his infant child through a porthole of the steamship *Ventura* from the wharf into the interior of said ship, the ship at the time in question being in quarantine by proper authority.

Held, That the misconduct contemplated by this charge, "though it need not amount to a crime, must offend so seriously against law, justice, morality, or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents" (Winthrop's Military Law and Precedents, p. 1104). The mere act of an officer pushing his infant child through a porthole of a quarantined ship, without allegation of graver attendant circumstances, does not appear to constitute misconduct such as either to be disgraceful socially or to bring dishonor upon the military profession (File 26262–8091, J. A. G., Jan. 21, 1921; G. C. M. Rec. 51123).

[P. 18] DESERTION: CONVICTION OF, IF COMMITTED IN TIME OF WAR, MUST CARRY WITH IT DISCHARGE FROM THE SERVICE.

An enlisted man was convicted of desertion committed in time of war and sentenced to be confined and subsequently discharged, etc. The convening authority approved the proceedings, findings, and sentence, but that portion of the sentence involving a bad-conduct discharge was held in abeyance and the accused placed on probation for the balance of his current enlistment, subject to conditions. This action of the convening authority is contrary to law. Sections 1996–1998 of the Revised Statutes set forth in article 3644, Navy Regulations, 1913, provide that men who have been convicted of desertion in time of war are forever incapable of holding any office of trust or profit in the United States, or of exercising any rights of a citizen thereof. If the convening authority desired to retain the accused in the service, yet hesitated to disapprove the findings of the court, the proper course for him to have pursued would have been to withhold all action on the case for a definite period, with a view to withholding action indefinitely should the conduct of the accused warrant. Such an action, which is pursued by the department in very exceptional cases, is legal because the finding of the court is not a conviction until approved by the convening authority (File 26262–8136, Jan. 24, 1921; G. C. M. Rec. No. 51428).

EVIDENCE: A CONFESSION MAY NOT BE USED TO ESTABLISH THE CORPUS DELICTI.

A witness for the prosecution was introduced and began to testify as to certain statements made by the accused to his commanding officer at the mast. Counsel for the accused objected to this testimony on the ground that it was a confession and that the corpus delicti had not been established; hence the confession was inadmissible. The court overruled the objection of counsel for the accused. Subsequently the witness testified that there were no threats or promises made to the accused at the mast. *Held*, that the court erred. Before a confession can be admitted into evidence, the corpus delicti and the fact that the confession was voluntarily made must be established (Naval Courts and Boards, 1917, sec. 120). The argument of the judge advocate simply amounts to this: That a confession may be used to establish the corpus delicti and the latter having been thus established, the confession is then the best evidence of which a case is susceptible (File 26251–26240, Feb. 3, 1921; G. C. M. Rec. No. 51799).

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EVIDENCE: ONLY MATTERS IN PROOF OF ALLEGATIONS SET FORTH IN THE SPECIFICATION MAY BE INTRODUCED IN EVIDENCE.

An accused was charged with "Scandalous conduct tending to the destruction of good morals." The judge advocate sought to [P. 19] introduce into evidence everything of a scandalous nature concerning the accused whether alleged in the specification or not. The drawing of the specification under the charge of "Scandalous conduct tending to the destruction of good morals" in the case in question can in nowise sanction the introduction of any evidence other than that necessary to establish the allegations set forth in the specification. It is an elementary principle of law that only the evidence which tends to prove the allegations made is relevant to the issue and the statement of the judge advocate in the case in question that "everything that happened to the accused, though not pertaining to this specification is a matter that should come before the court" is clearly in contravention of the established law (File 26262–8110, Jan. 20, 1921; G. C. M. Rec. No. 51206).

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(1) SURPLUSAGE: IN SPECIFICATIONS, WARRANTS RETURN OF RECORD TO THE CONVENING AUTHORITY.
(2) SAME: WHAT IS SURPLUSAGE, AND ITS EFFECT?

An officer was charged with being "* * * under the influence of intoxicating liquor or some stupefying drug." The court found the specification proved in part, proved except the words "or some stupefying drug."

(1) *Held*, that in passing upon the form and technicality of this specification, the court should have found the said excepted words to have been surplusage. It should have so informed the convening authority and awaited a reply before proceeding further (Naval Courts and Boards, 1917, sec. 235).

(2) As to whether or not the words in question are surplusage: "Superfluous and immaterial averments not descriptive of the identity of what is essential, will generally be rejected as surplusage, and therefore will not render the indictment bad. * * * An indictment cannot charge the offense in the disjunctive. An indictment is not rendered bad, however, by a statement in the disjunctive if the statement is superfluous, for it will be rejected as surplusage. An indictment for robbery is not bad because it charges that it was committed 'in or near the highway,' for the exact place of its commission is immaterial" (Clark's Criminal Law and Procedure, p. 178). "If the allegation is wholly foreign to the charge, or, though not foreign, can be stricken out entirely without destroying the accusation, it may generally be rejected as surplusage" (ibid., p. 180). Likewise here the words "or some stupefying drug" may be stricken out entirely without destroying the accusation, as the allegation that one was under the influence of a drug does not support a charge of "drunkenness," which in effect is the offense set forth in this case, while the allegation that one was under the influence of an intoxicating liquor does support such a charge. "As the law does not require superfluous circumstances to be alleged, so although they have been improvidently stated, the [P. 20] law, in furtherance of its object, will reject them as mere surplusage and will no more regard them than if they had not been alleged at all" (ibid., p. 181). "Where the statute denounces the offense of assault with intent to kill and there is no statute in reference to assault with intent to murder, an indictment charging an assault with intent to kill and murder is good, as the words 'and murder' may be rejected as surplusage" (*State* v. *Johnson*, 9 Nev. 175; File 26262–8110, Jan. 20, 1921; G. C. M. Rec. No. 51206).

EVIDENCE, DOCUMENTARY: COPY MUST BE AUTHENTICATED BY DEPARTMENTAL SEAL BEFORE ADMISSIBLE INTO EVIDENCE.

A copy of a sales slip certified by "M. J. Flanagan, Capt., U. S. M. C.," was introduced into evidence over the objection of counsel for the accused. The judge advocate informed the court that the original sales slip was not available as evidence, having been incorporated into the record of a board of investi-

gation. *Held*, that even if the original document had been unavailable, the copy introduced into evidence was not properly authenticated. No other evidence than the paper itself is admissible to prove the contents of a paper, with the following exceptions "* * * where the original is a record or other document in custody of a public officer, in which case copies duly authenticated under the seal of a department are admitted in evidence in the same manner as the originals, and, by statute, full credence, is to be given them (R. S. 882); * * *" (Naval Courts and Boards, 1917, sec. 190; File 26262–8275, Feb. 15, 1921; G. C. M. Rec. No. 52250).

EVIDENCE, DOCUMENTARY: OFFICIAL CORRESPONDENCE.

A letter from the Chief of the Division of Loans and Currency, Treasury Department, to the Chief Post-Office Inspector, was introduced into evidence before a court martial, over the objection of counsel for the accused, to prove that another letter had not been received by the addressee, who had made a statement to that effect to the Treasury Department. The Judge Advocate contended that the letter was admissible as documentary evidence from the files at Washington. If, by this contention, the Judge Advocate meant that the letter was admissible under the "public documents," exception to the hearsay rule he was mistaken, and the court erred in sustaining his contention. The letter in question was a mere repetition of a statement made by the third party, which statement, itself, would be inadmissible in evidence as being ex parte, not under oath, nor falling within any exception to the hearsay rule (File 26262–8273, J. A. G., Feb. 19, 1921; G. C. M. Rec. No. 32236).

[P. 21] FINDING: "GUILTY," WAS INCONSISTENT WITH THE PLEA OF "NOT GUILTY" AND THE CONCESSION OF AN OFFENSE IN LESS DEGREE THAN CHARGED.

An accused was tried and convicted of desertion. In pleading to the charge and specification he pleaded not guilty and then conceded that he was absent over leave. The court accepted the concession and no evidence was introduced by either the prosecution or the defense. *Held*, that the court erred in finding the charge proved. There was no evidence before the court from which it could infer the intent essential in desertion. The Judge Advocate, by introducing no evidence, precluded the possibility of establishing a prima facie case. It is clear that the accused's concession cannot sustain a finding of guilty to desertion, as it does not show an intent permanently to remain absent, but rather the contrary. An accused person may be found guilty of an offense, without any evidence being produced to prove the same, when he pleads guilty to the offense as charged. If he pleads not guilty and then makes a confession containing exculpatory statements, and the prosecution relies upon the confession alone, the exculpatory part cannot be disbelieved (*U. S.* v. *Williams*, 103 Fed. 98; *U. S.* v. *Long*, 30 Fed. 678). If he pleads guilty in less degree than charged, or guilty to part of the specification only, and the plea is accepted, the findings must be in accordance therewith (C. M. O. 114, 1918, p. 25). If the concession in this case be regarded as a confession or as a plea in a less degree than charged, it was clearly improper to find the accused guilty of desertion (File 26251–26621, Feb. 28, 1921; G. C. M. Rec. No. 51151).

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(1) AGE: PRESCRIBED BY LAW HAVING BEEN EXCEEDED, THE CANDIDATE IS INELIGIBLE FOR TRANSFER FROM THE NAVAL RESERVE FORCE TO THE REGULAR NAVY.

(2) SERVICE: IN A CIVIL CAPACITY CANNOT BE COUNTED AS PREVIOUS SERVICE IN THE ARMY, NAVY, OR MARINE CORPS.

Is an officer of the Naval Reserve Force (inactive) who on January 28, 1921, was 36 years, 8 months, and 8 days of age eligible for transfer to the Construction Corps of the Regular Navy?

May his service as ship draftsman from October 20, 1913, to July 22, 1918, a portion of which time he served as assistant to the naval constructor on the staff of Admiral Sims in London, count as prior naval service under the provisions of the act of June 4, 1920?

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(1) *Held*, that the examination for the transfer in question having been set for May 2, 1921, the officer will on that date have exceeded [P. 22] the age limit prescribed by the provisions of the act of June 4, 1920, section 5, including his active service in the Naval Reserve Force of 1 year, 8 months, and 8 days.

(2) *Held*, further, that in conformity with previous opinions of the Judge Advocate General no service other than service in the Regular Navy or Marine Corps may be included in the term "all prior naval service" unless it was rendered on active duty with the Navy (File 29226–16, Nov. 6, 1920), and that employment in a civilian capacity was not previous service in the Army, Navy, or Marine Corps (File 13707–59, Dec. 29, 1916; File 29226–11:4, Feb. 11, 1921).

NAVAL RESERVE FORCE: RETIRED OFFICERS WILL NOT BE REQUIRED TO REENROLL AFTED BEING RETIRED.

Upon the question as to whether members of the United States Naval Reserve Force transferred to the retired list in accordance with the provisions of section 1453, R. S., and the act of June 4, 1920, should be reenrolled when their periods of enrollment expire, the department held under the above law no separate retired list seems to be contemplated for members of the Naval Reserve Force; that they are made eligible for retirement under the same conditions as are now provided by law for officers of the Regular Navy, which evidently contemplates that when placed on the retired list they should be subject to the same conditions and restrictions as officers of the Regular Navy; and that therefore there is no authority of law for the reenrollment of members of the United States Naval Reserve Force after being placed on the retired list (File 28550–1413, Feb. 8, 1921).

RETIREMENT: SERVICE AS MIDSHIPMAN SINCE MARCH 4, 1913, DOES NOT COUNT.

Under the provisions of the act of March 4, 1913 (37 Stat. 891), an officer in the naval service appointed as midshipman since March 4, 1913, cannot count his service as said midshipman in computing length of service in the Navy for the purpose of retirement (File 27231–158:11, J. A. G., Feb. 12, 1921).

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[P. 13] (1) CHARGES AND SPECIFICATIONS: WHEN PLACE IS ESSENTIAL TO ESTABLISH JURISDICTION OF THE COURT IT MUST BE ALLEGED.

(2) SAME: WHEN AN OFFENSE IS IN VIOLATION OF A LOCAL OR SPECIAL ORDER, SUCH LOCAL OR SPECIAL ORDER MUST BE SET FORTH IN THE SPECIFICATION.

An accused was charged with violation of a lawful order issued by the Secretary of the Navy, in that he did, on or about January 6, 1921, when placed under arrest by the ship's patrol in the aforesaid city (Constantinople, Turkey), have in his possession one bottle containing a narcotic substance—to wit, cocaine.

(1) *Held*, that this specification does not set forth a cause of action, as it is not alleged that the accused had this bottle containing a narcotic substance—to wit, cocaine—in his possession on board a naval ship within the limits of a naval station, marine barracks, or any other place under exclusive jurisdiction of the Navy Department, as set forth in article 118, Navy Regulations, 1920, the order the accused is alleged to have violated. In this instance, place is of the essence of the offense, and the place alleged (Constantinople) not being one of those stipulated in the order, the specification was fatally defective.

The accused was also charged with conduct to the prejudice of good order and discipline, in that he did, on or about January 6, 1921, when placed under arrest by the ship's patrol, in the city aforesaid (Constantinople, Turkey), have in his possession a deadly weapon—i. e., one fully-loaded .32-caliber revolver.

(2) This specification likewise failed to allege an offense. If this specification was drawn with the intention of setting forth a violation of a local or special order, such local or special order should have been set forth in the specification, as it is not actionable per se for one to have in his possession a loaded revolver. Had it been alleged that the accused had this revolver concealed about his person, then by virtue of article 119, Navy Regulations, 1920, the specification

would have set forth an offense. But the allegation of concealment is essential in that case, and in this specification no such allegation appears. The fact that the accused pleaded guilty to both of these charges does not cure their defects, for, unless facts alleged constitute an offense, a plea of guilty does not support a finding of guilty (C. M. O. 71, 17, 1918; File 26262–8354, March 17, 1921; G. C. M. Rec. No. 52043).

"LESSER INCLUDED OFFENSE": ABSENCE FROM STATION AND DUTY WITHOUT LEAVE IS NOT A "LESSER INCLUDED OFFENSE" OF BREAKING ARREST.

An accused was charged, inter alia, with breaking arrest, and found guilty in a less degree than charged—guilty of absence from station and duty without leave. *Held*, that absence from station and duty without leave is not a lesser included offense of breaking arrest (C. M. O. 31, 1918). The offense of breaking arrest is completed the instant the accused escapes from his confinement, irrespective of whether or not he ever becomes absent from station and [P. 14] duty without leave. It therefore necessarily follows that absence from station and duty without leave is not a part of and does not go to make up or complete the offense of breaking arrest, and is not a lesser included offense of breaking arrest. If the accused absents himself without leave, the absence without leave is a separate and distinct offense. The finding on the charge in question was therefore disapproved (File 26262–8348, Mar. 16, 1921; G. C. M. Rec. No. 52613).

ORDERS: THEY MUST BE DEFINITE AND POSITIVE.

An accused was tried, inter alia, for conduct to the prejudice of good order and discipline, in that he, having been lawfully ordered by the acting patrol sergeant, on guard in the city of Port au Prince, to surrender a .45-caliber Colt automatic pistol, then in the possession of the accused, to the aforesaid acting patrol sergeant, did refuse to obey and did willfully disobey the said order. The acting patrol sergeant testified that "I was told by Sergeant Petrone to go out and see if Brown (the accused) did have a pistol, and if he did, to take it away from him. I went outside, spoke to Brown, telling him that he had better turn over the pistol." No other evidence was introduced which would indicate that a direct order had been given. *Held*, that the acting patrol sergeant did not lawfully order but merely told the accused that he had better turn over the pistol. The finding of guilty on the charge in question was therefore disapproved (File 26262–8358, Mar. 29, 1921; G. C. M. Rec. No. 52644).

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(1) WITNESSES: SANITY HAVING BEEN QUESTIONED, COURT MUST JUDICIALLY DETERMINE THIS FACT BEFORE PERMITTING THE WITNESS TO TESTIFY.

(2) SAME: SANITY MAY BE DETERMINED BY EVIDENCE OF ASSOCIATES AS WELL AS THAT OF SPECIALISTS.

Counsel for the accused objected to witness testifying on the ground of insanity, and he offered to introduce evidence to substantiate this statement if the court so desired, stating further that the evidence he had was not evidence of any medical authority, but was from the observation of others in the brig where this witness had been confined. The judge advocate replied that "he does not believe for a moment that prisoners confined in the brig are sufficiently competent to give an opinion as to a man's mental condition. That is a matter for the medical authorities, and particularly for the psychiatrists, who make a special practice of mental diseases; and therefore he now claims that the point is not well taken, and requests that he be allowed to examine the witness and let the court decide as to whether he is giving testimony which is correct or incorrect. And then, if the court wishes the witness examined by a psychiatrist, that would be the better procedure."

(1) When any question is raised as to the competency of a witness to testify on any grounds, it is the duty of the court, before allowing the testimony of such witness to be given, to decide whether or not that witness is competent. (See Naval Courts and Boards, 1917, sec. 136, p. 156; C. M. O. 32, 7, 1917.) It was the duty of the court, [P. 15] therefore, upon the objection of counsel for the accused to settle definitely the question of this witness' competency.

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(2) When a witness is objected to on the ground of insanity, there are two usual methods of proving whether or not he is competent to testify, the first being from the testimony of medical authorities who have made a special study of mental diseases and the second being from the opinions of persons of ordinary intelligence who have been acquainted with and who have had opportunity of observing the party under examination. (See McKelvey on Evidence, pp. 246–247, par. 2.) The position of the judge advocate that persons confined in the brig are not sufficiently competent to judge of a man's mental condition, but that it is a matter for the medical authorities, is not well taken. The fact that the persons by whom counsel for the accused intended to prove the insanity of the witness were confined in the brig would not affect their competency to testify though it might affect the weight to be given their testimony by the court (File 26251–27423, Mar. 23, 1921; G. C. M. Rec. No. 52406).

INTERNATIONAL LAW: JURISDICTION OF HIS STATE OF ORIGIN OVER AN ALIEN ENLISTED IN THE UNITED STATES MILITARY SERVICE.

Pierre L. Caffier, a citizen of France, declared his intention to become a citizen of the United States. He enlisted in the Marine Corps, was transferred to Haiti, and while stationed there with troops was summoned by the French Minister at Port au Prince, Haiti, to appear before the medical officer of the legation for examination.

"The taking out of first papers—that is, the declaration of intention to become a citizen—does not confer citizenship" (Moore, Dig. Int. Law, vol. 3, pp. 336–337).

"A mere declaration of intention to become a citizen of the United States does not change the nationality of the party making such declarations; he remains until final naturalization a subject or citizen of his origin (sic) * * *" (ibid., p. 339).

"Until a person has effected his naturalization in due course of law and obtained his final papers, he cannot claim the protection of the United States in case of his voluntary return to the country of his origin" (ibid., p. 340).

"A declaration of intention has no international value whatever in the event of the declarant returning * * * to his native country" (ibid., p. 343).

"The mere facts of enlistment and discharge do not confer citizenship, but only enable the individual to apply to a competent court for naturalization" (ibid., p. 335).

[P. 16] The practical application of the original rights of the French Government in relation to the laws of France regarding military service of French subjects is, however, not admissible under the circumstances of this case; for, conformably to the laws of the United States and the regulations of the United States Marine Corps, Caffier is regularly and legally enlisted in the military service of the United States. By reason of his oaths of enlistment and declaration of intention, Caffier owes allegiance to the United States, and conversely, the United States owes him protection. This is a statement of the general principle involved. This protection extends to him throughout his enlistment, certainly on the high seas and within the territorial jurisdiction of the United States and within the territorial jurisdiction of any country other than his native France; and only less certainly even within French jurisdiction should he happen within such jurisdiction in his official capacity as a member of the armed forces of the United States. Should he, however, be found individually and voluntarily (as for instance on leave of absence) within French territorial jurisdiction, the case would assume a different aspect.

The case under consideration seems to possess the salient features of "double allegience." Caffier's naturalization under American law and his expatriation under French law being not yet accomplished, he is still a citizen of France and only a prospective citizen of the United States. He is therefore obligated to a certain degree of allegiance toward both countries. When his naturalization shall have become accomplished, his citizenship will be established, his allegiance thenceforward will be single.

It was recommended that Caffier be not required or permitted to comply with the summons of the French diplomatic or consular authorities in Haiti (File 7657–1163, Mar. 19, 1921).

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[P. 10] BREAKING ARREST: EVIDENCE NECESSARY.

The Department held that the introduction of a service record entry alone that the accused was a "prisoner at large" was not sufficient proof to warrant a finding of guilty on the charge of "Breaking arrest." It is essential in establishing the offense to establish [P. 11] that the accused had actually been placed under arrest. Where the accused has not actually broken from close confinement, a service record entry (if properly introduced into evidence) which would be sufficient to establish a prima facie case of "breaking arrest" would be one which showed that the accused had been personally informed by proper authority that he was "under arrest" or that he was informed by proper authority that he was a prisoner at large (File 26251–27752, J. A. G., Apr. 25, 1921; G. C. M. Rec. No. 52750).

CHARGES AND SPECIFICATIONS: MUST ALLEGE AN OFFENSE.

An accused was tried by summary court martial on three specifications, on the first two of which he was acquitted, charging carelessness and inefficiency in the performance of duty in operating an automobile. The gist of the third specification was that the accused promised to pay the owner of the other automobile for the damage resulting to his machine from the collision with the vehicle driven by the accused. The findings on the third specification and sentence were disapproved by the Department on the ground that the specification does not allege an offense as it does not show that the accused was justly indebted to the owner of the car referred to, in the sum stated, or any other sum. To state an offense it must be alleged that the claim was undisputed or had been established by judgment of a civil court (File 27217-4795; J. A. G., Apr. 5, 1921).

COMMISSION AD INTERIM: EFFECTS OF ACCEPTANCE.

A permanent chief warrant officer, holding a temporary commission as a lieutenant in the Navy, who has been found qualified under the provisions of the act of June 4, 1920, for appointment as a permanent lieutenant in the Navy, and who, by virtue of that fact, has been tendered and has accepted an ad interim appointment as a lieutenant therein, cannot withdraw his acceptance of his ad interim commission after the same has been accepted by him, but he can tender his resignation from said ad interim appointment which resignation may be accepted or rejected by the President in his discretion.

The acceptance of an ad interim commission as a lieutenant by a permanent chief warrant officer who holds a commission as a temporary [P. 12] lieutenant does not operate as a cancelation of his commission as a temporary lieutenant for the reasons set forth in opinion of November 28, 1917 (File 11130–47). By virtue of the provisions of the act of June 4, 1920 (41 Stat. 835), the acceptance of an ad interim commission as a lieutenant does not operate as a cancelation of his commission as a chief warrant officer.

Permanent warrant or permanent chief warrant officers who hold temporary commissions in the Navy and are given permanent commissions therein in accordance with the provisions of this act retain their permanent warrant or permanent commissioned warrant status, as the case may be, under the provisions of the act of June 4, 1920 (41 Stat. 835), or it would not be possible for such officers to revert to such permanent warrant or permanent chief warrant status as herein provided should they thereafter fail professionally on examination for promotion.

Since his acceptance of an ad interim commission under the foregoing conditions does not cancel either his temporary commission as a lieutenant or his commission as a chief warrant officer, it is obvious that his resignation as a lieutenant under an ad interim commission would have no effect upon either his temporary commission or his commission as a chief warrant officer unless it could be shown that by said resignation he had clearly intended wholly to

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resign from the naval service and that his resignation had been accepted as such resignation from the naval service.

An officer holding only a temporary commission in the Navy, eligible under the provisions of the act of June 4, 1920, for transfer to a permanent commission, found qualified for said transfer under the provisions of said act and so commissioned, would not need to resign from his temporary commission for the reason that his acceptance of a permanent commission operates as a cancelation of his temporary commission for the reasons set forth in opinion of March 12, 1918 (File 11130–37: 4), which distinguished this case from the case presented in opinion of November 28, 1917 (File 11130–47). In the case of a permanent warrant officer or a chief warrant officer the acceptance of a permanent commission does not constitute a cancelation of his commission as a warrant officer or a chief warrant officer (File 29226–11: 5, J. A. G., Mar. 9, 1921).

DATE OF LOSS OR WRECK OF VESSELS OF THE NAVY: DETERMINATION OF.

The Secretary of the Navy submitted the following question to the Attorney General for his opinion:

> "Whether, where a vessel in the Navy has been unheard from so long that her wreck may be presumed, the determination by the Secretary of the Navy of the day when the wreck, destruction, or loss shall be deemed to have occurred is binding upon the accounting officers of the Treasury Department in [P. 13] settling the accounts of seamen and others, not officers, borne on the books of the vessel."

The Attorney General held that the above question "must be answered in the affirmative," stating that he "cannot agree" with the contrary conclusion which was expressed by the Comptroller of the Treasury in the latter's decision of October 30, 1919 (26 Comp. Dec. 336). The Attorney General based his decision upon section 286 of the Revised Statutes, which provides that—

> "The proper accounting officers of the Treasury are authorized, under the direction of the Secretary of the Navy, in settling the accounts of seamen, and others, not officers, borne on the books of any vessel in the Navy which shall have been wrecked, or which shall have been unheard from so long that her wreck may be presumed, or which shall have been destroyed or lost with the rolls and papers necessary to a regular and exact settlement of such accounts, to fix a day when such wreck, destruction, or loss shall be deemed to have occurred" (File 26254–3048: 2, Op. Atty. Gen., Feb. 25, 1921).

ELIGIBILITY OF TEMPORARY LIEUTENANT OF THE LINE TO RECEIVE A COMMISSION AS A LIEUTENANT IN THE SUPPLY CORPS UNDER THE PROVISIONS OF SECTION 4 OF THE ACT OF JUNE 4, 1920.

The requirements of this provision are that the appointee shall be a commissioned warrant officer of more than 15 years' service since date of warrant or date of first appointment as a paymaster's clerk, pharmacist, or mate; have served creditably in the war with the German Government in a temporary commissioned rank or grade in the Regular Navy; and been found qualified as established and shown by his record of service during his term of service for appointment to a permanent rank or grade not above the temporary rank or grade held by him at the time of transfer.

A commissioned warrant officer of more than 15 years' service as above provided may be given a permanent commission in any rank or grade not above the temporary rank or grade held by him at the time of his transfer in any corps of the service for which he is found qualified as established and shown by his record of service during his term of service (File 26256–332: 9, J. A. G., Mar. 2, 1921; 26256–332: 10, J. A. G., Mar. 28, 1921).

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INCOME-TAX EXEMPTION OF OFFICERS ON THE RETIRED LIST OF THE NAVY.

Article 86 of regulation 45, "relating to the income-tax and war-profits and excess-profits tax under the revenue act of 1918," provides that officers on the retired list of the Navy not on active duty are not entitled to the exemption applicable to naval officers [P. 14] on the active list or on the retired list if on active duty (File 28472–57: 1, J. A. G., Apr. 1, 1921).

JOINT RESOLUTION OF MARCH 3, 1921.

The Secretary of the Navy requested the Attorney General's opinion as to the effect upon certain Navy legislation of the joint resolution of March 3, 1921 (Pub. Res. No. 64, 66th Cong.), "declaring that certain acts of Congress, joint resolutions, and proclamations shall be construed as if the war had ended and the present or existing emergency expired." The specific questions submitted for the Attorney General's opinion were the following:

> "First. Does the joint resolution of March 3, 1921 (Pub. Res. 64, 66th Cong.), affect statutory provisions relating to the Navy which in general terms apply to any emergency or national emergency, and include the present or existing emergency without specific reference thereto? In other words, within the meaning of said statutory provisions, must the war and the national emergency which existed on the date of said resolution be regarded and treated as terminated thereby?
>
> "Second. Does the joint resolution of March 3, 1921 (Pub. Res. No. 64, 66th Cong.), affect statutory provisions relating to the Navy which relate in terms to 'time of peace'? In other words, within the meaning of said statutory provisions, must the said resolution be regarded and treated as terminating the war which existed on the date thereof and establishing peace?"

The foregoing questions were categorically answered by the Attorney General "in the affirmative," the Attorney General stating in his opinion that the said questions were "undoubtedly difficult" and that the reasoning to the contrary has force, but that in his judgment the said resolution "should be read, not in the letter and in subjection to its very terms, but as containing and enacting what is necessarily implied, though not verbally expressed, what is necessarily a part of the content of the phrases used." The Attorney General specifically held "that the following acts are affected by the joint resolution of Congress of March 3, 1921, in accordance with the foregoing opinion, and that the same come within its intended purpose of restoring the internal affairs of the United States to a peacetime basis, namely, the act of July 1, 1918 (40 Stat. 711); the act of August 29, 1916 (39 Stat. 587); the particular provisions of the act of July 1, 1918 (40 Stat. 711), referring to the Naval Reserve Force and officers; the act of October 6, 1917 (40 Stat. 393); the act of May 22, 1917, section 16 (40 Stat. 87); the act of Congress of August 29, 1916 (39 Stat. 602); the act of July 1, 1918 (40 Stat. 718); section 1462, Revised Statutes, and section 1592, Revised Statutes, referring to pay of officers; the act of August 29, 1916 (39 Stat. 587); the act of July 9, 1918 (40 Stat. 885); the act of February 24, 1919 (40 Stat. [P. 15] 1150); the act of August 29, 1916 (39 Stat. 586); various provisions of section 1624, Revised Statutes, Articles for the Government of the Navy, dealing with offenses committed during time of war; the act of May 22, 1917, section 21 (40 Stat. 90); the act of October 6, 1917 (40 Stat. 383); the act of October 6, 1917 (40 Stat. 389); the act of May 22, 1917, section 10 (40 Stat. 87), respecting promotions of probationary second lieutenants; the act of July 11, 1919 (41 Stat. 153); the act of February 24, 1919 (40 Stat. 1066); the act of October 6, 1917, section 204 (40 Stat. 403); the act of May 22, 1917, section 18 (40 Stat. 89)" (File 28766–342: 6, Op. Atty. Gen., Apr. 11, 1921).

MIDSHIPMEN: STATUS OF.

A midshipman appointed to the Naval Academy pursuant to law for the performance of certain specific duties is on active duty at the academy as a midshipman and not as a commissioned officer or as an enlisted man detailed to some specific duty in connection with the administration of the academy.

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Congress has provided three ways in which individuals may be inducted into the naval service of the United States—namely, enlistment, appointment as a midshipman, and appointment as a commissioned officer. While the courts have pointed out certain distinctions between enlisted men, midshipmen, and commissioned officers, all the decisions are to the effect that they are all members of the naval service and equally subject to the laws and regulations governing the Navy. The status, therefore, of midshipmen is not dissimilar to that of enlisted men undergoing training at technical, medical, or pay schools. Midshipmen are required during certain months of each year to cruise on board naval combat ships, at which time they perform regular duties aboard ship and encounter all the hazards to which commissioned officers or enlisted men aboard ship are subject. If, for example, while at the academy or aboard ship midshipmen are ordered to perform extra hazardous duties they must obey the same as any other member of the naval service.

Midshipmen at the Naval Academy are on active duty in the same degree as enlisted men or commissioned officers detailed to the Naval Academy for the performance of specific duty are on active duty, and, further, while aboard ship they serve under the same conditions as commissioned officers and enlisted men (File 5252–167, J. A. G., Mar. 9, 1921).

NAVAL RESERVE FORCE: RANK OF, ON RETIREMENT.

A provisional lieutenant in the Naval Reserve Force appeared before a naval retiring board and after he had been found permanently incapacitated for active duty and prior to final action thereon [P. 16] he was advanced by the Bureau of Navigation to the provisional rank of lieutenant commander in that force, which provisional rank he held at the time of his retirement and subsequent demise.

The question of rank to which this officer was entitled on the retired list being presented it was held that inasmuch as he had in fact been advanced to the rank of lieutenant commander and had in fact held that rank at the date of his retirement and subsequent death it is now too late to inquire into the question of his qualifications, and that the action of the department in so advancing him is res judicata of all that is involved, there being no suggestion that ------ was guilty of fraud in procuring such advancement or that all formalities and proceedings required by statute and regulations were not observed (28 Op. Atty. Gen. 180).

Had the question been presented to this office, at the time, of whether or not this officer might legally be advanced to the provisional rank of lieutenant commander, pending final action upon the finding of the retiring board in his case, the conclusion reached would doubtless have been the same as that expressed in an opinion of this office dated July 20, 1920 (File 27231–164, C. M. O. 101, 1920, 17) (File 26253–760; 2, Mar. 1, 1921, Op. J. A. G.).

NAVAL RESERVE FORCE: RETIREMENT OF.

A former officer in the Naval Reserve Force discharged therefrom on account of physical disability incurred in line of duty is not eligible for retirement under the provisions of the act of June 4, 1920 (41 Stat. 834), which state that "All officers of the Naval Reserve Force" who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty, for the reason that only officers now in the Naval Reserve Force are eligible for retirement under these provisions.

This opinion is further supported by the provisions of sections 1457 and 1588 of the Revised Statutes, which provide that it is necessary for a man to be an officer of the naval service at the time when he is placed on the retired list and that it is not sufficient that he may have been at some former time an officer in the naval service.

This opinion is fully supported by an opinion of the Attorney General in the case of Gen. Schuyler Hamilton (14 Op. Atty. Gen. 507, affirmed 17 Op. Atty. Gen. 9, and subsequent opinion, 19 Op. Atty. Gen. 202, 205); (File 28550–1438, Sec. Nav., Apr. 25, 1921).

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NURSES: SERVICE OF.

Nurses who were enrolled in the Naval Reserve Force and subsequently disenrolled therefrom on one day and on the following [P. 17] day appointed nurses, United States Navy, may be considered as having performed continuous service therein for the purposes of pay provided said service was on active duty, but that said active service may not be considered as continuous service for the purpose of crediting said nurses after appointment as nurses, United States Navy, with leave accumulated while serving in the Naval Reserve Force; (*b*) that Reserve Nurses, discharged on one day and on the following day appointed Nurses, United States Navy, may be considered as having performed continuous service therein for all purposes provided said service was on active duty (File 26477–101, J. A. G., Mar. 9, 1921).

OFFICERS: PROMOTION OF.

Opinion was requested of the Judge Advocate General on the following questions:

1. May the temporary officers of the line in the grades of lieutenant and below, who fill permanent positions in the regular establishment created by the act of June 4, 1920, and acts prior thereto, not to exceed the number of transfers and appointments authorized by section 3 of the act approved June 4, 1920, be counted in computing the number of line officers who may be permanently commissioned in selection grades on the active list at any one time?

2. May officers in the grade of lieutenant commander and above, who become ineligible for promotion by reason of age on June 30, 1921, under the provisions of the act of August 29, 1916, as amended by the acts of July 11, 1919, and June 4, 1920, be promoted after June 30, 1921, if they have been selected for promotion prior to that date to fill permanent vacancies existing prior thereto?

Answering categorically question 1, temporary officers of the line in the grade of lieutenant and below, who fill permanent positions in the Regular Establishment created by the act of June 4, 1920, and acts prior thereto, not to exceed the number of transfers and appointements authorized by section 3 of the act approved June 4, 1920, may be counted in computing the number of line officers who may be permanently commissioned in selection grades on the active list at any one time; and such temporary officers may be so counted either before or after they have qualified for permanent commissions under said act, not in excess, however, of the number who will actually receive such permanent commissions.

Question 2 is answered in the affirmative for reasons given in the Judge Advocate General's opinion of February 10, 1920, File 27231–158:1, C. M. O. 48, 1920, 34, which is to the effect that certain officers might legally be examined, nominated, confirmed, and commissioned when beyond the age limit for promotion, provided they had been recommended for promotion by the selection board, that said recommendation had been approved by the President, and that vacancies existed to which they might legally be promoted before they became ineligible for promotion by reason of age. In this connection it [P. 18] should not be overlooked that said opinion applied only to the cases of officers holding temporary commissions in the grade for permanent promotion to which they were selected, and whose cases were, accordingly covered by the act of May 22, 1917, quoted and discussed in subparagraph (*d*) of said opinion of February 10, 1920. Similarly in the present case, question 2 and answer thereto are limited to officers holding temporary commissions in the grades to which they are to be permanently promoted. As to officers not holding temporary commissions in such higher grades, it would be necessary that they be nominated prior to June 30, 1921, and before being so nominated they would have to pass the required examinations after their selection to fill an existing vacancy (File 27231–158:12, J. A. G., Mar. 16, 1921).

PRECEDENCE OF ACTIVE AND RETIRED OFFICERS AT OFFICIAL FUNCTIONS.

Active and retired officers of the same rank when attending official functions in uniform take precedence with each other according to their respective dates of commission in such rank, and in the absence of commissions they take preced-

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ence in accordance with the order in which their names appear on the official Navy Register as kept in the Navy Department. In other words, officers on the retired list take rank with officers on the active list in each grade according to the dates of their commissions. (See File 4991–1; 26806–73; 13559–17; C. M. O. 49, 1915, 22; 3809–6402; 26253–4601:1; File 11130–75, J. A. G., Mar. 3, 1921.)

PROMOTION OF OFFICERS IN THE NAVAL RESERVE FORCE.

An officer serving on active duty in time of war or other national emergency in a provisional rank in the Naval Reserve Force may be given a higher provisional rank, subject to such examination as the Secretary of the Navy may require, despite the fact that he is more than 64 years of age at that time.

An officer serving on active duty in a provisional rank in the Naval Reserve Force may not be promoted to a higher rank in that force until he has been confirmed in the provisional rank which he then holds (31 Op. Atty. Gen. 173; file 28550–1417, J. A. G., Feb. 25, 1921, approved by the Secretary of the Navy).

RETIREMENT OF CHIEF WARRANT OFFICERS.

While a commissioned warrant officer of the Navy who has been more than 30 years in the service may upon his own application be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade if the President, in his [P. 19] discretion, sees fit to so retire him, it has not been the policy of the department for a number of years to place chief warrant officers on the retired list after 30 years' service under these conditions (File 27231–170:1, Sec. Nav. Mar. 2, 1921).

STAFF OFFICERS: PRECEDENCE OF.

The following questions were submitted by the Secretary of the Navy to the Attorney General for his opinion:

1. "What rule, under existing law, governs the precedence of staff officers who entered the Navy prior to March 4, 1913 (*a*) with officers of the line and (*b*) with officers of other Staff Corps, who also entered the Navy prior to that date."

2. If, in answer to the above, the conclusion should be that the precedence of the aforesaid officers is governed by length of service in the Navy, the further question is presented, "Whether officers of the line and staff of the Navy who entered the Navy prior to March 4, 1913, and who have been advanced on the Navy Register should be credited, for purposes of precedence, with 'constructive service' sufficient to place them ahead of all other officers, line and staff, over whom they have been so advanced."

The Attorney General, in his opinion dated March 3, 1921, held as follows:

1. That the staff officers in question take precedence with officers of the line by length of service, in accordance with section 1485, Revised Statutes, except in the case of conflict between said section and the act of August 29, 1916, in which case the precedence of all the officers concerned, line and staff, is governed by date of commission. The conflict mentioned is illustrated by the Attorney General as follows: "Suppose Captain A, of the Construction Corps, outranks Captain B, of the same corps, by date of commission, Captain B outranks Captain C, of the line, both by date of commission and by length of service, and Captain C outranks Captain A by length of service. Obviously the order of precedence of these officers cannot be determined by applying either or both of the above statutes. Under the act of August 29, 1916, Captain A outranks Captain B, but that act does not define the relative rank of these officers to Captain C; that is done by Revised Statutes, section 1485, according to which Captain B outranks Captain C, who in turn outranks Captain A. But Captain B does not outrank Captain A, because that is contrary to the express command of the act of August 29, 1916."

With respect to this particular situation, the Attorney General held that section 1485, Revised Statutes, is repealed and "the unwritten law applies, according to which officers of the same grade take precedence by date of commission."

[P. 2] The Attorney General further held that "staff officers who entered the

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Navy prior to March 4, 1913, take precedence with officers of other Staff Corps who also entered the Navy prior to said date by date of commission."

3. The Attorney General further held that the second question above quoted "must be answered in the affirmative"; that is, that officers of the line and staff of the Navy who entered the Navy prior to March 4, 1913, and who have been advanced on the Navy Register, should be credited, for purposes of precedence, with "constructive service" sufficient to place them ahead of all others, line and staff, over whom they have been so advanced; and the Attorney General stated that this "applies as much where officers have been advanced by selection over officers in their own corps as in any other case" (File 11130–63: 8, Op. Atty. Gen., Mar. 3, 1921, modifying C. M. O. 280, 1919, p. 19, and C. M. O. 74, 1920, p. 16).

SUSPENSION FROM PROMOTION AND LOSS OF NUMBERS UNDER SECTION 1505, R. S., AS AMENDED BY ACT OF MARCH 11, 1912.

In the case of an officer who was examined for permanent promotion to the ranks of lieutenant (junior grade) and lieutenant and failed professionally on such examination, thereby incurring consequent loss of numbers under the provisions of section 1505 of the Revised Statutes as amended by the act of March 11, 1912 (37 Stat. 73), the question was presented whether this officer must lose the total sum of numbers determined by the average rate of promotion in the line to the rank of lieutenant (junior grade) and to the rank of lieutenant. *Held*, that this officer is not subject to lose the total sum of numbers so determined but that he was subject to lose, on account of his failure to pass his professional examination, the number determined by the average rate of promotion in the line to the rank of lieutenant (junior grade) (File 26260–8433: 1, J. A. G., Mar. 15, 1921).

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[P. 12] CHARGES AND SPECIFICATIONS: FATALLY DEFECTIVE SPECIFICATIONS.

A medical officer was tried on a specification, the gist of which was that having administered morphine to an officer, he failed to enter the fact in the officer's health record, as it was his duty to do.

The specification was held to be fatally defective, even though unobjected to, as it alleged no offense, and such a defect is not cured by verdict (124 U. S. 483). The Navy Regulations, General Orders and Manual for the Medical Department do not show that it is the duty of a medical officer to make such entries (File 26262–8357, J. A. G., April 5, 1921; G. C. M. Rec. No. 52645).

CHARGES AND SPECIFICATIONS: FATALLY DEFECTIVE, EXAMPLE OF.

An accused was tried on the following specification: "did, * * * feloniously have in his possession with the intention of removing same from said ship, two radio bulbs, one receiver of the value of about four dollars and twenty-seven cents ($4.27), and one transmitter of the value of about nine dollars and seventeen cents ($9.17), the property of the United States and intended for the naval service thereof * * *."

The gist of this specification is that the accused feloniously had in his possession two radio bulbs, the property of the United States. The clause "with the intention of removing same from said ship" adds nothing to the specification, as there is nothing to show that such a removal would be unlawful. The word "feloniously" has been given various definitions by the courts, but all substantially agree that it signifies an intent to commit a crime (*State* v. *Clark* 83 Vt. 305): that the act was done with a mind bent on doing that which is wrong, or with a guilty mind (*State* v. *Connors*, 94 Wait. 199); proceeding from an evil heart or purpose (*Ewing* v. *Commonwealth*, 129 Ky. 237). Therefore the specification really states that the accused had the radio bulbs belonging to the United States in his possession with a criminal intent.

The question remains whether such a possession, coupled with a criminal intent, is an offense cognizable by naval court martial. An offense, which

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may be the subject of criminal procedure, is an act committed or omitted in violation of public law, either forbidding it or commanding it (C. M. O. 2, 1921, 14). But, to constitute a crime, it is well settled that both criminal intent and a prohibited act must concur. "The mere doing of the prohibited act without the intent involved in the definition of the particular crime does not constitute the crime, * * *. Conversely, the mere intent to do a criminal act not accompanied by any act is not a crime" (Clark's Crim. Law, p. 56; see also sections 101 to 104, inclusive, Naval Courts and Boards).

[P. 13] The mere possession of Government property is not in itself a violation of any law, regulation or custom of the service and therefore, to make such possession, provided it be accompanied by the necessary criminal intent, an offense, it must be in violation of some special local order set out in the specification, as provided in section 63, Naval Courts and Boards. Since such an order is not set forth in this case it follows that the specification charges the accused with the doing with criminal intent of an act not prohibited by law.

This, in effect, is punishing the accused for his criminal intent alone, which, as has been pointed out above, is not an offense.

If, in this case, the possession of the radio bulbs by the accused was incidental to his theft or embezzlement of them, or to his receiving them as stolen property, or to his violation of (1) par. 9, art. 14, A. G. M.; or (2) art. 122 (2), Navy Regulations, 1920; or (3) a lawful ship's order, such offense should have been itself directly or positively charged in the specification (File 26287–7859, J. A. G., May 14, 1921).

DECK COURT: SPECIFICATIONS.

Section 470, Naval Courts and Boards, provides that the specification for a deck court shall be brief, but that in each specification it is necessary to set forth (*a*) the name and rate of the accused; (*b*) the offense and date of commission thereof; (*c*) all material facts connected with the offense, and that in every case the convening authority should see that the offense is set forth clearly and explicitly and is not left to be implied (File 27217–4887, J. A. G., May 16, 1921).

JEOPARDY: PLEA IN BAR OF TRIAL.

"A plea of former jeopardy cannot be sustained where the indictment in the former case did not contain the recitals necessary to charge the offense, or did not charge the defendant with any crime known to the law" (12 Cyc. 265, cases cited in notes 53 and 64; File 26287–7715, J. A. G., May 16, 1921).

MURDER: DISTINGUISHED FROM MANSLAUGHTER.

Clark and Marshall in The Law of Crimes states the difference between murder and voluntary manslaughter to be as follows:

> (Par. 257) "Voluntary manslaughter is distinguished from murder by the fact that it is committed, not with malice aforethought, express or implied, but in the heat of passion or heat of blood caused by reasonable provocation. When a man, in killing another, acts under the influence of sudden passion caused by a reasonable provocation, but not in necessary defense of his life, nor in order to prevent great bodily harm, the law does not excuse him because of the [P. 14] provocation; but it does not hold him guilty of murder. The law recognizes the fact that a man, when greatly provoked, will lose the control of his reason, and, under the influence of the passion and excitement caused by the provocation, resort to violence of which he would not be guilty in the absence of passion. It therefore attributes the killing to the frailty of human nature, and not to malice, and while it does not excuse the killing altogether, it reduces it to manslaughter.
>
> (Par. 260) "(*a*) *Sufficiency in general.*—To reduce a homicide from murder to manslaughter, the provocation must be adequate in the eye of the law, and to be so it must be so great as to reasonably excite passion and heat of blood. Passion without adequate provocation is not enough. If

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a man unreasonably allows his passion to control his judgment, he is responsible to the full extent for the consequence of his acts. The line which distinguishes provocations which will mitigate the offense from those which will not, cannot in the nature of things, be clearly defined. Reasonableness is the test. The law contemplates the case of a reasonable man—an ordinary reasonable man—and requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed. The rule is that reason should, at the time of the act, be disturbed by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly, and without reflection, and from passion rather than judgment." (See also *Johnson* v. *State*, 108 N. W., 56; *State* v. *Buffington*, 71 Kan.; File 26262–8615, J. A. G., May 18, 1921, G. C. M. Rec. No. 53227.)

MURDER: DISTINGUISHING CHARACTERISTIC.

The court has apparently misunderstood the application of "Malice aforethought" to cases of the character of the one at bar. With reference to the subject of "Malice," Clark and Marshall in The Law of Crimes, vol. 1, sections 240 (*a*) and 241 (*a*), inclusive, states as follows:

(*a*) "The distinguishing characteristic of murder is malice aforethought. When it exists, the homicide is always murder. When it does not exist, the homicide cannot be murder, but is either manslaughter, or else is justifiable or excusable. The expression 'malice aforethought' is very technical, and cannot be taken in the ordinary sense of the term 'malice.' It must be construed according to the decided cases, which have given it a meaning different from that which might be supposed. It does not necessarily mean anger, but, as we shall see in subsequent sections, includes many other unlawful or wrongful motives or conditions of mind. Chief Justice Shaw said in the celebrated *Webster case* that it is not confined to ill will toward one or more individual persons, but is intended to denote 'an action flowing from any wicked and corrupt motive—a thing done malo [P. 15] animo—where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief.'

(*b*) "Where, by statute, murder is divided into two degrees, deliberation and premeditation are generally made essential to murder in the first degree. The common law, however, recognizes no degrees of murder, and, to constitute murder at common law, deliberation and premeditation are not necessary. In other words, 'Malice Aforethought' required by the common law need not exist for any length of time before the killing, but it is sufficient if it exists at the time of killing. It may arise simultaneously with the act which causes death. Provoking language, as we shall see, is not sufficient provocation to reduce an intentional killing to manslaughter. Therefore, if a man, when provoked by insulting words, immediately revenges himself by the use of a deadly weapon and death ensues, there is malice aforethought, and the homicide is murder. It is none the less malice aforethought because the act is done suddenly and without deliberation or premeditation. 'The law,' said the Tennessee court, 'knows no specific time within which an intent to kill must be formed so as to make it murder. If the will accompanies the act, a moment antecedent to the act itself which causes death, it seems to be as completely sufficient to make the offense murder as if it were a day or any other time.'

(*c*) "From a very early day malice has been divided into express and implied malice. This distinction has been criticized on the ground that malice must of necessity always be inferred from the circumstances, and is therefore always implied. In a sense this is true, but it is not sufficient reason for not recognizing the distinction as it has been understood in the law of homicide. It is convenient and, if properly understood, it is not misleading. It is expressly recognized by the statutes in some States in dividing murder into degrees. By express malice is meant an

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actual intention to kill the person who is killed, or to kill some other person. Implied malice exists when there is no actual intent to kill any person, but death is caused by conduct which the law regards as showing such an abandoned state of mind as to be equivalent to an actual intent to kill. From such conduct the law implies malice.

(Par. 241.) (*a*) "Whenever an accountable man kills another intentionally, he is guilty of murder with express malice unless the killing is justifiable or excusable, or unless there are such circumstances of provocation as will reduce the homicide to manslaughter. And if a man voluntarily and willfully does an act, the natural and probable consequence of which is to cause another's death, an intent to kill will be presumed."

(See also Naval Digest—Murder—13, 19; *Hotema* v. *U. S.*, 186 U. S. 413; *Sparf* v. *U. S.*, 156 U. S. 51; File 26262–8615, J. A. G., May 18, 1921; G. C. M. Rec. No. 53227.)

[P. 16] REVIEWING AUTHORITY: ACTION OF.

It is noted that the immediate superior in command in his action on a summary court-martial case stated that "In reviewing the preceding case, it is noted that the second specification is faulty in that there is no offense alleged. The mere statement that the accused 'did, on the occasion specified, order ------ ------, seaman second class, U. S. Navy, to lock him in said storeroom and to stay outside,' does not in itself set forth an unlawful act." From this it appears that the immediate superior in command believed the specification to be fatally defective and, if so, he should have disapproved the proceedings and findings thereon, instead of merely pointing out the fatal defects (File 26287–7874, J. A. G., May 20, 1921).

REDUCTION IN RATING: REVOCATION OF PERMANENT APPOINTMENT AS CHIEF PETTY OFFICER IS NOT CONSIDERED REDUCTION IN RATING.

Article 30 of the Articles for the Government of the Navy authorized the punishment of reduction to the next inferior rating, but in the opinion of the Department the revocation of a permanent appointment as chief petty officer is not a reduction to next inferior rating. Such a revocation involves only a change in status and not in rating (File 27217–4892, J. A. G., May 18, 1921).

SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS: STOLEN PROPERTY IN POSSESSION.

The offense of receiving stolen property has four essential elements: (1) That the property described has been in fact stolen; (2) that the accused received it into his possession; (3) that he received it with the knowledge that it had been stolen; (4) that he received it with a fraudulent intent, this fourth element being usually described in the specification or indictment by the word "feloniously" (File 26287–7870, J. A. G., May 16, 1921).

SENTENCES: MITIGATION OF.

An accused was found guilty of desertion and sentenced to be confined for a period of two years, then to be dishonorably discharged from the service and to suffer all the other accessories of such sentence. The convening authority approved the proceedings, findings, and sentence but mitigated the sentence in accordance with paragraph 13, Manual for the Government of U. S. Naval Prisons. The action of the convening authority in mitigating the sentence as above would make it possible for the accused to be restored to duty, which would not be sanctioned by law. Sections 1996 and 1998 of the Revised Statutes provides that men who have been convicted of desertion in time of war are forever incapable of holding any office of trust or profit under the United States or exercising any rights of citizenship thereof (File 26262–8612, J. A. G., May 20, 1921; G. C. M. Rec. No. 53228).

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[P. 17] STATEMENT OF ACCUSED INCONSISTENT WITH PLEA OF GUILTY.

Courts martial should give careful consideration to statements made by accused, when he has pleaded guilty, so that if such statement is inconsistent with his plea, change thereof may be made and the case then tried on its merits, and thus any miscarriage of justice prevented (File 26287–7868, J. A. G., May 25, 1921).

WITNESSES: AGREEMENT BETWEEN TESTIMONY OF.

"Too close agreement between the testimony of witnesses as to a rather involved and complicated occurrence is to be regarded with suspicion * * * It appears suspicious that the testimony should agree so closely on what at the time would appear to have been a rather unimportant part of an operation, and should differ so widely on points which would appear to have been of more importance" (File 26262–8357, J. A. G., April 5, 1921; G. C. M. Rec. No. 52645).

DISABILITY RESULTING FROM INJURY RECEIVED OR DISEASE CONTRACTED IN LINE OF DUTY BY A PERSON IN THE NAVAL SERVICE, GENERAL RULES RELATING THERETO.

In an opinion of the Attorney General, rendered August 21, 1918 (32 Op. Atty. Gen. 12), it was held:

> "Personal injury or disease shall be deemed to have been suffered or contracted 'in the line of duty' within the meaning of section 300 of the War Risk Insurance Act when the person on whose account compensation is claimed was, at the time the injury was suffered or the disease contracted, in active service in the military or naval forces, whether on active duty, on furlough, leave of absence, or under arrest, unless it appears that the injury or disease has been caused by wilful misconduct on his part or by something done by him in pursuing some private avocation or business and which has intervened as the producing cause between his public service or performance of duty and the injury or disease" (Syllabus).

The general rule set forth by the Attorney General in this opinion governing the question of line of duty is as follows:

> "The mere fact that an injury or disease is coincident in time with service is not sufficient to class it as suffered or contracted 'in the line of duty.' It must have been caused by the presence of its victim in the line of duty when it was received or contracted. But the relation of causation is sufficiently shown when it appears [P. 18] that the victim was at a place and doing what was required or permitted by his duty as a soldier, and that, between his presence and conduct and the injury or disease, no adequate and sufficient cause, for which he is responsible intervenes between his service or performance of duty and the injury or disease. He will be responsible for an intervening cause if (1) it consists of his own wilful misconduct or (2) it is something which he is doing in pursuance of some private avocation or business."

3. By way of illustration the Attorney General stated the proposition as follows:

> "A soldier in camp may, during a rest hour, be employing his time by working on an invention wholly disconnected with the military service. He is, in general, in the line of duty, but at the moment is exercising a private right for private purposes. An explosion is produced by chemicals which he is using. There has intervened a cause for which he is responsible and the injury is not suffered in the line of duty. But while so employed he is struck by lightning, or becomes ill, or is suddenly stricken with appendicitis, clearly there has been no intervening cause for which he is responsible and the injury is suffered in the line of duty. In either case, what he was doing was in no way inconsistent with the performance of his military duty. While he was doing it the duties of a soldier still rested on him. He was not free from their obligations, nor was he necessarily de-

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prived of the rights which grow out of their performance. This would result only in the event the thing he was doing, outside of his duty, in fact, caused the injury he received."

4. This opinion having come to the attention of the Department, exception was taken to the above ruling and a reconsideration was requested April 2, 1920, presenting several specific cases then pending in the Department involving the question of line of duty. In its request for reconsideration the Department stated:

"There is believed, however, to be no doubt that the question (line of duty) is fundamentally the same regardless of how it may be presented or by what instrumentality it is in the first instance determined, thus making unnecessary the consideration of specific statutes or regulations applicable to the various cases which arise" (File 26250–1491: 1).

In reply to the above the Attorney General on June 2, 1920 (File 26250–1491: 1) stated that he had reexamined the question involved in his opinion of August 21, 1919, and after a careful consideration was constrained to adhere to the views then expressed, but stated further that in considering the specific cases submitted by the Department he thought a third general rule should be stated, namely, "something which grows out of relations unconnected with the service or is not the logical incident or provable effect of duty in the service."

5. It will be noted from the above that these two opinions of the Attorney General give a far more liberal interpretation of the former opinion of the Attorney General (7 Op. Atty. Gen. 149) and the case [P. 19] of *Rhodes* v. *United States* (79 Fed. Rep. 740) than has been previously given to these authorities by this Department. It will be observed, however, that these opinions of the Attorney General are not quite as liberal on the question of line of duty as the Court of Claims in the case of *Moore* v. *United States* (48 Ct. Cls. 110); which authorities these opinions purport to adopt. The essential provisions of the opinion of the Attorney General of May 17, 1855 (7 Op. Atty. Gen. 149) are as follows:

"When the statute provides pension for disability or death occasioned by wounds or injuries received, casualty occurring, or disease contracted, in the line of duty, it intends that the performance of duty must have relation of causation or consociation, mediate or immediate, to the wound, the casualty, the injury, or the disease, which produces the disability or death.

"To determine the right of pension, the question is not whether, when the cause of disability or death occurred, the party was on duty or not, in active service, or on furlough or leave, in arrest or not, but whether, in any of the possible conditions of service, the cause of disability or death was appurtenant to, dependent upon, or connected with acts within, or acts without, the line of duty.

"Upon the question of casualty, the opinions of experts are evidence, but they do not constitute either exclusive or conclusive proof; and the question is to be judged by the real facts like any other matter of evidence.

"Where the proofs as to the question of actor and subject are balanced, and it is impossible to determine by them whether the case be one of contemporaneity or collocation only, or of cause and consequence, it is a reasonable inference of public policy to presume in favor of the service.

"It is according to public policy to presume in favor of the service, where the line of duty enters potentially into the causes of disability or death, although it be not certainly provable that it was the exclusive or predominant cause" (syllabus).

The essential provision in the opinion of the Circuit Court in the case of *Rhodes* v. *United States* is as follows:

"Nor was there any error in the definition which the court gave to the jury of a 'disease contracted in the line of duty' when he declared that 'the service must have been the cause of the disease, and not merely coincident with it in time.' This is the patent and natural meaning of the language of the statute. It places the service and the discharge of duty in the relation of causes to the injuries and diseases that warrant the grant of pen-

sions. It allows a pension for wounds or injuries received, and for diseases contracted in the service and in the line of duty. No one would seriously contend that every wound, injury, or disease received or contracted during the term of service is pensionable under this law. A wound or injury inflicted upon himself by a soldier, or received by him while hunting wild animals, or squabbling with his comrades for his own amusement, or while doing any other act not in the line of his duty, [P. 20] would form no basis for a pension. The reason is that it would not be caused by his presence in the line of duty. The same rule applies to wounds, injuries, and diseases; for in the law they stand together in a single class. The result is that neither injury nor disease can authorize the grant of a pension under the acts of Congress unless it is caused by the presence of its victim in the line of duty when it was received or contracted."

The essential provisions in the case of *Moore* v. *United States* are as follows:

"A soldier is 'in line of duty' until separated from the service by death or discharge, if during such period he is submitting to all of its laws and regulations; and he is 'in line of duty' while on leave of absence. But the wounds or disease must not be the result of his own misconduct" (syllabus).

"In this case, or in any claim under this statute, is the court to take and consider evidence as to when the disease of which the soldier died was contracted? In this age of the discovery and dispute as to disease microbes and germs, is the court called upon to take evidence and decide when the germs of typhoid fever, tuberculosis, or other diseases first began to incubate? If so, then the evidence might show that a soldier engaged in active war duty for years, and in the midst of which he died of tuberculosis, contracted the disease before he entered the service.

"We do not believe that any such narrow construction of this statute is demanded. We think that a reasonable construction of it confers the benefit whenever the soldier dies while in the service generally, and submitting to its rules and regulations, from wounds or disease not the result of his own misconduct."

It was further held by this Department in the case of an individual who had contracted a disease prior to his entry in the service and clearly not in the line of duty, and died by reason of medical treatment received in line of duty, that—

"It was held that since the patient's death was the direct and immediate result of the treatment administered to him by proper medical authority, that the death of the deceased occurred in line of duty. It is immaterial that the disease for which he was being treated was contracted not in line of duty and was acquired as a result of his own misconduct, the fact being established that death was not the result of the disease, but of the medical treatment for the disease" (File 26543–213, J. A. G., April 29, 1918; C. M. O. 37, 1918, 23).

In view of the foregoing, I am of the opinion that a member of the naval service who, between the date of his entry into the service and the date of his discharge, suffers injury or contracts disease resulting in disability, is in line of duty unless such injury or disease is caused by (1) his own willful misconduct, or (2) some act or course of conduct of his disconnected with his military duty. Further that if such person is suffering from a disease not construed as in line of duty and there intervenes a cause, such as medical treatment in [P. 21] line of duty, which brings about his death or results in permanent disability, that disability should be held to have occurred in line of duty.

A further question presented in cases coming before the Department concerns whether or not certain diseases contracted within a given period by a person in the naval service after he had entered therein should be considered as having been contracted prior to his admission into the service and therefore not in line of duty, and subsequent thereto and in line of duty. This office has heretofore consistently held that no general rule can be established to govern cases of this character, but that each must be decided upon the law and the facts applicable thereto; that is, if the facts appearing on the record in the case or the facts obtained from a properly authenticated medical history thereof, such as records of creditable institutions or the statement of the physician attending

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at the time of the origin of the disability complained of, show that it existed prior to the admission of such individual into the naval service it should be held to have occurred prior thereto and not in line of duty. On the other hand, if the only information available to establish the fact that the disability occurred prior to his admission into the naval service is a presumption either arising from the nature of the disease or mere speculation, it should be held to have occurred in line of duty, providing the same conditions are present as would otherwise warrant a holding of line of duty.

An individual in the naval service found to be suffering from an injury or disability should be considered to stand in a more favorable position relative to line of duty if he was in fact duly examined by the proper naval medical officer or officers at the time of his admission into the naval service. The further fact that such an individual has been in the naval service for a considerable length of time before the disability complained of had rendered him incapable of performing all of his duties should be conclusive in practically all cases that the disability had been incurred in line of duty unless it can be shown that the disability complained of was due to his own willful misconduct or some act or course of conduct of his disconnected with his military duties.

As a general proposition where it can be shown that the disability complained of is a recurrence, I am of the opinion that he should not be given the benefits of a finding of line of duty, but if the original disability of which the one in question is presumed to be a recurrence in fact happened many years prior to his admission into the naval service, or if in fact he has served a sufficient number of years to raise a reasonable presumption of recovery from the original disability, a holding of line of duty would be warranted.

The following are a few illustrations which the Attorney General has given for the purpose of pointing out the manner in which the general rules laid down by him should be applied:

(1) A yeoman (female) in the U. S. Naval Reserve Force was killed by her husband upon returning to her home after the completion of her duty for the day. The facts deduced showed that [P. 22] her death resulted from jealousy on the part of the husband. In other words, it grew out of the domestic relations of this woman entirely separate and distinct from her relations to the Government or the service. It was accordingly held not to be line of duty.

(2) A yeoman in the U. S. Navy on duty at our naval headquarters in London was killed by a motorbus in the vicinity of said headquarters about 3 hours after he had completed his duties for the day. In this case his death was held to have occurred in line of duty for the reason that after the day's work was done he was not required to remain in any particular place, and it was contemplated of course that during his period of rest it would be necessary for him to pass through the streets of London; such an incident being the logical result of his services under the circumstances.

(3) An electrician in the U. S. Naval Reserve Force on duty at Boston, Mass., was granted liberty on Saturday until the following Monday. On returning to Boston on the following Sunday afternoon in an automobile for the purpose of reporting at his station and duty the following morning, he met death in consequence of an automobile accident. This was held to be line of duty, the Attorney General stating his conclusion as follows: "An ordinary furlough or short leave of absence, however, is a part of the disciplinary regulations of the military service, and the furloughed soldier is still, generally speaking, employed in the active service, and I am convinced, in the line of duty, so long as he complies with the regulations and with the terms of his furlough. Such a furlough, of course, contemplates traveling by the ordinary means, and such accidents as are liable to happen to one so traveling, are logically incidents of the service."

(4) An enlisted man on authorized leave of absence at Brest, France, was injured while en route to Paris by the accidental discharge of a pistol in the hands of a soldier riding beside him on the train. This injury was held to have been incurred in line of duty for the reason that the accident occurred to this man while on leave without his fault and in the same manner as any other passenger might have been injured.

(5) An officer of the Naval Reserve Force while on leave of absence attempted to assist a woman in distress and was injured by a pistol shot. This injury was held not to have been received in line of duty because it resulted from a cause intervening between his service and the accident.

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In view of the foregoing, I am of the opinion that the question of line of duty is primarily a question of law and fact which should in each instance be decided by the office of the Judge Advocate General, which office is charged under the law and regulations with the decision of all questions of law relating to the naval service (File 7657–390: 40, J. A. G., May 20, 1921).

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[P. 11] CULPABLE INEFFICIENCY IN THE PERFORMANCE OF DUTY: CULPABLE, DEFINITION OF

An officer was tried on the charge, "Culpable inefficiency in the performance of duty." The court found the specification proved except the word "Culpable" and found the accused "Guilty in a less degree than charged, guilty of 'Inefficiency in the performance of duty'."

Section 9, article 8, of the Articles for the Government of the Navy, provides that "Such punishment as a court martial may adjudge may be inflicted on any person in the Navy who is * * * culpably inefficient in the performance of duty." Under this section, to be punishable at all, the inefficiency must have been culpable, otherwise no offense is alleged. According to Standard Dictionary "Culpable" means deserving of blame or censure; being in or at fault; blamable. "Words and phrases," volume 2, states: "'Culpable' as used in speaking of 'culpable negligence' means blamable." It is clear, therefore, that if the inefficiency of the accused was not "culpable," he cannot be held blamable, and is therefore guilty of no offense. An officer may be inefficient in the performance of his duty through lack of knowledge of matters of which he should be versed, but inefficiency of this character should not be made the basis of general court-martial proceedings, but could be taken cognizance of in his reports of fitness (File 26262–8710, J. A. G., June 15, 1921, G. C. M. Rec. 53432).

DECK COURT: SPECIFICATIONS.

It is noted in a recent deck court that the specification alleges, in substance, that the accused used obscene language. Section 78, Naval Courts and Boards, provides that "Where particular words form the gist of the offense, they must be set forth with particularly or declared to be of like meaning and purport. In cases where objectionable language forms the gist of the offense the objectionable language must be alleged." Care should, therefore, always be taken in drawing specifications of this nature to set out the objectionable words (File 27217–4932, J. A. G., June 14, 1921).

DISOBEYING THE LAWFUL ORDER OF HIS SUPERIOR OFFICER: WHAT CONSTITUTES.
COMMAND BY STAFF CORPS IN LINE.
HOSPITAL SHIPS: COMMAND OF.

1. An officer of the United States Naval Reserve Force was tried by a general court martial convened by the commander in chief, United States Pacific Fleet, on the following charge and specification:

Charge.—Disobeying the lawful order of his superior officer.

[P. 12] *Specification.*—In that _____, United States Naval Reserve Force, serving on board the U. S. S. _____, having, on or about March 13, 1921, on board said ship, been ordered by Commander _____ (M. C.), U. S. Navy, the commanding officer of said ship, to sign form N. Nav. 143 for the noon position of said ship, did then and there refuse to obey and did willfully disobey said lawful order, the United States then being in a state of war.

The accused was found guilty as charged and sentenced to be dismissed from the United States naval service. The convening authority, commander in chief, Pacific Fleet, approved the proceedings, findings, and sentence, and referred the record to the Secretary of the Navy for transmission to the President, in accordance with article 53 of the Articles for the Government of the Navy.

2. Disobedience of lawful orders constitutes one of the most serious offenses known to military law, and thle sentence adjudged by the court in this case is

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clearly commensurate with the offense alleged if, in fact, the accused is legally guilty thereof. From a very careful review of the record, this case presents many unusual conditions and as such necessitates very careful consideration. From the facts disclosed in the record two salient and determining points are involved: First, assuming that Commander _____ as commanding officer could legally issue an order to the accused, was the accused's refusal to obey the order to sign Form N. Nav. 143 for the noon position of the ship a disobedience of a lawful order such as would make it a military offense and the accused punishable therefor; second, did Commander _____, an officer in the Medical Corps of the United States Navy and commanding officer of the U. S. S. _____, have the lawful authority to issue such an order to _____, an officer of the line in the United States Naval Reserve Force.

3. In taking up the first point involved and as set forth, *supra*, it is important to know what constitutes a lawful order and also when orders as such become operative; that is, when they acquire such binding force as to confer upon a failure in respect to obedience the character of a military offense. The presumptions of regularity and good faith which attend public officers in the performance of their duties apply to the orders of a superior with precisely the same force as to his other official acts, and, therefore, the general rule is that an order legal on its face is presumed to be legal. The accused may in his defense, however, rebut that presumption, failing in which he can properly be found guilty.

4. A lawful order may be defined as a command issued by a military superior to a person under his command requiring an act to be done which is permitted, sanctioned, or justified by the law of the land (Davis Military Law, p. 381). To justify, from a military point of view, a military inferior in disobeying the order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, [P. 13] or something of a serious character (not involving important consequences only) which, if done, would not be susceptible of being righted. An order requiring the performance of a military duty cannot be disobeyed with impunity unless it has one of these characters (Dig. J. A. G. Army, 27, par. 7; Davis Military Law, p. 381). Of the characters enumerated the case at bar falls within the class last named. Examining the specification carefully with due regard to the import of the offense alleged, together with the evidence adduced in reference thereto, we find that the accused was attached to the U. S. S. _____, and assigned by the medical officer in command to duty on board as "senior deck officer." Neither this title nor the duties thereof are prescribed in Navy Regulations, 1913 or 1920. He had had 23 years' active sea service, about 12 years of which was as deck officer and master of various steamers, passenger and cargo and oil tankers, including about three and one-half years in the Naval Reserve Force. Commander _____, a medical officer, ordered the accused to sign Form N. Nav. 143 for the noon position of the ship. It should be borne in mind that this form was at the time of the issuance of the order filled out with a noon position and signed by the officer who had by calculations determined upon the report given.

5. The U. S. S. _____ was making passage from Mare Island, Calif., to San Pedro, Calif., at the time the accused refused to sign the noon report. Commander _____, the commanding officer, testified (p. 15, Record, A.44): "At 12:20, the time I went to see Mr. _____, it was very foggy and thick." The lookouts on the ship had been doubled (Rec., p. 38, A.22). All had been directed to particularly keep their ears open and a steamer's whistle was heard on the starboard bow. Shortly after, at 12:26 p. m., the Point Arguella fog siren was picked up on the port bow (Rec., p. 40, A.7). It was estimated that the sound of the fog siren was abeam at 12:39 p. m. A sounding showed 39 fathoms, and when it was considered that Point Arguella was abeam the course was changed from south 48 east to south 65 east per standard compass. From the foregoing it will be seen that at the time of the refusal of the accused to sign the report the ship was on soundings, in a heavy fog, a steamer not visible on the starboard bow, and a sound signal on shore, the location of which determined a change of course. The circumstances surrounding the accused's refusal was that Lieut. _____, the line officer on the ship, designated as the navigator, was directed by the accused that "as the weather is now thick again, I could not enter the chartroom to figure out the noon position" (Rec. p. 40, A.6). The accused had roughly marked the position

on the chart based upon a speed that had been reduced; he instructed Lieut. ------ to allow 2 miles back of that position and to fill out the noon report, sign it, and turn it in to the commanding officer, who had previously, the night before, under similar weather conditions, authorized such [P. 14] procedure. The commanding officer testified: "I returned this position report by the orderly to Lieut. Commander ------ and requested that he sign it. The orderly returned, stating that Mr. ------ would not sign the report at that time. I again returned the position report by the orderly, directing Mr. ------ to sign it, or state in writing, his objections to me, the reasons. The orderly returned to my cabin and stated that Mr. ------ would sign the position report after the weather cleared up. I then personally took the position report up to the first deck and directed Mr. ------ to sign it. He stated he could not sign it then. I then asked him if he refused to sign it. He stated he did."

6. In determining the propriety and justification of the accused's refusal it is pertinent to consider other evidence as brought out by the testimony of the commanding officer. When asked, "47 Q. Was the ship on sounding at the time," he testified: "A. According to the log it was not." The counsel for the accused then, in comment to the court, stated that Commander ------ as commanding officer was required to be on the bridge and take part in heavy weather when on sounding or in other imminent danger; that the witness must know the answer to the question of his own knowledge and not refer to the log. "We have the log here and he can use it." The court then stated: "Does the witness desire to make any other answer to that question." "A. I do not." The witness, when asked how far the ship was from land, stated: "Not to my knowledge" (Rec., p. 16, q. 47). He further testified: "I have always considered that everything pertaining to the navigation of the ship was under the charge of Lieut. Commander ------" (Rec., p. 16, A. 80). Also, "52 Q. If the scope of your authority as commanding officer was similar to that of commanding officers of other vessels of the Navy, of which navigation of the ship was one, your duty would be on the bridge of the ship in fog or heavy weather?" "A. As commanding officer of a battleship—yes; of a hospital ship—no." Also "55 A. ------ I have never taken any actual part in the navigation of the ship."

7. That the very reason which actuated the commanding officer to order the accused to sign the noon report were the same reasons which governed the accused in refusing to sign the report is indicated by further testimony given by the commanding officer. "Q. 24. If the accused had signed that paper at the time, would you consider it proper for him to sign it without further investigation?" "A. My confidence in Mr. ------ is such that if he had signed that I knew it would be all right." "25. Q. Now, is it not a fact that the policy of the whole Navy, the policy which obtains in civil life, that no one should sign a paper without first satisfying himself or themselves that the facts mentioned therein are correct; is not that the policy which obtains in the service, Captain?" "A. Anything which an officer signs he is responsible for" (Rec., p. 30). It is [P. 15] interesting to note that Commander ------ testified that he did not report the noon position on March 13, 1921, to the commander in chief or to the commander of the train, due to the fact that Lieut. Commander ------ refused to sign the position report. "I had received an order from the chief of staff to report my position, and I consider it my duty to get the best position possible and the best authority to make my noon report" (p. 31, Rec., A. 33). In fact, the commanding officer disobeyed the lawful order of his superior officer and ostensibly justified his act upon the lack of sufficient and reliable information upon which to base such a report.

8. One of the governing causes that the commanding officer gave as his reason for insisting that the accused sign the noon report was that he had issued in writing an order to the accused making it his duty to "fill out N. Nav. Form 143 in every respect and submit the same to commanding officer over your signature at 8 a. m., 12 noon, and 8 p. m. Under remarks you shall state distance gone, distance to go, and probable date and time of arrival." However, in determining the guilt of the accused, reference must be had to the charge and specification as laid. If the accused in this case had been charged with neglect of duty and the specification alleged that he failed to fill out the noon report on March 13, 1921, as it was his duty to do, then that would have presented a different situation and the pertinence of the remarks hereinbefore stated would have a different relative bearing.

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9. In deciding the culpability of the accused upon the first point set forth herein recourse can only be had to the allegations as laid, to wit, the accused's refusal to sign N. Nav. 143, which had already been filled out by another. "Where an officer respectfully declined to comply with the directions of his superior to sign the certificate to a report of target firing on the ground that the facts set forth in such certificate were not within his knowledge, he having been stationed at the butt, where he was not in a position to be informed as to such facts, held that he was not amenable to a charge of disobedience of orders under this article" (Dig. J. A. G. Army, 30, par. 16; see also ibid., 29, pars. 12, 14, and 15; also Davis Mil. Law, p. 381).

10. A junior cannot shed himself from all responsibility for an act committed by himself under the protection of an order issued to him by his superior if the order itself was illegal. "Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at the moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatsoever to obey his superior officer would be fatal to military discipline [P. 16] itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior" (2 Willoughby Const. 1195, quoting Stephen's Hist. Cr. L. Eng., 205).

11. From the evidence adduced there was on board the hospital ship at the time of the alleged offense a number of sick, whose rescue in case of disaster, according to the testimony of Commander _____ was problematical. The commanding officer did not, in accordance with his own testimony, in any way exercise any supervision over the safe navigation of the ship, but placed the responsibility therefor upon the accused, who was merely ordered to the ship for duty under the commanding officer. This presents an anomalous situation in maritime custom, but the accused realized and knew this to be a fact, and testified that when he read the order to sign the report he considered it a very critical time. With the ship steaming in a thick fog, on sounding and within close proximity to shore, with the sound of an unseen steamer on the starboard bow, with the sound of a shore station on the port bow, on a course that was to be changed at the proper and proximate time, in a lane traversed by seagoing vessels, the meeting of which was more probable in thick weather at this place, can it be assumed that the accused, upon whose shoulders the responsibility for safeguarding the ship and lives on board rested, would have been warranted and absolved from blame if a disaster had resulted as a result of his compliance with the order of the commanding officer, who actually did not assume any of these responsibilities, nor was familiar with the conditions that existed, taken the report and checked all the data required thereon, thereby taking himself away from all possibility of exercising active control of the navigation of the ship? There seems to be no other reasonable or logical conclusion but that he would not have been so justified, and his action if so executed would have fallen within the classification of something of a serious character, which if done would not be susceptible of being righted. On the first of the points hereinbefore referred to I am therefore of the opinion that under all the circumstances of the case the actions of the accused do not constitute the military offense of disobedience of the lawful order of his superior officer.

12. Taking up the second of the points hereinbefore referred to, it must be noted that the accused was not on board the hospital ship U. S. S. _____ as a patient, but, on the contrary, he was an officer attached to the U. S. S. _____ by order signed by the Chief of the Bureau of Navigation, which directed him to report to the commanding officer of that ship for such duty as might be assigned to him on board. Therefore the question resolves itself into whether an officer of the line of the Navy, ordered to duty on board a hospital ship commanded by a medical officer of the Navy, is subject to his military command for the performance of line duties [P. 17] or such other duties as his commanding officer may direct. The accused in this case is an officer in the line of the United States Naval Reserve Force, and as such he is on the same basis as an officer in the line of the Regular Navy, and therefore no differentia-

tion need be made between the two in the discussion of the case at bar. The act of August 29, 1916, provides:

> "Enrolled members of the Naval Reserve Force shall be subject to the laws, regulations, and orders for the Government of the Regular Navy only during such time as they may by law be required to serve in the Navy, in accordance with their obligations, and, when on active service at their own request, as herein provided, and when employed in authorized travel to and from such active service in the Navy" (38 Stat. 588).

Officers of the United States Navy shall be known as officers of the line and officers of the staff (art. 148, Navy Reg., 1920). Officers of the line exercise military command (art. 150, Navy Reg., 1920). The Navy Regulations are silent insofar as a definition of staff officer is concerned, although it designates the officers of the staff as follows: Medical officers, dental officers, supply officers, chaplains, professors of mathematics, naval constructors, and civil engineers (art. 151, Navy Reg., 1920).

13. It is obvious that every military establishment, whether Army or Navy, must have connected with it certain organizations of business or scientific men whose services, although auxiliary to the combatant force of such establishment, are yet necessary to its efficiency. These constitute the staff corps as distinguished from the line. It is also necessary that the officers of such corps, being gentlemen who render important and valuable services, should be brought into such relations with the officers of the line that their dignity shall be preserved and the proper order of a military establishment maintained. While, therefore, rank is primarily established with those who are entitled to command with a view to determining the order in which they are to command, it is necessary to give to the grades created in other corps a rank which shall either be the same with the rank of the officer of the line or which by relation to the rank of the officer of the line shall entitle those holding it to such attention and respect as is accorded to officers of the line of the rank to which it relates or is assimilated. Such rank, whether it be absolute or relative rank, may, of course, be always subject to such exceptions as the legislative power may deem proper. In January 1871, a bill was passed by the House of Representatives which gave to each staff officer definite or absolute rank. * * * This bill was the subject of much discussion, and in the Senate it was amended and finally passed by both Houses of Congress in the form which gave to the officers of the staff relative rank, the phase used in regard to such officers being—e. g., "13 pay inspectors, who shall have the relative rank of commander" * * *. It is impossible to conceive why this change was made if Congress, when it [P. 18] finally passed the bill, did not suppose that the "relative" rank of commander was something different from the rank or grade of commander. While, undoubtedly, Congress might provide that he should have the absolute rank of commander and might annex to it appropriate conditions, considering the duties expected to be performed by him, such as that he should not exercise "military command," it is apparent that in inserting the word "relative" Congress has made the provision that it deemed necessary for the respect which was undoubtedly to be accorded to him (16 Op. Atty. Gen. 414). That Congress by giving relative rank to staff officers did not intend thereby to extend to them military command, additionally provides that "the relative rank given by the provisions of this chapter to officers of the Medical, Pay, and Engineering Corps shall confer no authority to exercise military command" (Sec. 1488, Rev. Stat.).

14. Section 1488, R. S., quoted, supra, was amended by the following provisions in section 7 of the Navy personnel act of March 3, 1899 (30 Stat. 1006):

> "All sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words 'the relative rank of are hereby amended so as to read 'the rank of,' but officers whose rank is so defined shall not be entitled in virtue of their rank to command in the line or in other staff corps."

Insofar as the law at present stands as regards medical officers, the above-quoted act of March 3, 1899, is governing and therefore restricts them from

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exercising command in the line or other Staff Corps unless it is repugnant in its application to the act of March 3, 1901 (31 Stat. 1153), wherein it is provided:

> "That the President of the United States be, and he is hereby, authorized to establish and from time to time to modify, as the needs of the service may require, a classification of the vessels of the Navy, and to formulate appropriate rules governing assignments to command of vessels and squadrons."

Article 668, Navy Regulations, 1920, reads:

> "A hospital ship, being assimilated to a naval hospital on shore, shall be commanded by a naval medical officer not below the grade of lieutenant commander, such commanding officer being detailed by the Navy Department."

15. Thus in enacting the above law did Congress intend to raise all restrictions of previous law as regards the duties that could be assigned to officers of the staff corps by providing that the President could "formulate appropriate rules governing assignments to command of vessels and squadrons." If this was the intent of Congress, then under this authority any officer of any staff corps could be assigned in command of a vessel or squadron so that it would apply not only to a medical officer, but also to a chaplain, professor of mathematics, etc. Therefore, it necessarily follows, insofar as the [P. 19] law is concerned, that a chaplain could legally be assigned to command a ship or squadron.

16. In arriving at the meaning of a statute where the proper construction is doubtful, it is always proper to consider the history of the statute and the different steps taken in the enactment of the law as disclosed by the legislative records; also to look into the conditions surrounding the subject matter of the legislation at the time the act was passed and the situation as it existed and as it was pressed upon the attention of Congress (Clark's case, 37 Ct. Cl. 60; *U. S.* v. *Smith*, 197 U. S. 386; *Holy Trinity Church* v. *U. S.*, 143 U. S. 457).

Section 1539, Revised Statutes, provided that—

> "The vessels of the Navy of the United States shall be divided into four classes, and shall be commanded as nearly as may be as follows: First rates, by commodores; second rates, by captains; third rates, by commanders; fourth rates by lieutenant commanders."

Section 1530, Revised Statutes, provided that—

> "Steamships of forty guns or more shall be classed as first rates, those of twenty guns and under forty, as second rates, and all those of less than twenty guns as third rates."

17. The foregoing laws were passed by Congress, July 16, 1862. It will be noted that in the designation of command for the classification of ships, the titles, commodore, captain, etc., were used. These titles were applied only to officers of the line, staff officers' titles being then designated and distinguished in the law by appropriate titles commensurate with the duties performed, such as chaplains, pay directors, medical directors, etc., Congress clearly indicating thereby that line officers only should command rated vessels of the Navy. In the preparation of the naval appropriation bill, which finally approved, became the act of March 3, 1901, the following provisions were inserted:

> "That sections 1529 and 1530 of chapter 6, table XV, of the Revised Statutes of the United States be amended so as to read as follows:
>
> " 'SEC. 1529. Vessels of the Navy of the United States, except torpedo boats and other special vessels, shall be divided into four classes, and shall be commanded as nearly as may be as follows: First and second rates, by captains; second and third rates by commanders; fourth rates, by lieutenant commanders and lieutenants; torpedo boats and other unclassified vessels, by officers below the grade of lieutenant commander.
>
> " 'SEC. 1530. Vessels of 5,000 tons displacement or more shall be classed as first rates; those of 3,000 tons or more and below 5,000 tons as second rates; those of 1,000 tons or more and below 3,000 tons as third rates; those of less than 1,000 tons as fourth rates.' "

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18. The then Secretary of the Navy addressed certain correspondence to the chairman, Committee on Naval Affairs, House of Representatives, [P. 20] wherein he referred to sections 1529 and 1530 of the Revised Statutes and stated "the classification of naval vessels prescribed in these two sections is obsolete. It was established before the era of steel vessels and rapid-fire breech-loading ordnance and is not applicable to a modern Navy * * *." Inasmuch as the presence on the statute books of provisions of law which cannot be observed is objectionable, it is desired that these sections be repealed. In view of the many elements which should be taken into consideration in determining the relative importance of vessels of the several classes, and in consideration of changing conditions affecting not only the vessels themselves but the Navy list also, which may speedily render any fixed rule inapplicable, it is suggested that no absolute classification of vessels or prescription as to command be embodied in the statute, but that, instead, the President be authorized to establish classification of naval vessels and to prescribe appropriate rules governing assignments to command. Such classification and rules would be susceptible of modification from time to time as altered conditions might require." (See Hearing before the Committee on Naval Affairs, 56th Cong., 2d sess., 1901, under caption Classification of Naval Vessels.) It was then recommended that the following provision be enacted into law:

> "That the President of the United States be and he is hereby, authorized to establish and from time to time modify, as the needs of the service may require, a classification of the vessels of the Navy, and to formulate appropriate rules governing assignments to command of vessels and squadrons."

19. The above provision was offered as an amendment to the act of March 3, 1901, and accepted in lieu of the amended sections of 1529 and 1530, Revised Statutes, hereinbefore quoted, and the same became a part of that law. As a result of this law, the President, in Executive Order of June 7, 1901, established a classification of naval vessels, and the classification of naval vessels and the appropriate commands therefore were consequently set forth in the Regulations for the Government of the Navy of the United States, 1905, articles 31–39, this being the next issue of the Navy Regulations after the passage of the law, and in all of the classifications of ships officers of the line were designated to command.

20. Again, considering the law and its application to the case at bar, it must also be borne in mind that the legislative intent does not necessarily mean the intention of the person who drafted the law, but must be the intent of the legislature as a whole. From an examination of the correspondence hereinbefore cited, there can be no question as to the intent and the object of the framers of this particular law. Let us, however, examine the law carefully to determine the apparent intent of Congress, which is the determining question.

21. It must be noted that the word "appropriate" is used by Congress in the language of the statute. In construing statutes every [P. 21] word is presumed to have a separate and independent meaning of its own. Congress is not presumed to have used words for no purpose. Accordingly, words cannot be construed as redundant and rejected as surplusage where it is possible to give them full effect. Also, it has been said that "there are many miles of interpretation, but they are of little use; common sense is the best guide" (Walker's Am. L., sec. 17). The rules by which courts are guided in construing statutes are sanctioned by wisdom and experience of which they are the outgrowth; an examination of these rules will show that "common sense" is generally their foundation.

22. It is considered meet and logical that Congress in using the word "appropriate" intended to include the full import of the word. Webster's New International Dictionary defines "appropriate" as "suitable, proper, fit, to adopt to the purposes intended, to answer the requirements of, correct." Therefore it is not believed that it is common sense to consider that Congress intended to raise all its prior restrictive legislation and authorize the President to assign any one to command vessels and squadrons of the United States Navy. Such assignments must be appropriate; i. e., adapted to the purposes intended. It

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could hardly be said that Congress intended that the President could under that provision of law assign a chaplain in command of a battleship, no matter how excellent the chaplain as such might be, for, as previously stated, it much be borne in mind that if Congress by the act of March 3, 1901, intended to remove all previous restrictive laws as pertained to the duties of staff officers, the above example is a legal possibility.

23. In reference to whether the assignment of a medical officer in command of a hospital ship under certain conditions and subject to certain restrictions would not be an appropriate assignment to command, the Attorney General, in an opinion dated August 24, 1909 (27 Op. Atty. Gen. 571), discussed the provisions of the law of March 3, 1901, in connection with the command of a hospital ship of the Navy, and *held*:

> "In the consideration of the various statutes here involved it may be suggested that the act of March 3, 1901, does not expressly repeal prior laws on the subject, and that section 1488, R. S., which declared that the relative rank of officers of the Medical Corps shall not authorize them to 'exercise military command' and the act of March 3, 1899, which abolished the relative rank but provided that the actual rank conferred upon medical officers should not entitle them to 'command in the line or other staff corps,' are still in force. The answer to this is, first, that, assuming the command of a hospital ship is a 'military command,' these words in section 1488 have been supplanted by the later act of March 3, 1899, which provides that medical officers shall not 'command in the line or in other Staff Corps'; and, second, that the command of a hospital ship by a medical officer is not a 'command in the line or in other Staff Corps.' It is command in the medical officers' own staff corps, and in their [P. 22] own Staff Corps medical officers have always had a command" (sec. 1136, Navy Reg., 1905; sec. 1004, Navy Reg., 1909). And further on he states:
>
> "It was clearly not contemplated by these regulations or orders that there should be any line officer or regularly enlisted man other than in the Hospital Corps as any part of the complement of the hospital ship. The medical officer in command, therefore, is given no command in the line of the Navy or in any other Staff Corps."

24. That Congress has consistently considered that staff officers have not the right to exercise military command in the line or other staff corps is indicated by further enactments of Congress where they have in certain instances removed this restriction. For example, in the act of June 24, 1910 (36 Stat. 614), it provided:

> "That line officers may be detailed for duty under staff officers in the manufacturing and repair departments of the navy yards and naval stations, and all laws or parts of laws in conflict herewith are hereby repealed."

The Judge Advocate General of the Navy, in an opinion dated January 18, 1915 (5038–20:1), in rendering an opinion on the effect of this law, *held:*

> "This provision was very restricted in its scope, limiting the detail of line officers under staff officers to the manufacturing and repair departments of navy yards and naval stations. In other words, the act of 1910 had the same effect as if it had specifically stated that line officers may not be detailed for duty under staff officers except in the manufacturing and repair departments of the navy yard and naval stations."

Also the following provision contained in the act of June 30, 1914 (38 Stat. 392), and repeated in the act of March 3, 1915 (38 Stat. 930):

> "* * * Officers of the Construction Corps shall be eligible for any shore duty compatible with their rank and grade to which the Secretary of the Navy may assign them."

Thus in the law last above cited Congress, in removing the restriction upon the duty to be assigned officers of the Construction Corps, provided that that duty on shore should be "compatible with their rank and grade." In other words, it carefully limited its scope to such assignments as were compatible with their rank and grade and did not go so far as to authorize the assignment of a construction officer to duty as a medical officer of a station; similarly, it did

not authorize the assignment of a construction officer to line duties, although in assigning him to construction duties line officers might be assigned to duty under him.

25. Under the caption "Authority of staff officers," article 153 (2), Navy Regulations, 1920, stated:

> "They shall not, by virtue of rank and precedence, have any additional right to quarters, nor shall they have authority to exercise command except in their own corps and except as provided in articles 170 and 171; * * *."

[P. 23] Article 170 provides that a medical officer may command a hospital ship, and article 171 provides that line officers may be detailed to duty under staff officers in the manufacturing and repair departments of navy yards and naval stations. Article 667 provides "that hospital ships shall be governed by the provisions of the Navy Regulations, so far as they apply, of the laws of the United States, and of The Hague convention," etc. The Navy Regulations of 1920, in so far as they contain subject matter pertaining to hospital ships, are very meager and inadequate to definitely determine and outline their status. On the other hand, the Navy Regulations, 1913, which were superseded by the Navy Regulations, 1920, are very complete and clearly outline the exact status of hospital ships and the duties of all on board. It is pertinent to note that the orders to both Commander _____ and Lieut. Commander _____ were issued during the time the 1913 regulations were in force.

Article 2914 of the Navy Regulations, 1913 provides:

> "A hospital ship, being assimilated to a naval hospital on shore, shall be commanded by a naval medical officer not below the grade of surgeon, such commanding officer being detailed by the Navy Department. Such vessels shall be manned by a merchant crew and officers, and in addition by a detail from the Hospital Corps of the Navy, the latter to be employed in carrying out the duties for which the vessel is especially assigned."

These regulations further outline the duties of the master of the hospital ship as having full and paramount control of the navigation of the ship and full responsibility for the discipline and efficiency of the civilian officers and crew.

26. It is a well-settled rule of judicial construction that the regulations issued by the Secretary of the Navy in conformity with section 1547 of the Revised Statutes are valid and have the force of law when they are not inconsistent with the statute under which they are issued by the Secretary (25 Op. Atty. Gen. 270, 274). However, it is not considered that any question need arise as to the legality of the regulations of the United States Navy as they are not necessarily contrary to existing law.

The laws of the United States bearing on the case at bar have been hereinbefore cited and discussed; so, also, the pertinent parts of the Navy Regulations approved by the President of the United States have been quoted. Thus it will be seen, at the time the orders to the commanding officer and to the accused were issued, neither the law nor the regulations contemplated the commanding officer an officer of the staff corps exercising military command in the line or in other staff corps, or, in other words, Commander _____, exercising military command over the accused.

27. General Order 541 of the series of 1913, the current "Ship's data, U. S. naval vessels," and the current Navy Directory all classify a hospital ship as an auxiliary. The act establishing the Naval Reserve Force (act of Aug. 29, 1916) provides:

> [P. 24] "Hereafter, in shipping officers and men for service on board United States auxiliary vessels, preference shall be given to members of the Naval Reserve Force, and after two years from the date of approval of this act, no person shall be shipped for such service who is not a member of the Naval Reserve Force."

It will be borne in mind that the above law applied to all naval auxiliary vessels, of which a hospital ship was but one, and in providing officers and crew for the hospital ship it was therefore necessary to order naval reserves on active duty to these ships; but, on the other hand, to conform to the law and the then existing regulations, it was necessary that the naval reservist crew of the hospital ship must be on inactive duty, thereby complying with article 2914

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of the Navy Regulations, 1913, that the crew be a merchant crew and also complying with the law in all respects.

28. From a careful examination of the Navy Regulations, 1920, which superseded the previous existing regulations, there appears to be no specific provisions whatsoever to cover the question of the crews of hospital ships and the duties of the personnel thereof. On the other hand, the Navy Regulations of 1920 specifically limit the authority of medical officers not to command in the line and other staff corps (art. 153 (2)), except as provided in article 170, which states medical officers may command hospital ships and, furthermore, article 667, which states that "hospital ships shall be governed by the provisions of the Navy Regulations, so far as they apply, of the laws of the United States," etc., thereby clearly limiting the command of hospital ships to comply with the laws and regulations.

29. From the foregoing, it will be seen that the situation arising in this case presents peculiar conditions, for it appears in fact that the accused, a line officer, was serving on the hospital ship commanded by a medical officer. Thus it will be seen that the conditions as existing in this case are different from those that existed at the time of the Attorney General's opinion (27 Op. Atty. Gen. 571) hereinbefore quoted, where he stated that the medical officer in command was not exercising a command in the line but a command in his own staff corps as the crew was a merchant crew and therefore he could legally command. Furthermore, when medical officers were initially placed in command of hospital ships by the President of the United States, acting in his capacity as Commander in Chief, it was not contemplated by him that line officers would be attached thereto. President Roosevelt, in issuing the order to place medical officers in command of hospital ships (Jan. 4, 1906), stated, "and no line officer should be aboard it."

30. In view of the foregoing remarks, it appears conclusive that medical officers cannot exercise command in the line or other staff corps, either by law or existing regulations, and, therefore, the accused was not guilty of having disobeyed the lawful order of his superior officer.

[P. 25] The accused, when arraigned on the charge and specification thereunder, demurred thereto on the ground that the order as given by Commander ------ to the accused was not a lawful order, and, therefore, in view of the foregoing remarks, the court erred in finding the charge and specification in due form and technically correct, for the reason that the order was not a lawful order. It is further noted that the specification alleges, when the offense was committed on March 13, 1921, "the United States then being in a state of war." This allegation was incorrect, by virtue of Alnav 26, wherein it was stated, inter alia, that "the averment 'the United States then being in a state of war' will be omitted in specifications of offenses committed on or after March third, 1921."

31. In view of the foregoing, * * * the proceedings, findings, and sentence of the general court martial in the case of Lieut. Commander ------, United States Naval Reserve Force, were disapproved and the accused released from arrest and restored to duty.

MEMBERS OF COURT: CHALLENGED BY ACCUSED, AND CHALLENGE SUSTAINED, SHOULD WITHDRAW.

In a recent case each member of the court was challenged by the accused, and the challenge in each case was sustained. The record shows, however, that none of the challenged members withdrew, but continued to sit on the court and to determine the remaining challenges. Such procedure was wholly illegal. The challenge of a member having been sustained, the officer in question is no longer a member of the court during the trial of that particular case, and should immediately withdraw. Furthermore, the court continued to sit as a court in determining challenges after it had been reduced below a legal quorum of five members. Section 282, Naval Courts and Boards, provides that: "If, by challenges sustained, a court is reduced below the legal quorum, the convening authority shall be notified as soon as practicable and the court adjourned awaiting the appointment of new members by the convening authority."

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MEMBERS OF COURT: NOT SWORN.

In a recent case the court, having been reduced below the legal quorum by sustained challenges, adjourned. After the adjournment the accused withdrew his objections and the convening authority thereupon directed the court to proceed with the trial. The record shows that upon reconvening the court proceeded with the trial without ever being sworn. Such omission constitutes a fatal error. Section 283, Naval Courts and Boards, provides that: "Until a court is duly sworn according to law, it is incompetent to perform any judicial act except to hear and determine challenges against its members" (File 26262–8262, J. A. G., March 1, 1921; G. C. M. Rec. 52171).

[P. 26] SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS: STOLEN PROPERTY IN POSSESSION.

All officers in the naval service should understand what are the essential elements of this offense and what proof of these elements is sufficient to justify a court martial in finding the specification proved. In *Kirby* v. *United States*, 174 U. S. 47, 1898, the court said that it was necessary to prove beyond a reasonable doubt (1) that the property described in the indictment had been in fact stolen, (2) that the defendant received it into his possession, and (3) that he received it with knowledge that it had been stolen.

(*a*) To establish a prima facie case of theft in connection with this offense all that need be proved is (1) the corpus delicti of the theft, e. g., that it had been committed, which is sufficiently established by proof that the article was missing under such circumstances as to indicate a theft, and (2) that the theft was committed by someone other than the accused. This latter is necessary because theft and receiving stolen property are separate and distinct offenses (Court-Martial Order 114, 1918, p. 25), and consequently proof of the one will not support an allegation of the other. In naval cases a prima facie case of theft or larceny (the two words being identical in meaning) has been made out when the true owner of the articles testifies that he had left the article in a place of safety, such as his locker, or securely fastened on a clothesline, from which he would be the only person to have the right to remove it, and that the article was gone the next time he went to get it. To establish a prima facie case that the accused was not himself the original thief, it is not necessary to show positively that someone else was the thief, but only that, under all the circumstances of the case, it was improbable that the accused could have been the original taker from the possession of the true owner.

(*b*) To be guilty of receiving, the accused must have come into possession. An article is considered to be in the possession of a person in the naval service whenever it is within a place which that person has the exclusive use of, such as a man's locker, hammock, or ditty box. Such possession in and of itself establishes a prima facie case that the accused willingly received the article into his possession, this prima facie case being open to rebuttal by evidence that the article was placed in the accused's possession without his knowledge or consent.

(*c*) The point most difficult of proof is that the accused knew that the goods were stolen at the time he received them, for it is not enough that the accused has merely retained goods in his possession which he has ignorantly received but has later become aware were stolen. Nor is there any presumption of guilty knowledge on the part of the accused from the mere fact that he was in possession of the stolen goods, but some evidence as to his guilty knowledge must be introduced (22 L. R. A. (N. S.) 840).

From a review of the adjudged American cases, the rule may be laid down for use in the naval service that a court martial is justified, [P. 27] though not required so to do, in drawing the inference of guilty knowledge on the part of the accused when, in connection with proof of the accused's possession and of the fact that the goods were actually stolen at the time of his receiving, additional evidence is offered that—

(1) The accused bought the article at a price so low that it would tend to arouse suspicion in the mind of the ordinary man as to the genuineness of the seller's title, accompanied by lack of any inquiry on the part of the accused.

(2) That the article was plainly marked with the name of a man other than the seller and that the accused made no inquiry re such marking.

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(3) That the accused denied receipt or possession of the article, which is shortly afterwards found in his possession, coupled with the failure of the accused to rebut this prima facie of receiving.

(4) That the transfer to the accused was made furtively, at a strange hour of the night, or in an unusual place, not ordinarily frequented by the parties to the transaction.

(5) That the accused and the thief were intimates.

(6) That notice of the losing of the article had been read off at quarters, posted on the bulletin board, or had become common knowledge in any other way to such an extent that the accused's knowledge, together with that of the rest of the crew, could be inferred beyond a reasonable doubt.

(7) That the accused had concealed his possession, or had himself quickly gotten rid of the article, in a secret manner as by taking it ashore and pawning it.

(8) Any other similar suspicious circumstances that lead the court to believe that the accused knew the character of the goods at the time he received them.

There is a further element not discussed in *Kirby* v. *U. S.*, *supra*, necessary to be proved in this as in every other criminal case. This is the criminal intent with which the act was done, for unless the goods are received with an intent to defraud the rightful owner thereof, no offense has been committed (34 Cyc., 516). Although the law does not presume the existence of a fraudulent intent from the fact that a party received stolen property with knowledge of the theft (*Goldstein* v. *State*, 1902, 66 Nebr., 312), yet, since intent is never a matter of direct proof, in the absence of a plea of guilty, but must be proved by the circumstances, it may very well be that the circumstances already established, e. g., that the accused had received into his possession stolen goods, plus some evidence to indicate his knowledge of the character of the goods, accompanied by his failure to return them to the true owner prior to their discovery in his possession, will establish a prima facie case for the prosecution in respect to the accused's fraudulent intent. But if the defense proves that the accused received the goods for a legitimate purpose, such as to return the goods to the true owner without holding for reward, the crime is not committed, because no [P. 28] criminal intent has been established (sec. 101, Naval Courts and Boards; File 26287–7785, J. A. G., June 14, 1921).

From the foregoing it will be seen that the specification inserted by Changes No. 3 on page 120, Naval Courts and Boards, alleging the offense of receiving stolen property, is difficult of proof in any event. Where it is merely desired to punish an offender for having another man's property in his possession, the simpler procedure outlined in the following article, "Possession of other men's property," should be followed.

POSSESSION OF OTHER MEN'S PROPERTY: SHOULD BE MADE AN OFFENSE BY MEANS OF A SPECIAL LOCAL ORDER.

In the reviewing of summary courts martial and deck courts it is noted that some ships and stations are still using the specification alleging merely an unlawful possession of property, the insufficiency of which was pointed out in Court-Martial Order 237, 1919, pages 15–16, and which was stricken from page 120, Naval Courts and Boards, by Changes No. 3, dated November 29, 1919.

Inasmuch as the use of this erroneous specification necessitates the setting aside of a case by the Department, and since the specification alleging the receiving of stolen property inserted in its place on page 120, Naval Courts and Boards, does not fit the facts in many cases, and is difficult to prove in the naval service, it is suggested that commanding officers promulgate an order to their commands prohibiting anyone from having in his possession, without permission from proper authority, articles of property belonging to the United States, or persons in the service other than himself, and directing that any clothing or other property found should be turned in at once to such person as may be designated by the order. A violation of this order would then be punishable as an infraction of a lawfully issued order.

In drawing up a specification for the offense of having another person's property in possession after the publication of such an order, the following specimen specification can be used as a guide:

"*Specification.*—In that ------ ------, landsman for electrician, U. S. Navy did, on or about December 21, 19__, on board the receiving ship at ------

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------, while serving on board said ship, in violation of a lawful ship's (station) order, have in his possession without permission from proper authority, one gold watch, of the value of about thirty-five dollars ($35), and one gold chain, of the value of about seven dollars ($7), both the property of ------ ------, seaman, U. S. Navy; and eight dollars ($8) in United States money, the property of ------ ------, electrician third class, U. S. Navy."

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[P. 11] ACCUSED: STATEMENT OF, INCONSISTENT WITH PLEA OF GUILTY.

An oral statement by an accused after a plea of guilty, setting up that it was necessary in the performance of his duty for him to commit the act charged in the specification, is inconsistent with a plea of guilty (File 26287–8007, July 25, 1921).

ACCUSED: COUNSEL, DETAIL OF.

An accused entered and requested that counsel be detailed for him and the court directed the recorder to act as such. From the provisions of section 266, Naval Courts and Boards, it is apparent that it was improper for the court to detail counsel for the accused and that the proper procedure would have been for the court to have adjourned until the convening authority had detailed suitable counsel. Furthermore, the counsel, when the accused requests one, should be an officer other than the recorder. The latter is properly charged with the interests of the accused only in cases where the accused has no counsel.

In view of the fact that the procedure followed by the court in this case in effect deprived the accused of a right to which he is entitled and which he did not waive, the proceedings, findings, and sentence in the case of the above-named man are set aside (File 26287–8053, August 4, 1921).

CHARGE: UNAUTHORIZED.

The accused was tried, among other charges, on the charge "Assaulting and striking his superior officer." "Changes, Naval Courts and Boards, No. 2," directed that this charge be stricken out, the specification thereof thereby falling under "Assaulting and striking another person in the Navy." *Held*, that although the former charge was not an authorized one, since the specification supported both "Assaulting and striking his superior officer" and "Assaulting and striking another person in the Navy," the charge and specification should not be set aside (File 26262–8809, July 11, 1921; G. C. M. Rec. No. 53768).

CONFINEMENT: UNAUTHORIZED SENTENCE.

Accused was tried on charges (I) "Drunkenness," (II) "Assaulting and striking his superior officer," and (III) "Using threatening language toward his superior officer," plead guilty to charges I and III and was found guilty of charge II in a less degree than charged, guilty of "Assaulting his superior officer." The court sentenced him to be confined for a period of five (5) years, dishonorable discharge [P. 12] and accessories, but as the highest period of confinement on all these charges is two (2) years and nine (9) months, the Department set aside so much of the confinement in excess of this period (File 26262–8309, July 11, 1921; G. C. M. Rec. No. 53768).

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

A general definition of this offense contained in "Winthrop's Military Law and Precedents," page 1106, reads as follows:

> "Action or behaviour in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman, or action or behaviour in an

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unofficial or private capacity, which in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms."

Specific offenses which have been laid under this charge are set forth below, taken from Dudley's "Military Law and the Procedure of Courts-martial":

"Knowingly making false official reports or certificates; preferring false charges or accusations against another officer; *violation of pledge to abstain from intoxicating drink; appearing in a public place drunk, wearing his uniform,* or visiting a disreputable place in uniform; gambling with enlisted men; indifference to pecuniary obligations so as to bring discredit and scandal upon the service; violently assaulting another without cause; giving false testimony as a witness before a court martial, or attempting to suborn testimony; breach of trust; acts of fraud; cheats, etc.; abusing, assaulting, or beating his wife; duplication of pay accounts; commission of felony or crime; and other acts of like character, have been held chargeable under this article."

(File 26262–8826, July 23, 1921, G. C. M. Rec. No. 53815.)

EVIDENCE: HEARSAY.

In a recent case, counsel for the accused objected to any information received by ------, the witness on the stand, this witness having testified that he had information that the property in question was Government property. No action was taken by the court on this objection. As the information received by ------ was clearly hearsay, the court should have directed that that part of the witness's testimony be stricken from the record, and in any event when objection is made action thereon should be taken by the court in every case (File 26251–27998, July 5, 1921; G. C. M. Rec. No. 53593).

[P. 13] PRINCIPAL AND ACCESSORY.

Clark's Criminal Law, page 100, states:

"The distinction between principals and accessories is recognized in felonies only. The same participation or assistance which in case of a felony would make one an accessory before or after the fact will make him a principal in treason. *In case of a misdemeanor, all those who counsel or abet its commission, and who would be accessories before the fact if the crime were a felony, are treated as principals,* while those who assist after the act, and who would be accessories after the act, in case of a felony, are not punished at all for the particular misdemeanor. They may, however, be guilty of other substantive crimes, such as rescue, and obstructing an officer."

And on page 109 of the same volume the definition of accessory before the fact is stated as follows:

"An accessory before the fact is one who was absent when the act was committed, but who procured, counseled, commanded, or abetted the principal or actual doer of the act to commit it."

In the case at bar, no testimony whatsoever was introduced which would indicate that the accused in any way aided, abetted, or approved of the action of the other marine, he merely being present at the time of the assault but taking no part whatsoever in it, and there was no evidence of a preconceived plan to perform the acts related in the specification of the charge under which the accused might have been held as a principal. "Mere presence and neglect to endeavor to prevent a felony will not of itself make one a principal in the second degree; and this is true even though the person so present is to be benefited by the deed" (Clark's Criminal Law, p. 103).

(File 26262–8791, July 6, 1920; G. C. M. Rec. No. 53712.)

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RES GESTAE: WHAT CONSTITUTES.

Court admitted certain hearsay testimony on the ground that it was "res gestae." Department stated: "Res gestae has been defined to be 'declarations of the individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, and may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might otherwise not have. To make declarations on this ground admissible, they must not have been mere narratives of past occurrences, but must have been made at the time the act was done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction' (Rice on Evidence, vol. III, p. 122). Res gestae, in other words, may be said to consist of involuntary exclamations made contemporaneous with the main occurrence, and inspired by sudden excitement or fright" (G. C. M. Rec. No. 53868).

[P. 14] SPECIFICATION: NO OFFENSE ALLEGED.

A specification alleged that accused "while serving at the Marine Barracks, Naval Station, Guantanamo Bay, Cuba, did, on or about June 5, 1921, willfully receive and have in his possession one bundle of laundry of the value of about thirty-four ($34) dollars, the property of ------, private, U. S. Marine Corps." *Held:* This specification failed to set forth an offense, as no allegation was made that accused intended to convert property to his own use or commit any other illegal act in connection with it, the mere receiving not in itself being unlawful (File 26262–8810, July 11, 1921; G. C. M. Rec. No. 53770).

SPECIFICATION: NO OFFENSE ALLEGED.

An accused was tried the specification alleging that the accused "did * * * willfully break open the door of a refrigerator in the diet kitchen of O ward of said hospital."

It is the opinion of the Department that the specification is insufficient and fails to state an offense against the accused. Even though the accused did willfully break open the door of the refrigerator, he may have been authorized or even commanded to do so. If the accused had maliciously destroyed Government property or had broken open a door of the refrigerator without authority when authority was necessary, it should have been so alleged in the specification. It is pointed out that the primary meaning of the word "willfully" is "intentionally" and that if it is desired to charge a person with having done an act "criminally and maliciously" the specification should read "willfully and maliciously" (File 26287–8007, July 25, 1921).

SENTENCE: LIMITATION WHERE DEPOSITION IS INTRODUCED.

An accused was tried on the charge "Robbery," was found guilty of the charge, and sentenced to be confined for a period of seven (7) years, then to be dishonorably discharged from the naval service and to suffer all the other accessories of the sentence.

In order to prove the corpus delecti the deposition of ------, the party alleged to have been robbed, was introduced as evidence at the trial. Section 390, Naval Courts and Boards, states that "in any case where it is necessary to use depositions at the trial thereof, the maximum punishment under such circumstances shall in no case exceed one year." The court therefore exceeded its authority in sentencing ------ to be confined for a period of seven years, one year being the limit of confinement (File 26251–27690, July 6, 1921; G. C. M. Rec. No. 53193).

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[P. 15] SENTENCE: IMPROPER.

An accused was sentenced to two (2) years confinement and dishonorable discharge. No accessories as prescribed in section 349, Naval Courts and Boards, were adjudged. This would result in the accused receiving the full pay of his rating while in confinement and would entail upon the Government an expense for which it would receive no adequate return. So much of the sentence as involves confinement was remitted and the accused was immediately dishonorably discharged (File 26262–8829, July 16, 1921; G. C. M. Rec. No. 53825).

SENTENCE: IRREGULAR AND UNDESIRABLE.

An accused was sentenced to be confined for a period of six (6) months and to suffer all the other accessories of the sentence.

The action of the court in this case directs the performance of an impractical, irregular, and undesirable sentence, as compliance with this action requires that the accused be sent to prison in a status altogether different from that of any of the other prisoners. After completion of his sentence he will be returned to duty in an honorable status. This procedure being contrary to the department's policy, the period of confinement in this case and all accessories except loss of pay were remitted (File 26262–8843, July 27, 1921; G. C. M. Rec. No. 53884).

SENTENCE: IMPROPER MITIGATION OF.

Sections 1996 and 1998, Revised Statutes, as amended by the act of August 22, 1912 (37 Stat. 356), provide that persons who are convicted of "Desertion" from the naval service in time of war are incapacitated from holding any office of trust or profit under the United States or from exercising any rights of citizenship thereof. It follows, therefore, that such a person cannot be retained in the United States naval service, and in all such cases the sentence of general court martial should include dishonorable discharge. By virtue of the fact that a prisoner whose sentence is mitigated in accordance with paragraph 13 of the U. S. Prison Manual may usually earn his restoration to duty in the naval service, it is obvious that the action of the convening authority in so mitigating the sentence in this case is without effect and that that portion of his action so mitigating the sentence is a nullity (C. M. O. 114, 1919, p. 14; File 26262–8765, June 23, 1921; G. C. M. Rec. No. 53607).

[P. 16] EXTENSION OF ENLISTMENT FOR "DURATION OF WAR."

An opinion was requested as to whether a marine who enlisted for the period of the war and whose discharge has not yet been effected may now extend his enlistment.

Under the provisions of the act of July 11, 1919 (41 Stat. 139), enlisted men of the Marine Corps who enlisted for the period of the war or had their status changed to that of men who enlisted for that period, if otherwise entitled to an honorable discharge, may, under such regulations as the Secretary of the Navy may prescribe, extend their enlistments under the same conditions as enlisted men of the Marine Corps who had enlisted for a period of four years.

Under the provisions of Joint Resolution 64 passed March 3, 1921, fixing that date as the termination of the war for certain purposes, enlisted men who were serving under an enlistment for the period of the war were not entitled to extend their enlistments under the provisions of the act of July 11, 1919, after March 3, 1921, unless their detention in the naval service was required by the public interests, under which conditions, however, they would be entitled to extend said enlistment for a period of one, two, three, or four full years under the same conditions provided by the act of August 22, 1912, for individuals who had enlisted for a four-year term (20 Comp. Dec. 377,381; File 26254–1227:11, Sec. Nav., Nov. 19, 1913; File 7657–505, J. A. G., Oct. 29, 1917; File 26254–2881; 160, J. A. G., May 12, 1921).

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LEAVE: NAVY NURSE CORPS.

The decision of the Judge Advocate General dated March 9, 1921 (File 26477–101, C. M. O. No. 4, 1921), was reconsidered and affirmed. Nurses in the Naval Reserve Force were discharged therefrom and immediately appointed in the Navy Nurse Corps in each case for the reason that there was no provision of law which authorized the department to transfer them to the Regular Navy Nurse Corps, except by a discharge from the former and an appointment in the latter. When persons in the naval service, whether in the Naval Reserve Force or in the Regular Navy, are discharged they surrender all the benefits which have accrued to them in that service, unless the law specifically provides that, upon reappointment in that or some other branch of the service, they may carry [P. 17] such benefits with them. Upon their discharge from the Reserve Force all rights to leave theretofore acquired lapsed, i. e., they were no longer in a position to receive leave of absence accrued with pay. In the absence of any provision of law authorizing them, as members of the Navy Nurse Corps, to receive the leave which they had previously earned as nurses in the Naval Reserve Force, said leave cannot be granted (File 26477, 101: 1, Sec. Nav., June 9, 1921).

LINE OF DUTY AND MISCONDUCT CONSTRUED.

An enlisted man of the Navy became insane after serving in the Navy for more than three years. The diagnosis was "dementia praecox" and the various boards of medical survey which examined him agreed that a predisposition existed to this disease prior to his enlistment. He received two medical examinations upon entering the service, one on his first enlistment and another upon his reenlistment, besides being under medical observation throughout the entire period. There was no definite evidence adduced which would show that he had a predisposition toward dementia praecox throughout this period.

The Judge Advocate General held that the disease from which this man is now suffering was incurred in line of duty (File 7657–390: 40, J. A. G., May 19, 1921).

LINE OF DUTY AND MISCONDUCT CONSTRUED.

An enlisted man of the Navy, while on authorized liberty at Liverpool, England, was struck on the head by an unknown assailant as he descended from a street car. It appeared that he was not intoxicated and that the assault was wholly unprovoked. He was discharged from the naval service for physical disability as the result of the injury received.

The Judge Advocate General held that this man received his physical disability in the line of duty (File 7657–640: 1, J. A. G., July 1, 1921).

LINE OF DUTY AND MISCONDUCT.

Facts: An enlisted man, while on authorized liberty from his ship, accidentally walked off the dock near drawbridge at Salina Cruz, Mexico, and was drowned. No evidence whatever to indicate deceased was intoxicated or otherwise incapable of taking proper care of himself when he met his death, the facts of the record affirmatively showing that there was no intervening cause for which enlisted man could be held responsible for his death.

[P. 18] *Held:* That death was the result of an incident of the service, was incurred in the line of duty, and was not the result of any misconduct on the part of the deceased (File 8322–447: 1, J. A. G., July 28, 1921).

MEDICAL TREATMENT WHILE ON LEAVE OR FURLOUGH.

The decision of the Judge Advocate General dated 29 June, 1921 (File 6757–390: 39), holds that an enlisted man of the Navy is not entitled to medical treatment in a civil hospital by a civilian physician at public expense while on leave of absence or furlough or extended leave of absence or furlough.

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OATH OF ALLEGIANCE ADMINISTERED BY NOTARY PUBLIC AT RECRUITING SUBSTATION.

The question was presented as to whether it would be legal to have recruits take the oath of allegiance at recruiting stations before a notary public where no commissioned officers are available, as the provisions of the pending naval bill make it impossible to transfer recruits from substations to the main stations for the purpose of taking the oath of allegiance, and therefore it will be probably desirable to have this oath administered by notaries public.

Held, that while it is the policy of the department not to employ notaries public in any matters of naval administration where officers of the Navy or Marine Corps are authorized by the act of March 4, 1917 (39 Stat. 1170), to administer oaths for the purpose of the administration of naval justice and for other purposes of naval administration, it is legal to have notaries public administer the oath of allegiance to recruits at recruiting stations where no commissioned officers are available for that purpose (File 19037–104: 1, J. A. G., July 9, 1921).

OFFICERS OF THE COAST AND GEODETIC SURVEY, LIGHTHOUSE ESTABLISHMENT, MARINE HOSPITAL, AND PUBLIC HEALTH SERVICE MAY NOT BE ENROLLED AS MEMBERS OF THE NAVAL RESERVE FORCE IN TIME OF PEACE.

Under the provisions of the acts of May 22, 1917, July 1, 1902, and August 29, 1916, the President is authorized, whenever in his judgment a sufficient national emergency exists, to transfer to the service and jurisdiction of the Navy Department or the War Department such personnel and matériel of the Coast and Geodetic Survey, Lighthouse Establishment, and Marine Hospital and Public Health Service as he may deem to be to the best interests of the country for service with the Army or the Navy, respectively.

The laws enumerated above make these several forces available for military service whenever the President may deem that a [P. 19] national emergency exists and in fact give them the status of reserve forces which may be called out in the discretion of the President and assigned to either the Army or the Navy for service.

If officers of these several services were enrolled in the Naval Reserve Force and the President under the laws above cited should conclude that it was to the best interests of the country to have such officers serve with the Army, it is apparent that they would occupy a dual status, the one incompatible with the other.

In view of the further provisions of the act of August 29, 1916, which prevents any member of the Naval Reserve Force from serving as an officer or enlisted man in any branch of the military service of the United States, the department has decided that such officers of the Coast and Geodetic Survey, Lighthouse Establishment, and Marine Hospital and Public Health Service are not eligible in time of peace for enrollment in the Naval Reserve Force (File 28550–1477, J. A. G., July 25, 1921).

RETIREMENT OF FORMER TEMPORARY OFFICERS.

An individual who while a temporary officer was discharged from the naval service is no longer a "temporary officer" within the meaning of the act of June 4, 1920, which provides that temporary officers who have incurred physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty, and he is therefore not eligible for retirement under the provisions of that act.

Under sections 1457 and 1588, Revised Statutes, it is necessary for a man to be an officer of the naval service at the time when he is placed on the retired list and it is not sufficient that he may have been at some former time an officer in the naval service (File 29226–23: 2, Sec. Nav., May 25, 1921).

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RETIREMENT OF FORMER OFFICERS OF THE NAVAL RESERVE FORCE.

An opinion was requested as to whether a former officer of the Naval Reserve Force whose enrollment in the Naval Reserve Force has expired or who has been disenrolled therefrom is eligible for retirement under the provisions of the act of June 4, 1920.

The provisions of the act of June 4, 1920, apply in terms only to officers of the Naval Reserve Force and do not include former officers of the Naval Reserve Force who have subsequently severed their relations thereto, either in terms or by implication. An individual who has been disenrolled from the Naval Reserve Force or whose enrollment therein has expired is no longer an officer of the Naval Reserve Force and cannot avail himself of the benefits of the act of June 4, 1920, authorizing the retirement of officers of [P. 20] the Naval Reserve Force who have incurred physical disability in line of duty (File 28550–1454, J. A. G., May 25, 1921).

SAMOA: DETAIL OF NAVAL OFFICER TO CIVIL OFFICE IN.

The Judge Advocate General held that section 1860 of the Revised Statutes, as amended by the act of March 3, 1883 (22 Stat. 567), does not apply to the island of Samoa, it being an unrecognized territory, and the laws of the United States being made applicable by section 1891, Revised Statutes, only to organized territories. (See *Hawaii* v. *Mankichi*, 190 U. S. 197, 215; 23 Op. Atty. Gen. 634; 31 Op. Atty. Gen. 118.) A naval officer may be detailed to duty in the island of Samoa for the purpose of holding such civil office under the Government of the island as may be deemed necessary for its administration (File 3931–1471:1, J. A. G., May 26, 1921).

TEMPORARY APPOINTMENTS, CONTINUANCE OF.

Under the act of June 4, 1920 (41 Stat. 834), the continuance of temporary appointments now existing in any grade or rank not to exceed the number allowed therein until December 31, 1921, is authorized and this provision is in nowise affected by Joint Resolution No. 64 (File 26260–7214:3, J. A. G., July 2, 1921).

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[P. 10] CHARGES AND SPECIFICATIONS: OFFENSE MUST BE ALLEGED.

In reviewing a recent summary court martial it was noted that an accused was brought to trial on the following specification:

> "In that _____ _____, private, U. S. Marine Corps, serving at the Marine Barracks, Naval Operating Base, Hampton Roads, Va., did, on _____ at the said marine barracks, have in his possession three field trousers of the value of about five dollars and seventy cents ($5.70) and three chambray shirts of the value of about five dollars and forty-three cents ($5.43), the said articles being uniform clothing and property of the United States, intended for the naval service thereof, and did then and there knowingly and willfully appropriate the said articles to his own use."

It is the opinion of the Department that the specification is insufficient as it fails to set forth an offense against the accused. There is nothing to show that the accused received the articles of clothing in question in any other than an authorized manner. If the accused had them in his possession in violation of a special order of his commanding officer, such fact should have been set forth in the specification; if he had stolen them, the sample specification for cases of theft set forth in Naval Courts and Boards should have been used; if he had received them in his possession knowing they were stolen articles, the specification on page 120, Naval Courts and Boards, as corrected by Changes No. 3, should have been used.

In view of the foregoing, the proceedings, finding, and sentence in the case were set aside (File 26287–8121, Sec. Nav. August 25, 1921).

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COUNSEL: CRITICISM OF.

The argument of accused's counsel would have been an excellent argument for the Judge Advocate but it is hard to conceive how counsel for the accused could make such an argument if he had the slightest idea of his duty toward the accused. He stated "The next witness, the detective, stated that both men took the drills from the ship; it is just as possible the men could have taken the drills," and "My own testimony shows that there were such drills taken from the ship. It appears to me that the accused did actually take the drills from the ship." These statements, made as they were, by counsel for the accused, must certainly have impressed the court unfavorably toward the accused, since his own counsel, one toward whom he had the right to feel that he could look for advice and defense, stated in effect, that he was of the opinion that the accused was guilty of the offense charged. The Judge Advocate made no closing argument, it presumably being his opinion that none was necessary in view of the fact that no defense had been made and also in view of the argument of the accused's counsel. It is the opinion of this office [P. 11] that the accused was not in fact represented by counsel but on the contrary was opposed by two prosecutors, although it was the duty of one of these prosecutors to defend him. This office cannot understand the action of the counsel for the accused in his conduct of the affairs of the accused during the trial and lays it to ignorance of the duties of his position as counsel. However the veriest layman could hardly have damaged the interests of the accused to the extent that counsel did in this case and if his action was caused by ignorance of what his true duty was he should have declined to act as counsel for that reason. At any rate, after agreeing to act as counsel it was his duty to defend the accused in every possible legitimate way (File 26262–8757, J. A. G., June 27, 1921, G. C. M. Rec. No. 53596).

EVIDENCE: HEARSAY.

In a recent case objection was interposed by counsel for the accused, to the testimony _____, captain, Zone Police, Cristobal, C. Z., in answer to question No. 5, pages 3, 4, and 5, of the record, on the ground that this testimony was hearsay. This objection was overruled by the court on the ground that the testimony in question had a direct bearing on the issue. This ruling of the court was erroneous since there is no principle of law that any testimony having a direct bearing on the issue could be admitted. A considerable part of the testimony in question was hearsay, and should have been directed striken from the record. The court again overruled further objection by counsel for the accused to parts of the same testimony on the ground that this testimony constituted res gestae. "Res gestae" has been defined to be, "declarations of the individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, and may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might otherwise not have. To make declarations on this ground admissable, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction" (Rice on Evidence, vol. III, p. 122). Res gestae in other words may be said to consist of involuntary exclamations made contemporaneous with the main occurrence, and inspired by sudden excitement or fright. It is clear from the foregoing that the statements of the parties which the court states is res gestae is not in fact res gestae. The statements were made to Captain of Police _____ upon his making an investigation of the facts charged against the accused, were not contemporaneous with the main occurrence and were not involuntarily made under circumstances connected with the main fact, which might control [P. 12] the action of the mind. As a typical example of res gestate which was introduced in the case of Com. V. Hackett (2 Allen 136), a witness testified that, at the moment the fatal stabs were given, he heard the

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victim cry out "I am stabbed" and he at once went to him and reached him within twenty seconds after that, and then heard him say "I am stabbed; I am gone: Dan Hackett has stabbed me" (File 26262–8850, J. A. G., July 28, 1921; G. C. M. Rec. No. 53868).

IMMEDIATE SUPERIOR IN COMMAND: DEFINED.

In accordance with the terms of the act of August 29, 1916 (39 Stat. 586) the sentence of a summary court martial does not go into effect until approved by the "immediate superior in command" except in case the officer ordering the court is the senior officer present, in which event the approval of the officer ordering the court is alone necessary to give effect to the sentence. The term "immediate superior in command" as used in the above act, is construed as meaning that officer present who in the chain of command of the forces immediately present, is next above the officer ordering the summary court martial. Thus the officer present commanding a division is next above each of the commanding officers of the ships of that division present; the officer present commanding a brigade is next above each of the commanding officers of the regiments of that brigade present; and when ships are present which are not attached to a unit under the command of an officer present junior to the senior officer present, the commanding officers of such ships are next below the senior officer present, which latter officer is the immediate superior in command of such commanding officers. If the officer who orders the summary court martial is in the presence of an "immediate superior in command" he should sign and forward the record to such superior in command for the latter's final action.

From the foregoing, it is evident that the proper officer to act as immediate superior in command in cases of summary courts martial is a question of fact and not one of designation (File 27207–13, Sec. Navy, August 18, 1921).

INCONSISTENT PLEA.

Accused plead guilty to theft of a camera but in a written statement offered to the court at his trial he stated he "had no intention of stealing the camera." Court should have rejected plea of guilty and directed Judge Advocate to advise accused to substitute plea of not guilty as provided for in section 310, Naval Courts and Boards, 1917 (File 26257–28043, June 24, 1921, G. C. M. Rec. No. 53600).

[P. 13] INCRIMINATING QUESTIONS: PRIVILEGE, PERSONAL.

Counsel for the accused objected to witness answering a question on ground that the answer might degrade or tend to incriminate him. Court sustained the objection. Privilege is personal and may be claimed by the witness himself only, and if he does not claim it for himself, no one else, not even his counsel, can (File 26262–8740, J. A. G., Jan. 24, 1921; G. C. M. Rec. No. 53554).

RETIRED OFFICERS: MEMBERS OF GENERAL COURT MARTIAL.

Upon an appeal by the Government in the habeas corpus proceedings of David A. Henkes (C. M. O. 48, 1920, 22) to the Circuit Court of Appeals, Eight Circuit, the court in an opinion delivered by Judge Lewis, reversing the decision of the District Court, said inter alia:

> "* * * although, it was necessary that each member of the court be fully competent to sit, nevertheless we are of the opinion that Order No. 304 (the precept) convening the court and appointing the detail and the resulting service and action taken by those detailed, raised the presumption that its members were competent and possessed all the necessary qualifications entitling them to sit as such and that the burden rested on the petitioner to overthrow that presumption."

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REDUCTION IN RATING: ILLEGAL SENTENCE.

A hospital apprentice was sentenced by a summary court martial "to be reduced to the rating of seaman second class * * *." Article 30 of the Articles for the Government of the Navy empowers a summary court martial to adjudge a sentence of "reduction to next inferior rating." The records of the Department show that the accused on July 1, 1920, changed his rate from seaman second class to hospital apprentice second class. The rating table in effect which was established by Bureau of Navigation Circular Letter No. 9–21, dated May 2, 1921, shows that the rate of seaman second class and hospital apprentice second class are the same except in different branches; therefore, the next inferior rating of the accused is apprentice seaman. The reduction adjudged is, therefore, illegal.

In view of the foregoing, that portion of the sentence involving reduction in rating was set aside (File 26287–8123, Sec. Navy, August 29, 1921).

ROBBERY: INSUFFICIENT EVIDENCE.

Accused was tried among other charges, on charge of robbery, the second specification of the charge alleging that the accused "did, with force and violence, feloniously make an assault upon M. Gilles, * * * and did then and there, against the will and by [P. 14] violence to the person of the said M. Gilles, feloniously rob, steal, take, and carry away from the person of the said M. Gilles, one (1), thirty-eight (38) caliber revolver, of the value of about fifteen ($15) dollars the property of the said M. Gilles * * *."

When placed on the stand by the prosecution M. Gilles stated that the revolver in question was placed on his right side in a holster in plain view, that the accused met him in the middle of the road between Maissade, and the Marine Camp, talked to him, but Gilles did not understand what he said, and pulled his pistol from his holster. He further stated that the accused did not strike him and from his testimony it appears that no force or violence was used nor did the witness make any attempt to prevent the accused from taking the pistol. Robbery at common law is the felonious taking, without a bona fide claim of right, of a thing of value from the person or presence, against his will, by force, or by putting him in fear. Absolutely no evidence was presented in support of this specification which would indicate that force or violence was used or that M. Gilles was put in fear. Specification and finding was set aside (File 26262–8740, J. A. G., June 24, 1921; G. C. M. Rec. No. 53554).

SENTENCE: IRREGULAR.

As no dishonorable discharge was adjudged in this case and as it is contrary to the policy of the Department to have men serving sentence in a naval prison in cases where the sentence does not involve a discharge at the completion thereof, in other than an honorable status, and as, under the ruling of the Department, a case is not to be returned to a court for any increase in the sentence, so much of the sentence as involves confinement was remitted; all accessories of the sentence except loss of pay were remitted, and the loss of pay was reduced (File 26251–28562, J. A. G. August 18, 1921; G. C. M. Rec. No. 54092).

SUMMARY COURTS MARTIAL: JURISDICTION OF.

In reviewing the summary court martial in a recent case, it was noted that the specification read:

> "In that _____ fireman third class, U. S. Navy, serving on board the U. S. S. _____, at the Navy Yard, Portsmouth, N. H., was on July 11, 1921, while on duty, under the influence of intoxicating liquor, and thereby incapacitated for the proper performance of duty."

It is the opinion of the Department that the specification is fatally defective in that it fails to show any jurisdiction by the Commanding Officer of the U. S. Receiving Ship at Portsmouth, N. H., over the person of the accused.

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Article 26 of the Articles for the Government of the Navy provides that "summary courts martial may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy yard [P. 15] naval station, or marine barracks to which they belong * * *." The act of August 29, 1916, quoted under article 26, on page 35, Naval Courts and Boards, provides that "summary courts martial may be ordered upon enlisted men in the naval service under his command by the commanding officer of any brigade, regiment, or separate or detached battalion, or other separate or detached command * * *."

From the words "to which they belong" and "under his command" it is clear that a commanding officer authorized to convene a summary court martial has no power to prefer specifications against a man not under his command, for the reason that such man is not within his jurisdiction.

In view of the fact that "naval courts martial are courts of limited jurisdiction," their records must affirmatively show that they have authority to hear and determine cases coming before them for trial (sec. 21, Naval Courts and Boards) and of the further fact that courts martial have no presumptions to aid them and their records must show the right of the court to try the particular case (*Ex parte Girins*, 262 Federal Reporter, 704). The proceedings, findings, and sentence in the case of the above-named man were set aside.

However, attention is directed to the fact that this case is no bar to another trial for the same offense, since before there can be former jeopardy the court before which the former proceedings had been conducted must have been a duly constituted and legally competent court (sec. 298, Naval Courts and Boards). In this connection attention is directed to the fact that the specification in this case would have been sufficient if the words "Stationed on board the receiving ship at Portsmouth, N. H.," had been inserted after the words "U. S. Navy" in the second line of the specification (File 26287–8104, Sec. Navy, August 19, 1921).

THEFT: CORPUS DELECTI MUST BE PROVEN.

An accused was charged with having stolen from a clothes bag on the main deck of the U. S. S. _____ two pairs of blue trousers and one blue dress jumper, the property of one _____ _____. In order to prove its case the prosecution first introduced the testimony of _____ _____, seaman second class, who testified that he was laying in his hammock when the accused came along and asked him if he wanted some blues. He answered in the affirmative and told the accused to put the blues in the gear locker on the second deck. He further testified that he did not know whether the blues in question belonged to the accused or not.

Upon completion of the testimony referred to in the foregoing paragraph the prosecution produced two witnesses, one of whom, the judge advocate, read to the court the written confession of the accused, the other testifying as to the circumstances surrounding the making of this confession. No evidence whatsoever was introduced [P. 16] which would indicate that _____, the party to whom the property alleged to have been stolen belonged, had lost the property and the corpus delecti of this offense was therefore not proved. Section 102, Naval Courts and Boards, 1917, provides:

> "The corpus delecti, so called, or the fact that the alleged criminal act was committed by someone, is a separate fact to be proved. Proof of a confession does not prove the corpus delecti, but the latter must be independently proved before evidence of the confession can be admitted. The rule with regard to the proof of the corpus delecti, apart from the mere confession of the accused, proceeds from the reason that the general fact without which there could be no guilt, either in the accused or in any one else, must be established before any one can be convicted of the perpetration of the alleged criminal act which caused it; as in the cases of homicide the death must be shown, in theft it must be proved that the goods were lost by the owner, and in arson that the house had been burned; for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive or of theft when the owner had not lost the goods, or of arson when the house was not burned. But where the general fact is proved the foundation is laid and it is competent to show by any legal

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and sufficient evidence how and by whom the act was committed and that it was done criminally (See C. M. O. 26, 1910, 10) * * *."

Had the prosecution placed ------ the owner of the alleged stolen goods on the stand to testify that he had possessed the articles in question, that he did not then have them in his custody, that he had neither given them away, sold, or otherwise disposed of them and that the articles before the court were his property, the corpus delecti would have been proved and the confession of the accused would have been properly admissible. The testimony of ------ did not in any way tend to prove the general fact that the blues had been stolen (File 26262–8785, J. A. G., June 30, 1921; G. C. M. Rec. No. 53688).

ELIGIBILITY OF TEMPORARY CHAPLAINS FOR PERMANENT APPOINTMENT.

A number of permanent acting chaplains with the rank of lieutenant, junior grade, having received temporary appointments in the grade of chaplain with the rank of lieutenant junior grade, the question was presented of whether or not they were eligible for appointment [P. 17] as permanent chaplains with the rank of lieutenant, junior grade.

The department in passing upon this question held that permanent acting chaplains with the rank of lieutenant, junior grade, who have been given temporary appointments as chaplains with the rank of lieutenant, junior grade, are not eligible for reappointment as permanent chaplains with the rank of lieutenant, junior grade, under section 3 of the act of June 4, 1920, for the reason that section 3 of that act has been held by the Department to apply only to such temporary officers as have no permanent status as officers in the regular Navy (File 29226–7:2, August 2, 1921).

FORMER MIDSHIPMEN APPOINTED FROM ENLISTED PERSONNEL: EXAMINATION FOR REAPPOINTMENT.

An enlisted man who successfully passed the competitive examination and entered the Naval Academy in 1920, resigned and again enlisted in the Navy and requested permission to enter the Naval Academy from the enlisted personnel without being required to pass a second mental examination, as provided by the act of March 4, 1917, which requires that such appointments shall be made in the order of merit from candidates who have "in competition with each other" passed the mental examination required by law for entrance to the Naval Academy.

The Department held that a former midshipman appointed by the Secretary of the Navy to the Naval Academy from among the enlisted personnel, who had resigned therefrom, could be reappointed to the academy only after passing the prescribed examination required for original appointments of enlisted men thereto (File 5252–202, August 3, 1921).

OFFICERS DETAILED TO DUTY INVOLVING FLYING.

The question was presented to the Judge Advocate General for opinion as to whether or not under the act of July 12, 1921, there was any limit on the number of officers that may be detailed to duty involving actual flying, and who would be entitled to receive the increase in pay authorized for officers so detailed.

It was held that the Secretary of the Navy might detail in his discretion such officers and men of the Navy and Marine Corps to duty involving actual flying and aircraft as he might determine to be necessary for the requirements of naval aviation and that officers so detailed who are required in the performance of their duties to make flights in aircraft with such frequency as is required by the accounting officers of the Treasury (not more than one calendar month intervening between flights) may receive additional pay as authorized in the act of March 3, 1915, and the number who may be so paid is not limited (3244–258, J. A. G., August 4, 1921).

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[P. 18] REAPPOINTMENT OF TEMPORARY AND RESERVE OFFICERS OF MARINE CORPS, ACT AUGUST 29, 1916.

A number of former temporary officers of the Marine Corps and officers of the Marine Corps Reserve, having applied for reappointment as permanent second lieutenants in the Marine Corps to take rank at the foot of the lists of that grade, the Department held that these officers were not eligible for such appointment under the provisions of the act of August 29, 1916, which clearly did not contemplate these classes of officers for the obvious reason that there were no former officers of the Marine Corps Reserve or former officers in the Marine Corps serving under temporary commissions at that time (File 28687–32, August 8, 1921).

RETIREMENT OF OFFICERS OF NAVAL RESERVE FORCE.

A boatswain reenrolled as a warrant officer in the Naval Reserve Force March 3, 1917, and on the date of the expiration of his reenrollment was not physically qualified to be reenrolled. He was subsequently taken to the naval hospital, New York, N. Y., and a board of medical survey, having found his physical disability to have been incurred in line of duty, recommended that he be ordered before a naval retiring board. The question presented is whether or not this boatswain is eligible for retirement under the provisions of the act of July 12, 1921.

In replying to this question, the Department held that an officer of the Naval Reserve Force who is disabled in line of duty and whose injury has become officially known prior to the expiration of his enrollment is eligible for retirement under the provisions of the act of July 12, 1921, regardless of the fact that his enrollment had expired before his retirement could be consummated in due course (File 28550–1454: 1, August 2, 1921).

RETIREMENT OF FORMER OFFICERS OF MARINE CORPS RESERVE AND FORMER TEMPORARY MARINE OFFICERS.

------ ------, sergeant, U. S. M. C., served as an officer in the Marine Corps Reserve from December 16, 1918, to March 13, 1919, on which latter date he was disenrolled to accept an appointment as a temporary second lieutenant in the Marine Corps. He received this temporary appointment on March 5, 1919, was promoted to the grade of first lieutenant, temporary, March 5, 1919, and was honorably discharged as a temporary first lieutenant by direction of the President August 19, 1919.

On September 10, 1920, ------ ------ was found physically unfit for appointment in the Regular Marine Corps as a permanent commission officer by a board of medical examiners, whereupon he requested to be ordered before a retiring board under the provisions [P. 19] of the act of July 12, 1921. The question presented is whether or not a former officer of the Marine Corps Reserve is entitled to retirement under the provisions of this act, together with the further question of whether or not a former temporary officer in the Marine Corps is eligible for retirement under the provisions of the act of May 22, 1917.

In passing upon this question the Department held that former officers of the Marine Corps Reserve and former temporary officers of the Marine Corps are not eligible for retirement on account of physical disability incurred in line of duty prior to their separation from the service, for the reason that the act of May 22, 1917, providing for the retirement of temporary officers in the Marine Corps, and the act of July 12, 1921, providing for the retirement of officers of the Marine Corps Reserve, are applicable in terms only to officers serving as officers in the Reserve Force or as temporary officers respectively at the time when they seek the benefits of these acts (File 29371–2, J. A. G.).

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REVOCATION OF ACTING APPOINTMENT OF WARRANT OFFICER: EFFECT OF.

A person holding an acting appointment as gunner desired revocation of such appointment in order that he may reenlist as a chief electrician, which rating he held when given his acting appointment as gunner, providing such revocation as gunner and subsequent reenlistment will not result in loss of benefits acquired by him during his previous enlisted service in the Navy.

Held, Upon revocation of appointment as gunner the man reverts to status as enlisted man with permanent rating as chief electrician held by him at the time he received his acting appointment as gunner and upon expiration of enlistment is entitled to such discharge as record warrants. If he receives an honorable discharge he is entitled upon reenlistment to all the benefits provided by law for men reenlisting in the Navy. His pay upon reverting to his enlisted status will be the same as he was receiving when given the acting appointment as gunner, subject to any changes made meantime by law in pay of enlisted men (File 17789–95, J. A. G., July 9, 1921).

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[P. 10] CHARGES AND SPECIFICATIONS: DEFECTIVE.

In a recent summary court martial the specification alleged that the accused "did, on or about July 5, 1921, while a venereal patient at the aforesaid training station, willfully and unlawfully obtain leave of absence from the aforesaid training station."

It is the opinion of the Department that this specification is insufficient to state an offense. The act of willfully obtaining leave of absence is in itself perfectly proper and the Department has repeatedly held that an act not prohibited by some law, regulation, or custom of the service cannot be made an offense by merely describing it as having been "unlawfully" done. If the act is unlawful all the facts and circumstances making it unlawful should be set out in the specification. In this connection attention is directed to Court-Martial Order 237, 1919, page 15. In view of the foregoing, the finding on this specification was set aside (File 26287–8144, J. A. G., Sept. 13, 1921).

EVIDENCE: HEARSAY.

The prosecution introduced into evidence over the objection of the accused's counsel a written statement made by one White describing the alleged assault. The judge advocate stated that White was then absent overleave and every effort had been made to locate him. He further stated that White's statement was official.

In the opinion of this office, the court made a fatal error in receiving this statement into evidence. The statement was not made under oath, was not an official routine report required in the regular course of duty, and the accused was deprived of his right of cross-examining the witness against him. Furthermore one of the witnesses for the defense subsequently testified that in his opinion White was drunk at the time of the occurrence in question. This would greatly discredit White's statement and the accused should clearly have had opportunity to cross-examine on this point. White's statement was of such character that its admission could not have failed to prejudice the rights of the accused (File 26262–9002, J. A. G., Sept. 8, 1921, G. C. M. Rec. No. 54277).

COURTS MARTIAL: MULTIPLICITY OF TRIALS.

In reviewing the summary courts martial in the case of _____ _____, mess attendant third class, U. S. Navy, it was noted that five summary courts martial were held on the same day in his case for varying offenses and that the total loss of pay adjudged by the court was $450. As the rate of pay per month of this man is $34.50 the court by holding separate trials adjudged a loss of pay which was more than thirteen months' pay at the rate of pay of the accused ($34.50).

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Multiplicity of trials is undesirable and the accused should be tried once with separate specifications preferred against him for each offense. If the offenses committed are of such gravity that the limitation of punishment that the court may impose is inadequate, then resort should be had to a higher court with greater powers.

[P. 11] In view of the above, those cases in which the accused was tried for possession of deadly weapons, possession of obscene pictures, possession of civilian clothing, and falsehood, were set aside, and it was directed that his records be corrected accordingly. This action left upon his record a summary court martial for "willful failure to obey a lawful order" wherein he was sentenced to deprivation of liberty on shore on foreign station for a period of thirty days and to lose pay amounting to $70 (File 26287–8149, J. A. G., September 9, 1921).

COURTS MARTIAL: PROCEDURE OF, UPON IMPROPER PLEA OF ACCUSED.

It is noted that the accused pleaded guilty to the specification of charge II, "Conduct to the prejudice of good order and discipline" and changed his plea of "guilty" to the charge to "not guilty" during the trial. The court after finding "the charges and specifications in due form and technically correct" acquitted the accused of charge II. This action was inconsistent inasmuch as the specification must have supported the charge in the opinion of the court, they having found it to be "technically correct" and therefore if the accused was guilty of the specification he was clearly guilty of the charge. The proper procedure in this case would have been to have rejected the plea of guilty to the specifications and then if the court believed the accused not guilty of the offense as alleged in the specification, to find the specification not proved. In accepting the plea of guilty to the specification the court was precluded from finding other than "guilty" to the charge. A plea of guilty to a specification and not guilty to the charge under which it is laid, after the charge and specification have been found to be in due form and technically correct, is improper for the above reasons.

The convening authority disapproved the findings and acquittal under each charge, which action was approved by the Department (File 26262–8979, J. A. G., Sept. 16, 1921).

COURTS MARTIAL: RECONVENING OF.

"The action of the convening authority in reconvening the court for the purpose of increasing its sentence was in contravention of the President's established policy and of his mandate to courts of the military service, as outlined in Court-Martial Order 309, 1919, page 2" (File 26287–8156, J. A. G., Sept. 15, 1921).

CRITICISM OF COURTS MARTIAL.

In a recent summary court martial an accused was tried on a specification, the gist of which was, that he deliberately and willfully remained absent from the ship until after she had sailed in order to avoid duty on board.

The accused pleaded not guilty, immediately after which the following entry appeared in the record of proceedings: "The prosecution offered no evidence." Thereafter the accused, at his own request, was sworn in as a witness in his own behalf and the court found the specification proved on the strength of his testimony, which was the only evidence before it.

[P. 12] It is the opinion of the Department that it is the recorder's duty in the face of a plea of not guilty, by the accused, to attempt to introduce sufficient evidence to establish a prima facie case for the prosecution, before the defense is called upon to present any evidence whatsoever. Therefore, in this case the court should not have permitted the recorder to rest his case (apparently in the hope that the accused would convict himself on the witness stand) without introducing any evidence. If there was no evidence to support the prosecution's case, then it was the duty of the recorder to inform the convening authority accordingly, in order that the latter might authorize a nolle prosequi.

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The action of the court in convicting the accused on his own testimony after a plea of not guilty and the prosecution's failure to introduce any evidence whatsoever, is repugnant to the Anglo-Saxon idea of justice, e. g., that a man is innocent until proved guilty, and throws the burden on the accused to prove his own innocence or else be found guilty regardless of the evidence introduced against him. Furthermore, the testimony of the accused in this case was insufficient to prove that he had been guilty of the offense of missing ship and should, of itself, have resulted in the accused's acquittal.

In view of the above, the Secretary of the Navy directed that the proceedings, findings, and sentence be set aside (File 26287–8154, J. A. G., September 16, 1921).

DISOBEDIENCE OF LAWFUL ORDER: WILLFULLY.

One cannot disobey the order of his superior officer and thereby commit an offense unless the disobedience was willful (File 27217–5040, J. A. G., September 8, 1921).

REDUCTION TO NEXT INFERIOR RATING: CLASSIFICATION FOR MARINES.

The next inferior rating to that of quartermaster sergeant, U. S. Marine Corps, is that of either first sergeant or gunnery sergeant. That part of section 449, Naval Courts and Boards, 1917, relating to classification of Marines was modified by Marine Corps Order No. 18, series 1920 (File 26287–7138, J. A. G., September 15, 1921).

SENTENCES: COMMUTATION AND MITIGATION.

Where the convening authority reduced the period of confinement but directed that the accused "suffer all other accessories of said sentence" and the accused was not sentenced by the court to suffer all the other accessories of said sentence, the nature of the punishment is changed by the convening authority, in that "hard labor" is added to the sentence of the accused. Thus his action is a commutation and not a mitigation and is therefore illegal (G. C. M. Rec. No. 54015; File 26262–8892, J. A. G., August 22, 1921).

[P. 13] SENTENCE: DISMISSAL OF FORMER OFFICER OF RESERVE FORCE.

A former officer of the Naval Reserve Force was tried by general court martial for embezzlement in violation of article 14 of the Articles for the Government of the Navy and sentenced to be dismissed * * *. As this officer had already been separated from the naval service, by reason of expiration of enrollment, the Department held that this part of the sentence was a nullity (File 26251–28254, J. A. G., August 31, 1921).

SPECIFICATIONS: MUST SUPPORT CHARGE.

An accused was recently tried on the charge "Violation of a lawful regulation issued by the Secretary of the Navy," the specification alleging that:

> "* * * did * * * knowingly, willfully and without proper authority, keep in his possession on board ship * * * cocaine."

The court found this specification proved in part, making substitution so as to make the specification as proved read, "* * * did * * * without proper authority have in his possession on board ship * * * cocaine."

In the opinion of the Department the specification as found proved by the court does not state an offense. The court by its finding has eliminated the mens rea, and one of the essential elements of any offense is lacking (File 26262–9010, J. A. G., Sept. 8, 1921; G. C. M. Rec. No. 54287).

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STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

In a recent summary-court-martial case the specification alleged that the accused "serving on board the U. S. S. * * * at Balboa, C. Z., did, on * * * 1921, attempt to smuggle on board said ship, one bottle containing intoxicating liquor."

The accused pleaded guilty but made a statement, in part, as follows:

> "The act was neither premeditated or done with malicious intent. The package did not belong to me but in mitigating circumstances, my own package containing kimona and slippers was unknowingly exchanged with this package. For this reason and the fact that I have a clear record I beg the clemency of the court."

It is the opinion of the Department that the statement of the accused was inconsistent with his plea of guilty to the charge of attempting to smuggle liquor on board ship. The statement of the accused denies in effect any intention to smuggle liquor and affirms the ignorance of the accused in regard to the fact that a package of liquor was on his person. It would appear that a man cannot be guilty of the offense of smuggling liquor unless he willfully attempts to smuggle the liquor on board. Under these circumstances the court should have followed the procedure outlined in sections 310 and 312, Naval Courts and Boards (File 26287–8155, J. A. G., Sept. 13, 1921).

[P. 14] SUMMARY COURTS MARTIAL: ILLEGAL SENTENCES.

In a large number of summary courts martial a portion of the sentence reads as follows: "And to be restricted to his station and duty for a period of * * *," or "And to be restricted to his ship or station for a period of * * *." Restriction to ship or station or to station and duty is not one of the punishments authorized by article 30 of the Articles for the Government of the Navy, which punishments, as modified by the act of February 16, 1909, section 8, are the only ones which may be legally adjudged by sentence of a summary court martial. (See Naval Digest, 1916, p. 538, par. 6, under "Restriction"; File 26287–8614, J. A. G., September 17, 1921.)

EXAMINING BOARDS: WAIVER OF RIGHT TO APPEAR IN PERSON, EFFECT OF.

Effect of waiving right to be present in person before a naval examining board is to deprive the officer being examined of the right to appear before a second board (File 26260–7870: 2, July 11, 1921).

LINE OF DUTY.

In a recent case coming before the Department the following question was presented, i. e.:

> "Whether or not a member of the naval service who has successfully passed the prescribed physical examinations for admission therein, but who is subsequently found to be suffering from tuberculosis, is entitled to a finding of line of duty in the absence of positive facts to the effect that the disease existed prior to his appointment, enlistment or enrollment in the naval service, or that it was due to his own misconduct."

Citing a recent opinion of the Department (May 19, 1921. File 7657–390: 40) it was held that under the decision of the court in the case of *Moore* v. *The United States* (48 Ct. Cls. 110) a presumption raised by facts developed subsequent to enlistment is not sufficient. The facts which must be shown in a case where this question is involved before a finding of not line of duty is warranted, in the absence of fraud, are facts established by proof of their existence prior to enlistment; for example, if it is shown from the records of a creditable institution or the testimony of a reputable physician attending the complainant, prior to his enlistment, that he was suffering from tuberculosis, chronic, pulmonary, at that

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time; or if a statement of the claimant describing certain physical conditions which he had noticed prior to his enlistment is submitted and this statement could have no other plausible explanation than that he was suffering from tuberculosis in some form at that time, i. e., prior to his enlistment, a finding of "not in line of duty" would be warranted, but, [P. 15] under no other conditions except where fraud is shown. The disability complained of in the case under consideration having been discovered after the individual had entered the naval service, and no facts being presented showing that he was suffering from said disease prior to his enlistment or that his enlistment therein was obtained through fraud such as to vitiate the effect of the physical examination given him at the time, it must be held that the disability complained of originated in line of duty regardless of the fact that it was discovered almost immediately after his enlistment (Sept. 15, 1921—File 29372–8, J. A. G.).

MARINE CORPS.

Duties of the Marine Board provided for under the provisions of the act of June 4, 1920:

Under the provisions of the act of June 4, 1920, the board of Marine officers therein provided for were required to fix the precedence of all officers serving temporarily in the grades of captain and below on June 4, 1920, who were transferred to or reappointed in the permanent Marine Corps in the grades not above captain, among themselves and with all other officers of the Marine Corps (File No. 26521–435:6, May 28, 1921).

MARINE CORPS.

Transfer from the Marine Corps Reserve to the Regular Marine Corps under the provisions of the act of June 4, 1920:

A member of the Marine Corps Reserve having made application for transfer to the Regular Marine Corps under the provisions of the act of June 4, 1920, was notified of his tentative acceptance as a first lieutenant and ordered to present himself for the necessary physical examination which he passed March 14, 1921. An ad interim commission dated March 21, 1921, was forwarded to him March 23, 1921, but he did not formally accept this appointment until July 12, 1921, twelve days after the date on which the law required all such transfers to be made. In the meantime a commission as first lieutenant in the Marine Corps by and with the advice and consent of the Senate was duly executed on May 2, 1921, but was held up pending receipt of acceptance of the ad interim commission. *Held*, that this man having made application for transfer to the Regular Marine Corps on April 24, 1921, which application was accepted and he was found duly qualified, the issuing of an ad interim commission completed his transfer and no further acceptance on his part was necessary to fulfill the requirements of the act of June 4, 1920 (File No. 29226–27, July 27, 1921).

MIDSHIPMEN.

The following questions were recently presented to the Department for its consideration relative to the administration of midshipmen:

(*a*) Whether a midshipman may be summarily dropped from the rolls of the Naval Academy and the naval service for inaptitude or for any other reason without complying with the provisions of section 1 of the act of Congress, approved April 9, 1906.

[P. 16] (*b*) Whether it is legal to dismiss midshipmen attached to the Naval Academy, but on summer practice cruise, for misconduct, as the result of the sentence of a general court martial.

Replying to question (*a*), the Department held that midshipmen may not be dropped from the rolls of the Naval Academy for inaptitude or general misconduct, not including hazing, except in the manner prescribed by section 1 of the act of April 9, 1906, citing its former opinions of July 13, 1906 (File 5146–1), and November 9, 1920 (File 5252–162). In answering that part of question (*a*) concerning summarily dropping midshipmen from the rolls "for any other reason" the Department pointed out that in view of the act of June 5, 1920 (40

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Stat. 1028), the midshipmen may not now be summarily dropped from the rolls of the academy or the service on account of failure to pass any of their original examinations at the close of the academic term, which constitutes an exception to the procedure laid down in the act of April 9, 1902. The Department further noted that sections 2 and 3 of the act of April 9, 1906, applied specifically to the methods of procedure which must be followed before a midshipman may be dismissed on account of hazing, and concluded that except for cases above noted midshipmen may not be summarily dropped from the rolls of the academy and the naval service without specifically complying with the provisions of section 1 of the act of April 9, 1906.

Replying to question (*b*), the Department held that a midshipman serving on board a naval vessel, either on a summer cruise or on active service, is amenable to the jurisdiction of the commanding officer and the commanding officers immediately superior to him, in command for purposes of discipline and that under the act of August 29, 1916, the commanding officer of a squadron, division, flotilla, or larger naval force afloat, authorized by the Secretary of the Navy to convene general courts martial, may convene a general court martial for the trial and punishment of any member of the naval service, including midshipmen, under his command, for the violation or violations of the laws and regulations for the government of the Navy (September 16, 1921—file 5252–208, J. A. G.).

MIDSHIPMEN: STATUS OF WHILE AT NAVAL ACADEMY.

An individual appointed to the Naval Academy pursuant to law is on active duty at the academy as a midshipman and not as a commissioned officer or an enlisted man detailed to some specific duty in connection with the administration of the academy. While the courts have pointed out certain distinctions between enlisted men, midshipmen, and commissioned officers, all decisions are to the effect that they are all members of the naval service and therefore midshipmen while actually in attendance at the academy are on active duty in the same degree as enlisted men or commissioned officers detailed to the academy for the performance of specific duty (File No. 5252–137 : 4, June 6, 1921).

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[P. 9] CHARGES AND SPECIFICATIONS: SPECIFICATIONS SHOULD SET FORTH FACTS CONSTITUTING OFFENSE.

In a recent summary court-martial case, it was noted that the specification alleged that the accused "serving on board the U. S. S. *Fulton*, at Marblehead, Mass., did on August 5, 1921, while on leave from said ship and at the place aforesaid, act in a disorderly manner, thereby reflecting discredit upon the uniform of the naval service." The specification did not set forth the facts and circumstances constituting the alleged offense with the required certainty and precision, but merely stated a conclusion of fact. (See Naval Courts and Boards, p. 80, sec. 71.) The specification should have alleged the particular acts which constituted the offense alleged (File 26287–8226, J. A. G., October 18, 1921).

CHARGES AND SPECIFICATIONS: MUST ALLEGE AN OFFENSE.

In reviewing a recent deck court it was noted that the specification alleged, in substance, that the accused "did * * * lose one bag of the value of about two dollars and thirty cents ($2.30) the property of the United States."

It is the opinion of the Department that the specification is insufficient and fails to state an offense against the accused. The fact that an article of government property is lost while in the custody of a person in the service does not necessarily mean that the person was guilty of negligence or carelessness and thereby caused the loss, and in order that there may be an offense, it must be so alleged. So far as the specification shows, the bag might have been lost by an unavoidable accident, or by an act of the accused in line of duty in attempting to save articles of greater value (File 27217–5092, J. A. G., October 14, 1921).

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FINDINGS: CHARGE NOT SUPPORTED BY SPECIFICATIONS AS FOUND PROVED.

In reviewing the case of William J. Bilger, gunner's mate third class, it is noted that the court found the first specification of the charge "Assault and battery" proved with the exception of the word "strike, beat" which words were not proved, and the convening authority in his action on the case stated that the word "wound" should also have been excepted. After excepting the above words the charge is not supported by the specification, the latter merely alleging assault (File 26262–9056, J. A. G., Sept. 22, 1921; G. C. M. Rec. No. 54386).

[P. 10] SENTENCES: INCLUDING LOSS OF PAY AND REDUCTION IN RATING.

Section 442, Naval Courts and Boards, provides that "When a sentence of loss of pay is coupled with that of reduction in rating, care shall be taken to insure the fact that the loss of pay adjudged is based on the pay of the rating to which the accused has been reduced and not on his original rating" (File 26287–8224, J. A. G., October 18, 1921).

SENTENCES: UNAUTHORIZED.

In reviewing a recent summary court-martial case it was noted that a portion of the sentence read "To be confined to the ship for a period of thirty (30) days." This is not one of the punishments authorized by article 30 of the Articles for the Government of the Navy, which punishments, as modified by the act of February 16, 1909, section 8, are the only ones which may be legally adjudged by sentence of a summary court martial. (See Naval Digest, 1916, p. 108, par. 41, under "Confinement"; File 26287–8210, J. A. G., October 13, 1921.)

SUMMARY COURTS MARTIAL: ILLEGAL SENTENCE.

In reviewing a recent summary court-martial case it was noted that reduction in rating and confinement were both adjudged in the sentence.

That portion of the act of February 16, 1909, section 8, quoted under article 30 of the Articles for the Government of the Navy on page 37 of Naval Courts and Boards, 1917, reads "Courts authorized to impose the punishments prescribed by article 30 of the 'Articles for the Government of the Navy' may adjudge either a part or the whole as may be appropriate, of any one of the punishments therein enumerated." From the foregoing it is plainly understood that only one of the punishments enumerated in article 30 of the Articles for the Government of the Navy may be adjudged, except as indicated in section 8 of said article 30 (File 26287–8225, J. A. G., October 18, 1921).

SUMMARY COURTS MARTIAL: IRREGULAR PROCEDURE.

In reviewing a recent summary court martial it was noted that the recorder asked leading questions on direct examination, when the accused who had pleaded not guilty was not represented by counsel.

It was further noted that the accused, who took the stand at his own request, was examined first by the recorder and then by the court, before he was given an opportunity to present any evidence. While such procedure is not illegal, it is highly irregular.

[P. 11] The record did not show that article 253a was explained to the accused and from the errors in the proceedings of the court, there is a doubt if it was explained.

In view of the above, the Department is of the opinion that the accused was not fully accorded the right of an adequate defense. Accordingly, the Secretary of the Navy directed that the proceedings, findings, and sentence in this case be set aside (File 26287–8186, J. A. G., October 1, 1921).

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JURISDICTION.

An officer dropped from the rolls for absence without leave for three months or more, in accordance with the act of April 2, 1918, cannot thereafter be tried by court martial, he having by this act become fully separated from the service and become a civilian.

Where an accused commits an offense against the United States, such as forging a Treasury check, and is tried and punished for this offense by a United States District Court, he cannot thereafter be tried by a court martial for the same offense, the act, under such circumstances, constituting but one offense, namely, an offense against the United States. (See Naval Courts and Boards, p. 51; File 26516-371, J. A. G., October 12, 1921.)

STATUS OF PROBATIONARY SECOND LIEUTENANTS IN THE MARINE CORPS RELATIVE TO TRANSFER UNDER ACT OF JUNE 4, 1920.

A probationary second lieutenant in the Marine Corps, who had been given a temporary commission in a higher grade, and at the expiration of his probationary period was found qualified as a permanent officer in the grade of second lieutenant, stood in the same position as any other officer in the Marine Corps, in the grade of captain and below whether permanent or temporary, for purposes of promotion or transfer under the provisions of the act of June 4, 1920, authorizing transfers in the Marine Corps in the grades of captain and below (File No. 26521-435:4, May 16, 1921).

FORMER JEOPARDY.

The following opinion as to the time when former jeopardy attaches in the proceedings of a Navy general court martial is published for the information of the service.

[P. 12] The following questions are presented respecting the time when former jeopardy attaches in the proceedings of a Navy general court martial:

(*a*) At what time in the proceedings of a naval general court martial has jeopardy attached so that the accused can take advantage of a plea in bar of former jeopardy as entered in the cases now pending in the Department and thereby be relieved from being tried a second time for the same offense? In other words, whether or not a trial by a naval general court martial which has proceeded to the point where the court has reached a verdict and agreed upon the sentence to be imposed upon the accused, but owing to the fact that the stenographic notes made at the time of the trial cannot be found and a permanent record cannot be transcribed therefrom upon which the judge advocate can enter the verdict and sentence of the court in his own hand as required by court-martial procedure in such cases, and upon which each member of the court and the judge advocate can affix their signatures, has placed the accused in jeopardy so that he may not again be tried upon the identical charge(s) and specification(s) by a naval general court martial without violating his right under article 5 of the Amendments of the Constitution of the United States to not be put twice in jeopardy for the same offense.

2. If the answer to the foregoing question be that jeopardy has attached in the cases now pending in the Department; i. e., the cases of Clarence Y. Hunt, gunner's mate 3d class, U. S. N., and Marian C. Carnicle, boaswain's mate 1st class, U. S. N., the further question is presented which may be stated as follows:

(*b*) Would a record of the first trial in each of these cases made up by the judge advocate together with the members of the court conducting such trial, containing not a verbatim statement of the evidence but merely a summary thereof, be sufficient under the laws and regulations governing the procedure of naval general court martial? In other words, would this Department be warranted in accepting such a record, in lieu of the verbatim records of the proceedings before the court for the purposes of reviewing and transmittal to the President under article 53 of the Articles for the Government of the Navy?

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3. Under article 5 of the Amendments to the Constitution of the United States it is provided that "nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb." This provision of our National Constitution was taken from the common law and had it not been incorporated among the provisions of this instrument it is more than probable that it would have been invoked by the courts in very much the same manner as it is now invoked, so thoroughly had it become grounded in the common law system of jurisprudence. The application of this provision, however, particularly the time when it attaches, is dependent upon the facts in each case.

[P. 13] 4. The facts in the cases now pending in the Department are briefly as follows:

(*a*) Clarence Y. Hunt, gunner's mate third class, U. S. Navy, while serving at the U. S. Naval Air Station, San Diego, Calif., as a Navy mail clerk was tried by a general court martial, March 14 and 15, 1921, on the charges I. "Absence from station and duty after leave had expired" supported by two specifications. The accused having been arraigned his trial was held in due form and the proceedings are admitted to have been correct in every respect. The court after carefully considering the evidence adduced before it arrived at a verdict. The judge advocate, as required in such cases, examined the record of the accused for evidence of previous convictions. The court after deliberation decided upon the sentence to be imposed upon the accused. However, when the point was reached when it became necessary to create a permanent record of said proceedings from the stenographic notes made at the time of the trial said notes were missing and have not since been found. Consequently, when the judge advocate was recalled to enter the verdict and record the sentence of the court in his own hand as part of the record, the same to be signed by each member of the court and the judge advocate, this could not be done for the reason that a verbatim record of the proceedings could not be furnished by the judge advocate to which the signatures of the several members of the court and the judge advocate could be affixed.

On June 15, 1921, this same man, Clarence Y. Hunt, gunner's mate third class, U. S. N., was again brought to trial upon the identical charges and specifications upon which he had been tried March 14 and 15, 1921. When arraigned in due course of his trial, the counsel for the accused entered a plea in bar on the ground of former jeopardy, but inasmuch as the verdict of a general court martial is not made public until after it has been approved or disapproved by the proper authorities in due course, it was not possible for the accused to plead more specifically, i. e., a former acquittal or conviction of the same offense. However, it is admitted by this Department that the plea entered was in due form under the procedure of a naval general court martial.

The court, after hearing evidence for and against said plea in bar, denied said plea on grounds of substance and directed the trial to proceed, which it did, the accused being found guilty of each charge and sentenced to three years' confinement, dishonorable discharge, and accessories.

(*b*) The facts in the case of Marion C. Carnicle, boatswain mate first class, U. S. Navy, attached to and serving on board the U. S. S. *Wyoming*, are the same as those presented in the case of Clarence Y. Hunt, gunner's mate third class, U. S. Navy, except that Carnicle was tried by a general court martial March 9, 1921, on the charge of "Desertion" and was retried on the identical charge June 8, 1921, [P. 14] found guilty as charged, and sentenced to eighteen months' confinement, dishonorable discharge, and accessories.

5. It is well settled in the law of the United States that no man shall be twice put in jeopardy for the same offense (206 U. S. 333; 202 U. S. 344; 195 U. S. 100; 113 U. S. 329; 97 U. S. 509; 18 Wall. (85 U. S.), 163). The test in each case is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense (131 U. S. 176; 195 U. S. 100).

6. Just when a defendant may be said to be in jeopardy in a criminal proceeding before the Federal courts, is a matter of decision not absolutely certain. But the courts have generally concurred in the view that the phrase "twice put in jeopardy of life or limb" as embodied in the Federal Constitution, means that a party shall not be tried a second time for the same offense after he has once been acquitted or convicted, unless the judgment has been arrested or a new trial has been granted on motion of the accused (9 Wheaton 579). Further, where the defendant has been placed on trial upon a valid indictment, before

a competent court and jury duly sworn, he is put in jeopardy and in such cases a nolle prosequi, or the discharge of the jury duly sworn without a verdict, unless by consent of the accused entered of record, or for some unavoidable necessity, must necessarily result in the acquittal of the accused and may be so pleaded in bar of a second trial (111 Fed. 257; 25 Fed. Cases 15, 075).

7. In the foregoing case of *Kepner* v. *United States* (195 U. S. 100 at 128) the foregoing rule was expressed as follows:

> "It is true that some definitions given by the textbook writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority as well as decisions of this court have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal, *Coleman* v. *Tennessee*, 97 U. S. 509. Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury; no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against the second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit."

It is further stated at another point in this same case (p. 130):

> "It is then the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered although no judgment be entered on the verdict, and it was found upon a defective indictment." (See also *United States* v. *Ball*, 163 U. S. 662.)

8. In the case of *Ex parte Lange* (18 Wheaton 183) the proposition of punishing a man twice for the same offense determined by a [P. 15] single verdict was presented and it was held that, under the 5th amendment, a single verdict would not support a second punishment, and also that the Constitution was designed as much to prevent an individual from being twice punished for the same offense as from being twice tried for it (p. 173). If, however, the trial is in fact a nullity for any reason jeopardy has not attached (237 Fed. 813). The court further held in this case that "No doubt he was in jeopardy down to the time the trial judge withdrew from the case, but the jury in a criminal case may be discharged because of the judge's inability to proceed with the trial on account of illness, and in such event the defendant is not in jeopardy and may be tried again."

9. There are many other points which could be considered with profit concerning when the proceedings of the court may be held to be a nullity and therefore no jeopardy could attach, but all such questions being admitted by the facts of the cases under consideration it is deemed advisable in the interests of brevity not to make any further reference to them in this memorandum.

10. There cannot be any doubt that the constitutional provision under consideration applies with the same force to general courts martial, whether military or naval, as it does to criminal courts generally. In the case of *Grafton* v. *United States* (208 U. S. at 352) it was stated that "Congress by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter." *Ex parte Reed* (100 U. S. 13) is to the same effect. "Its judgments (general courts martial) when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest under like circumstances." Many other cases may be cited to the same effect.

11. From a careful examination of the opinions of the Attorney General on this question it appears that they are to the same effect. In the case of Captain Nathaniel N. Hall of the U. S. Army, Attorney General Wirt stated in the course of his opinion that under the laws of the United States the sentence of a court martial, in case of death or dismissal, is not perfected until it has been approved by the President, and that "his disapproval annihilates it; the

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case stands as if there had been no trial, and is just as open to an order for a court martial as it was in the first instance" (1 Op. Atty. Gen. 242). A careful consideration of the facts in this case, however, show that he was considering the power of the President to order a new trial before a court martial where in his opinion the court erred on the first trial in excluding proper testimony. This is a well-established proposition of criminal procedure in the Federal courts and as such needs no further comment. If there could [P .16] be any doubt about the limitations of the statement of the Attorney General above quoted it is dispelled by a later opinion of the Attorney General in the case of Private Gustave Liesendahl (26 Op. Atty. Gen. 239) in which it is stated "That Private Liesendahl was legally tried for the crime of desertion, and as he cannot be again tried or any other sentence imposed for that offense, the disapproval by the reviewing authority of the sentence of the court that tried him operated as his acquittal of the charge." (See also 13 Op. Atty. Gen. 459.)

12. In the case of a naval officer who had received a private reprimand the Attorney General stated in the course of his opinion that "the jeopardy of the law means real peril, originally of life or limb, and always of substantial punishment or penalty * * *. Of course, if there is a trial in some form, which might result in conviction and punishment, the jeopardy is none the less complete and valid as a bar to another trial because, in fact, it issues in a simple rebuke; for absolute acquittal, if the peril is real, is equally a bar" (25 Op. Atty. Gen. 623).

13. It is of course no longer open to controversy that the convening authority may order a court martial to reassemble, provided it has not been dissolved, to revise its proceedings and its sentence. A revision, however, by a court martial of its findings is not in any manner a second trial nor can it be said that the rights of the accused under the 5th amendment are thereby encroached upon. A court martial, on revision, does not rehear the case; it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon and is in no sense a trial de novo (6 Op. Atty. Gen. 200). Going further into this same question it is stated that until the sentence of a court martial has been approved, or disapproved, the case still stands sub judice and that the analogy of a court martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of the judge in the latter. The verdict must be accepted by the judge and the judgment rendered accordingly before the verdict can have its complete execution and effect whether of conviction or acquittal; so in a corresponding case it must be with the proceedings of a court martial (ibid. 206).

14. In each of the cases under consideration there was a verdict and a sentence, but the absence of a record of the proceedings in each case rendered it impossible to enter either the verdict or the sentence and the members of the court and the judge advocate could not sign said record as required by article 52 of tht Articles for the Government of the Navy. In a case where one member of the court died before he could append his signature to the record the Attorney General held that the purpose of this article is to direct the officers of the court to sign the sentence, notwithstanding they may not have concurred in the decision, in order that the sentence may be known with certainty to have been correctly recorded. Further, [P. 17] that "the article orders officers under military discipline to sign the sentence. It does not say that the fact that such a sentence has been pronounced must be taken as nonexistent, however clearly it can be proven, if they or some of them are not in a position to sign as directed. I see no reason for believing it to be the intent of the law that in a case like the present the trial and sentence shall go for naught" (23 Op. Atty. Gen. 550).

15. This opinion of the Attorney General is squarely in point and if carried to its logical conclusion means that the real purpose of article 52 is to have the names of the court and the judge advocate appear on the record to show that they approve the record as correct and not to show how any of them voted on the evidence adduced before the court. In other words, the arriving at a verdict and the sentence are facts which may be established as any other facts and that the signed record is a confirmation of said facts. This is in accordance with prior decisions of this office, i. e., the signature required by this article is for the purpose of authentication and does not necessarily impart unanimous concurrence in rulings, findings, decisions, and other action taken (J. A. G. File 1434–04).

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16. Section 298, Naval Courts and Boards, issued by the Secretary of the Navy which was intended to be applied in these cases, contains the following statement relative to former jeopardy:

> "In order, however, that a person on trial before a court martial may be given benefit of this principle, it is necessary that he should have been actually acquitted or convicted on a former trial. That is, the former trial, on which an accused claims to have been placed in jeopardy, must have proceeded to a final acquittal or conviction in order to constitute former jeopardy (C. M. O. 7, 1914, 5; 22, 1916, 6). But, after the proceedings in a former trial have been carried to an acquittal or conviction, the jeopardy is complete, and it matters not whether any action, or if any, what action has been taken upon the proceedings by the reviewing authority."

17. The foregoing is important as showing the rules under which the court was presumed to have been proceeding in each of the cases under consideration. But I am of the opinion, presuming this provision of courts and boards binding upon the court in each case, that a final verdict (conviction or acquittal) within the meaning of this section had been reached in each of said cases.

18. It has been suggested that in the absence of a verbatim record duly authenticated as required by article 52 of the Articles for the Government of the Navy, i. e., "The judgment of every court martial shall be authenticated by the signature of the President and of every member who may be present when said judgment is pronounced, and also of the judge advocate," the verdict could not be final, and that jeopardy could not attach. It appears to me, however, that the accused being duly arraigned upon proper charge(s) and specification(s) before a general court martial having jurisdiction [P. 18] over the accused and the offense tried, a verdict reached, and a sentence agreed upon, he has been in jeopardy and in the absence of any act rendering the proceeding a nullity, he may not be again tried upon the same offense. Question (*a*) is therefore answered in the affirmative.

19. Turning to the second question, the proposition presented appears to be one of considerable difficulty. The Articles for the Government of the Navy require in connection with the trial of members of the naval service by general court martial that said courts be convened in a certain manner (art. 38); that they be constituted of a certain number of officers, not exceeding thirteen nor less than five (art. 39): that each member and the judge advocate be sworn (art. 41); that the accused be furnished with a true copy of the charges and specifications at the time he is put under arrest (art. 43); that the proceedings continue from day to day and be not suspended or delayed on account of the absence of any of the members, provided five or more are present (art 45); that no member absent himself except under certain conditions (art. 46); that the witnesses who have testified in the absence of a member of the court, be recalled for cross-examination when said absent member returns (art. 47); that in case of a sentence of death two-thirds of the members present concur (art. 50); in case of clemency, that the reason therefor must appear on the record (art. 51); and in case of the dismissal of a commissioned or warrant officer, the sentence to be confirmed by the President; in all other cases, that the sentence be confirmed by the commander of the fleet or officer ordering the court (art. 53).

20. The Constitution guarantees to the accused many valuable rights, such as the right to be present during his trial; opportunity to cross-examine witnesses; to have witnesses appear in his own behalf; to have the assistance of counsel for his defense; and that his trial be conducted strictly in accordance with due process of law. The last guarantee mentioned, i. e., due process of law, requires that the charges and specifications be in due form and technically correct; that the rules of evidence and other substantive law be strictly adhered to; and that the accused be given every opportunity to make his defense according to the well-known rules of law and criminal procedure.

21. There are some things required by Naval Courts and Boards issued to the service for its "guidance" in conducting said courts and boards that are not required by the Constitution of the United States, the Articles for the Government of the Navy, or substantive law, i. e., such as the entering of the findings and sentence of the court upon the record of the proceedings by the judge advocate in his own hand. Obviously such requirements are merely

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directory, and if not complied with the interests of the accused have not been interfered with. Such requirements, however, when issued to the service in the form of court-martial orders are binding upon the [p. 19] service and must be complied with, but neither the Secretary of the Navy nor the President is bound thereby.

22. Article 54 of the Articles for the Government of the Navy authorizes every officer who may convene general court martial, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he may approve or confirm. So also section 9 of the act of February 16, 1909, authorizes the Secretary of the Navy to set aside the proceedings or remit or mitigate in whole or in part the sentence imposed by any naval court martial convened by his order or by that of any officer of the Navy or Marine Corps. These provisions of law, together with the provisions of article 53 hereinbefore referred to, authorize, under certain circumstances, a review of the proceedings of a general court martial by the President and in all cases by the Secretary of the Navy and by the commander of the fleet or the officer ordering the court.

23. Obviously the purpose of this review is to see that the rights guaranteed the accused under the Constitution, Articles for the Government of the Navy, and substantive law, have been properly safeguarded in that he has had a speedy, public, and legal trial, and that the interests of the Government and the public have not suffered through failure upon the part of the court and the judge advocate to properly perform the duties required of them by law.

24. In view of the foregoing, I am of the opinion that the record of the proceedings must in every case show upon its face everything required by the Constitution, the Articles for the Government of the Navy, substantive law, or statutory law affecting the rights of the accused or the procedure in connection with general courts martial. Otherwise the reviewing authorities would have no proper evidence from which to determine whether or not the law had been complied with and the interests of all parties to the trial conserved.

25. The only question remaining, therefore, is whether a verbatim record of every step of the proceedings, including the evidence adduced before the court is required. I am of the opinion that it is not, particularly so much of the record as pertains to the evidence adduced before the court. From a careful consideration of this proposition, it appears to me that any record is sufficient which shows that the interests to all parties to the trial have been safeguarded, and if the record shows who were witnesses for or against the accused, all evidence admitted over the objections of the accused or his counsel, that he was given an opportunity for cross-examination and any other steps in the proceedings required by law to be shown, the record will be sufficient to inform the reviewing authority as to whether or not the rights of all the parties to the trial have been conserved, and the requirements of law complied with.

26. It is not suggested for a moment that the present practice of requiring every step in a trial by a general court martial be recorded verbatim, be changed, but in cases such as those under consideration it appears to me that substantial justice can be done and all [p. 20] the rights of the parties to the trial conserved by making up a record showing each step in the procedure as required by law, together with a summary of the testimony given by each witness, either for the government or the accused. The members of the court who have heard the testimony of the witnesses, observed their conduct before the court, and have had every opportunity of weighing the words and acts of said witnesses, should in all cases be, and doubtless in most cases are, better qualified than any one else to determine the value and force of such testimony. Nothing, therefore, can be lost if the reviewing authorities do not have every word of the testimony. If, however, it should be held that a verbatim record is required in all cases, obviously the accused in many future cases, guilty of having committed grave crimes, would go unpunished. Such a decision would lend an incentive toward conspiracies to defeat the ends of justice by making away with the stenographic notes, the source of the verbatim record.

27. No such record is required in criminal procedure generally. If the State or the accused wishes to obtain a verbatim record of the testimony in a given case the same may be provided for, but as a general proposition the accused must provide the means for making such a record if he wants one. The jury in a criminal case is not furnished with a verbatim record of the

testimony upon which to deliberate, and I can see no good reason why a record which complies with the provisions of the law governing court-martial procedure and merely contains a summary of the evidence would not be sufficient for all purposes, and you are so advised.

28. It is understood, of course, that this record of the first trial must be made up by the judge advocate and the members of the court and authenticated by them as true records of the procedings of the court before said court has been dissolved; otherwise it would not be the act of the court and Article 52 could not be complied with. It is also obvious that this substitute record should be made up without delay, after it is learned that the stenographic notes have disappeared, to obviate the possibility of having some of the essential facts pass beyond the memory of the court. Obviously, as it becomes generally known that such a record is acceptable, the opportunities for invoking its use will be reduced to a minimun, if not eliminated altogether.

29. In view therefore of all the circumstances surrounding the trial of such cases as are considered in this memorandum, I am of the opinion that question (*b*) should be answered in the affirmative (26251–27573, J. A. G., October 4, 1921).

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[P. 1] Lieutenant George Marvell, United States Navy, was tried by general court martial September 3, 1921, at the Navy Yard, Boston, Mass., by order of the Secretary of the Navy, on the following charges and specifications.

Charge.—Conduct to the prejudice of good order and discipline.

Specification 1.—In that George Marvell, now a lieutenant, U. S. Navy, while so serving in command of the U. S. S. *O–9*, at the Submarine Base, New London, Conn., having, on April 25, 1921, at said submarine base, been lawfully ordered by Lieutenant Commander Harold M. Bemis, U. S. Navy, Commander of Submarine Division Number Eight, to assume temporary command of the U. S. S. *O–4* then at said submarine base, for the purpose of making a trip to Hampton Roads, Va. to attend a Presidential review, did, on said date, without ascertaining by personal inspection the condition of the material and personnel of the said U. S. S. *O–4*, in an official letter of protest, dated April 25, 1921, and directed to the Commander of the Submarine Base, New London, Conn., comment upon the aforesaid order in words and figures as follows:

> "1. I wish to protest being temporarily detailed to command the U. S. S. *O–4* during the absence of her regular commanding officer for the following reasons:
>
> "(*a*) The vessel is being ordered to sea on this date when protested by the heads of departments of the vessel as unfit for sea and incapable of maintaining the desired performance.
>
> "(*b*) I am totally unfamiliar with the officers and crew.
>
> "(*c*) I have not had opportunity to assure myself of the efficiency and organization of the crew, upon which the safety of the vessel depends.
>
> "(*d*) These orders separate me from my regular command for the safety of which I am personally responsible and from which I am not relieved.
>
> "(*e*) These orders force me into the position of accepting the responsibility for the U. S. S. *O–4's* performance when I am in no way prepared to accept that responsibility, and have had no opportunity to remedy any defects of personnel or material that may exist.
>
> "2. The military necessity for my assuming command of the U. S. S. *O–4* and putting to sea under these conditions does not, [P. 2] in my opinion, exist and I am forced to protest the execution of these orders."

and he, the said Marvell, in presuming to pass, in the letter above quoted, upon the military necessity of performing a duty upon which he had been ordered by a proper superior, as aforesaid, presumed to pass judgment upon a matter which is not within his, the said Lieutenant Marvell's provinces to decide, and, in stating in said letter that the military necessity of performing the duty to which he had been assigned did not, in his, the said Marvell's opinion, exist, improperly criticize the judgment of the aforesaid superior in deciding, after due investigation and deliberation, and as it was within his, the said superior's provinces to decide, that such necessity did in fact exist.

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Specification II.—In that George Marvel, now a lieutenant U. S. Navy, while so serving in command of the U. S. S. *O–9*, at the Submarine Base, New London, Conn., having on April 25, 1921, at said submarine base, been lawfully ordered by Lieutenant Commander Harold M. Bemis, Commander of Submarine Division Number Eight, to assume temporary command of the U. S. S. *O–4*, then at said submarine base, for the purpose of making a trip to Hampton Roads, Va., to attend a Presidential review, and having, on said date in an official letter of protest, dated April 25, 1921, and directed to the Commander of the Submarine Base, New London, Conn., commented upon the aforesaid order in words and figures as follows:

"1. I wish to protest being temporary detailed to command the U. S. S. *O–4* during the absence of her regular commanding officer for the following reasons:

"(*a*) The vessel is being ordered to sea on this date when protested by the heads of departments of the vessel as unfit for sea and incapable of maintaining the desired performance.

"(*b*) I am totally unfamiliar with the officers and crew.

"(*c*) I have not had opportunity to assure myself of the efficiency and organization of the crew, upon which the safety of the vessel depends.

"(*d*) These orders separate me from my regular command for the safety of which I am personally responsible and from which I am not relieved.

[P. 3] "(*e*) These orders force me into the position of accepting the responsibility for the U. S. S. *O–4's* performance when I am in no way prepared to accept that responsibility, and have had no opportunity to remedy any defects of personnel or material that may exist.

"2. The military necessity for my assuming command of the U. S. S. *O–4* and putting to sea under these conditions does not, in my opinion, exist, and I am forced to protest the execution of these orders."

did, on the day and at the place aforesaid, after having his attention called, by the commander of the said submarine base, Captain Frank D. Berrien, U. S. Navy, to the fact that, pursuant to the above-quoted letter of protest, certain repairs had that day been made on the U. S. S. *O–4* and an inspection of same made by Lieutenant Commander Freeland A. Daubin, U. S. Navy, the Base Engineer and Repair Officer and an experienced submarine officer, as a result of which inspection Lieutenant Commander Daubin had reported it as his opinion that the engines of the U. S. S. *O–4* "are now reliable for any trip within the usual capacity of the submarine," without ascertaining by his, the said Lieutenant Marvell's own personal inspection the condition of the material and personnel of the said U. S. S. *O–4*, persist in his protest as aforesaid, which action on the part of the said Lieutenant Marvell, in so persisting in said protest without making personal inspection or taking any steps to verify the matters brought to his attention as aforesaid, was arbitrary, unwarranted, and prejudicial to the interests of good order and discipline.

Findings

The first specification of the charge "Proved."

The second specification of the charge "Proved in part, proved except the word 'arbitrary,' which word is not proved." And that the accused, Lieutenant George Marvell, U. S. Navy, is of the charge "Guilty."

Sentence

The court therefore sentences him, Lieutenant George Marvell, U. S. Navy, to lose twenty-five (25) numbers in his grade.

The Chief of the Bureau of Navigation Placed the Following Comment Upon the Record

"The particular acts which made necessary the trial of Lieutenant Marvell, U. S. Navy, by a general court martial, indicate a very [P. 4] insubordinate spirit on the part of this officer, or a belief that he can assume himself to be the judge of the propriety of a duty to which he has been assigned or of an order issued to him by his superior officer; the Bureau cannot conceive of an

officer being so little acquainted with Navy regulations, customs, and traditions as to have felt that in submitting the written protest he did, he was fully complying with the regulations and that his acts were in accord with service customs and traditions.

"The regulations require all persons in the service to obey readily and strictly, to execute promptly the lawful orders of their superiors. Under such conditions only can discipline and efficiency be maintained.

"The method of appealing from an order or decision is fully covered in the regulations, and had there been any just reason for submitting an appeal, which in this particular case the Bureau does not consider existed, such methods as are prescribed should have been closely adhered to. A protest against a legal order issued by a superior has no standing in the naval service and cannot be tolerated. It at once implies the right of the one receiving such order to judge the propriety and legality of the order, which if countenanced and permitted would in time have an evil effect upon discipline and efficiency.

"Subject to the incidents which are fully covered by this general court martial, the Bureau has noted several other protests submitted by officers, which while covering matters of a much less important nature, nevertheless clearly indicate that, to some at least, the right to unhesitatingly judge and question orders issued, exists; the Bureau therefore recommends that such part of the proceedings of the general court martial as will clearly point out the mistaken ideas be published for the information of the service."

ACTION OF THE SECRETARY OF THE NAVY

The Secretary of the Navy, on November 3, approved the proceedings, findings, and sentence, and concurred in the foregoing comments of the Chief of the Bureau of Navigation, which are hereby published for the information and guidance of the naval service.

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[P. 8] STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

In reviewing a recent summary court-martial case, it was noted that the accused after pleading guilty to leaving post before being regularly relieved, made an oral statement, in substance, as follows:

> "I wish to tell the court that when I left my post I thought I was carrying out my orders. I left to try to catch a man who was smoking. He refused to stop on my order. I further wish to call the court's attention to the fact that my enlistment expires on December 7, 1921, and it is my desire to be paid off with an honorable discharge. I ask the clemency of the court."

The Department is of the opinion that the statement of the accused is inconsistent with his plea of guilty. If the accused pleads guilty and then makes a statement inconsistent with his plea, it becomes the duty of the court to instruct the accused in the premises in order that he might withdraw his plea of "Guilty" and substitute therefor the plea of "Not guilty," and if he persists in his plea of "Guilty" to direct that the plea of "Not guilty" be entered and proceed with the trial as if the plea had originally been "Not guilty" (File 26287–8296, J. A. G., November 22, 1921).

ACCUSED: WITNESS IN OWN BEHALF, SCOPE OF CROSS-EXAMINATION OF.

The following is quoted from the record of proceedings in a recent case:

> "The counsel for the accused stated that he would like to state to the court that the accused was desirous of taking the stand in his own behalf for the purpose of testifying to charge III and the specification thereunder and requested a ruling from the court as to the scope of cross-examination permitted the judge advocate under paragraph 161, Naval Courts and Boards, 1917.

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"The court was cleared. The court was opened. All parties to the trial entered and the president announced that it was the opinion of the court that if the accused took the stand in his own behalf his oath as a witness would compel him to state everything within his knowledge in relation to the charges.

"The counsel for the accused stated that he understood by the ruling just handed down that the court refused to permit the accused to take the stand and testify relative to charge III, and the specification thereunder only.

"The court was cleared. The court was opened. All parties to the trial entered and the president announced that the accused might take the stand in his own defense on any charge but when on the stand his oath as a witness would compel him to answer any questions in regard to the charges and the president of the court would not administer to a witness any oath other than the one given under article 288, Naval Courts and Boards, 1917."

[P. 9] It is the opinion of this office that the above ruling of the court was erroneous, particularly that part which stated "when on the stand his oath as a witness would compel him to answer any questions in regard to the charges." It is a well-settled principle of the law of evidence that cross-examination must, in general, be confined to the matter brought out in the direct examination, and this principle applies to the accused when a witness as well as to other witnesses. (See Naval Digest, 1916, Witnesses 5). Therefore if the accused took the stand in his own behalf and was interrogated by his counsel on matters pertaining to charge III only, he could not legally be questioned on cross-examination by the judge advocate on the other charges. Of course counsel for the accused should be held to know this principle of evidence, but in view of the incorrect impression apparently created by the ruling of the court, and as the accused was thereby precluded from taking the stand to answer the offense alleged under charge III, it is recommended that the findings on this charge be set aside (File 26262–9107 J. A. G., December 24, 1921, G. C. M. Rec. No. 54578).

EVIDENCE: IRREGULARITIES IN ADMISSION OF.

The judge advocate attempted to have the witness then on the stand refresh his memory from the findings of a board of investigation (p. 5 of the record) to which the counsel for the accused objected on the ground that the board of investigation had not been sworn. This objection was sustained by the court. The judge advocate then tried to introduce the opinion of the board of investigation indirectly by asking the witness what report the board had made and what facts brought out in the investigation had caused the board to form the opinion it had formed. The counsel very properly objected to this line of questioning and the court sustained his motion that all such testimony by the witness be stricken from the record. The findings and recommendation of a board of investigation are always inadmissible as evidence in a court martial for the reason that they are purely opinion evidence and do not come within any of the exceptions under which opinion evidence may be sometimes admitted. (See Naval Courts and Boards, sec. 146, and Naval Digest, Boards of Investigation, 6.) At a later stage of the proceedings (p. 21) the judge advocate advised the court that the above ruling was erroneous. In giving this advice, the judge advocate was clearly mistaken.

The judge advocate also attempted (p. 9) to introduce the testimony of Haitiens, deceased at the time of trial, before a board of investigation referred to above. The counsel objected and the court sustained his objection, as was proper, since the testimony before a board of investigation is admissible in evidence by a court martial only if offered as an admission by the accused, or for the purpose of showing a previous contradictory statement before the board of investigation by the witness in the court martial, or in an attempt [P. 10] to prove perjury, or to refresh the memory of a witness. (See sections 198 (*a*) and (*b*), Naval Courts and Boards.) On page 21, the judge advocate also mistakenly objected to the court's ruling on this point.

The court admitted in evidence (p. 12) testimony received in the general court martial of _____ _____, corporal, U. S. Marine Corps, and also testimony received in the general court martial of _____ _____, private, U. S.

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Marine Corps (p. 29). The reason advanced by the judge advocate for the use of testimony contained in the records of these general courts martial was that the marines whose testimony was read had been transferred to the United States. Testimony received at a previous trial is not admissible in evidence unless (1) the latter trial relates to the same crime and the same party is being prosecuted; (2) the person against whom the evidence is to be given had the right and opportunity to cross-examine the witness when his examination was taken. Furthermore, it must be shown that the witness at the previous trial is (1) dead, (2) physically or mentally incapable of being present at the trial (e. g. very sick or insane), or (3) kept out of the way by the adverse party. In this case a different man was being tried and the accused, _____, had had neither the right nor opportunity to cross-examine witnesses in the trials of _____ and _____. It was also brought out (p. 30) that no attempt had been made to have the witnesses concerned brought back to Haiti or to obtain their depositions. Clearly, therefore, testimony at the trials of _____ and _____ was inadmissible in _____'s general court martial and the admission of such evidence would have been a fatal error, necessitating the setting aside of the case, if _____ had been convicted.

For the reasons stated above, this office is of the opinion that the convening authority was also in error when he stated in his action that the court erred in sustaining the objection of the counsel for the accused to strike out the testimony of the witness who had testified as to the findings, and reasons therefor, of the board of investigation. The convening authority was also in error when he stated that the testimony of the deceased natives before the board of investigation was admissible because it was the best evidence available. Although it is true that the difficulty of other proof is the basis of several of the exceptions to the hearsay rule, nevertheless these exceptions are also based on the fact that the statements are made under circumstances entitling them to special reliability. The taking of the oath or an equivalent affirmation is the test of reliability in court proceedings, and the fact that a person is now dead has no bearing on the question of the admissibility in evidence of the person's unsworn statements while living. This general rule of evidence is followed in section 198 (*b*), Naval Courts and Boards, which provides for the exclusion of such unsworn statements and on which the court based its decision.

It would appear that the failure to empower the board of investigation to administer oaths, when the most important witness before [P. 10] the board, _____ _____, had been badly burned and was in hospital in a serious condition as a result thereof, coupled with the failure on the part of the judge advocate to attempt either to summon or to obtain the depositions of the marine witnesses who had been transferred to the United States, made it impossible to place before the court legal and properly admissible evidence on which the accused might have been convicted.

In view of the irregularities, pointed out above, the proceedings were set aside (File 26262–9108, J. A. G., Nov. 8, 1921, G. C. M. Rec. No. 54396).

BREAKING ARREST: DOCUMENTARY EVIDENCE OF.

It is noted from a review of the record of proceedings in the general court-martial case of _____ _____, fireman first class, U. S. Navy, that the only evidence introduced by the prosecution to prove charge III, "Breaking arrest," was an entry from the service record book of the accused which reads as follows:

> "8–19–21. Was found to be absent from ship, station, and duty without permission from proper authority. Straggler's reward of $25.00 offered. After ten days reward of $50 offered for apprehension and delivery. Declared a deserter. Articles 1696–1706 NR, 1920, complied with. This man was a prisoner at large awaiting trial by summary court martial for A. O. L. about 8 days from 8 a. m. August 8, 1921."

The introduction of a service record entry alone that the accused was a "prisoner at large" is not sufficient proof to warrant a finding of guilty on the charge of "breaking arrest." It is essential in proving this offense to establish that the accused had actually been placed under arrest.

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Where the accused has not actually broken from close confinement, a service record entry (if properly introduced in evidence) which would be sufficient to establish a prima facie case of "breaking arrest" would be one which showed that the accused had been personally informed by proper authority that he was under arrest or that he was informed by proper authority that he was a prisoner at large. (See C. M. O. 4, 1921, p. 10; File 26251–28994, J. A. G., November 9, 1921.)

COUNSEL FOR ACCUSED: ARGUMENT.

In a recent general court martial, it was noted that in his argument counsel for the accused read into the record the honorable discharge of the accused from the U. S. Army. This was improper, the correct method to introduce such matters being stated in Naval Courts and Boards, 1917, section 187, page 170.

It is noted also that the court permitted counsel to make up his closing argument almost entirely of material facts not introduced in evidence, which, had they been presented in a proper manner, might have constituted a valid defense to the charge.

[P. 12] Argument of counsel should be confined by the court to the facts adduced in the case, and while it is true that a reasonable latitude should be allowed him in his closing argument, such argument should not be used for the purpose of introducing averments of material facts which, if properly presented, would be evidence. (See C. M. O. 129, 1918, p. 21; File 26262–28979, J. A. G., November 10, 1921.)

DECK COURT: ORDER CONVENING COURT MUST BE SIGNED.

In reviewing a deck court it was noted that the convening authority had not signed the order convening the court. This omission renders all subsequent proceedings null and void, since no authority for holding the trial appears upon the record. (In this connection see section 469, Naval Courts and Boards; File 27217–5130 J. A. G., November 23, 1921.)

SPECIFICATIONS: AS FOUND PROVED MUST ALLEGE AN OFFENSE.

In a recent summary court-martial case, it was noted that the specification alleges that the accused "did * * * feloniously take, steal, and carry away from the clothesline on the forecastle of the U. S. S. _____ one white hat * * *"; and that the court found "the specification proved in part, proved except the words 'feloniously take, steal, and carry away from the clothesline on the forecastle of the U. S. S. _____' which words are not proved, and for the excepted words the court substitutes the words 'unlawfully have in his possession; which words were proved."

It is the opinion of the Department that the specification found proved is insufficient, in that it fails to state an offense against the accused. It is not sufficient to allege in a specification that an action is unlawful, such a statement being but a conclusion of law. All the facts and circumstances which constitute the unlawfulness must be stated. (See Court-martial Order 237, 1919, p. 15.) The insertion of a conclusion of law in a specification where desired for the sake of particularity is permissable, but such a conclusion adds nothing to the specification, which must rest upon a statement of fact (File 26251–8302, J. A. G., November 23, 1921).

[P. 19] BAD-CONDUCT DISCHARGE: EXERCISE OF MITIGATING POWER IN CASE OF APPROVAL OF.

In reviewing the records of summary courts martial received by the Department, it has been noted in a large number of cases that the instructions contained in section 462, Naval Courts and Boards, have not been observed. The instructions to which reference is had is that part of the above section

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which provides that in sentences involving a bad-conduct discharge, together with loss of pay, the latter should, whenever necessary, be remitted to such an extent as to leave the discharged man sufficient money for his immediate needs after his separation from the service. These instructions, while not mandatory, express a policy which the Department deems should be given every consideration by reviewing authorities when taking action on cases where sentences involve bad-conduct discharge, together with loss of pay.

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[P. 6] ATTEMPT: ELEMENTS OF AN.

An attempt to commit a crime consists of three elements (1) the intent to commit the crime, (2) performance of some act toward the commission of the crime, and (3) the failure to consummate it, the third element being just as essential as the other two (*Graham* v. *People*, 181 Ill. 477). It follows that one who has actually deserted cannot be found guilty of an attempt to desert and that a specification alleging desertion does not support a charge of "Attempting to desert" (File 26262–9163, J. A. G., Nov. 16, 1921; G. C. M. Rec. No. 54755).

CHARGE: IRREGULARLY DRAWN.

An accused was convicted of "Knowingly, wilfully, and intentionally hazarding the safety of a vessel of the Navy and exposing the lives of the crew to danger" and sentenced to be confined for a period of one year, dishonorable discharge, and accessories.

The above charge is based on section 10, article 4 of the Articles for the Government of the Navy, which provides that "The punishment of death or such other punishment as a court martial may adjudge, may be inflicted on any person in the naval service who intentionally or wilfully suffers any vessel of the Navy to be stranded, or run upon rocks, or shoals, or improperly hazarded * * *." In order, therefore, for the act of hazarding a vessel to [P. 7] be an offense under the foregoing statute, it must have been improper, and in the opinion of this office, the above charge is deficient in that the word "improperly was omitted. However, the specification clearly and fully supports the charge as it should have been set forth, and in the absence of objection, and as the omission in question is not prejudicial to the interests of the accused, it is the opinion of the Department that the failure to include the word "improperly" in the charge is not fatal (File 26262-9104, J. A. G., October 14, 1921, G. C. M. Rec. No. 54567).

CORPUS DELECTI: CIRCUMSTANTIAL EVIDENCE.

At the very outset, the court, after listening to the testimony of the first witness, an eyewitness to the occurrence, who, in a case of manslaughter by drowning, had testified that he had seen the victim strike the water and that he had not been seen since, sustained a motion by counsel for the defense to strike out the testimony of the witness on the ground that the corpus delecti had not been independently established by direct evidence. In other words, the court made a ruling which, carried to its logical conclusion, would have meant that no testimony could have been introduced in the present case inasmuch as the body of the deceased had never been recovered. This ruling was of course erroneous as the court itself later recognized by its action in refusing to sustain further motions of this kind in connection with the testimony of later witnesses. It is well settled that circumstantial evidence is competent to establish the corpus delecti in cases similar to the present one (File 26251–28754A, J. A. G., Nov. 3, 1921; G. C. M. Rec. No. 54635).

COUNSEL FOR ACCUSED: IMPROPER ARGUMENT.

In a recent case the court permitted counsel to embody in his argument matters bearing on the merits of the case, which, if introduced as evidence, could have been considered by the court in arriving at the sentence. The

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proper method of presenting matters of this character is to bring in witnesses who can testify to such facts as it may be desired to bring to the attention of the court as matters of extenuation. In this connection, attention is invited to the provisions of section 314, Naval Courts and Boards, 1917 (File 26262-9213, J. A. G., December 16, 1921; G. C. M. Rec. No. 54875).

CROSS-EXAMINATION: IMPROPER.

In the cross-examination of the witness whose testimony, insofar as can be gathered from the record, was given in a straightforward manner, counsel for the accused went beyond even the wide latitude allowed on cross-examination and inquired into matters which, from a reading of the record appeared to have no connection either with his examination in chief or with his credibility. For example, much time was devoted to bringing out at great length all the details of the business of the witness and the firms with which he engaged in business. So far as the record divulged there was no point to this; [P. 8] it has nothing to do with the matter at issue, and it is difficult to see how the fact that the witness represented the ------ Company, which dealt in ------, had anything to do with his credibility. While, as above stated, a wide latitude should be allowed in cross-examination, courts should distinguish between the legitimate ends of cross-examination and the mere pointless harassing of a witness and should not permit the former bounds to be passed (File 26251-28754A, J. A. G., Nov. 3, 1921; G. C. M. Rec. No. 54635).

DECK COURT: ORDER CONVENING COURT MUST BE SIGNED.

In reviewing a recent deck court it was noted that the convening authority had not signed the order convening the court. This omission rendered all subsequent proceedings null and void, since no authority for holding the trial appears upon the record.

In view of the above, the Secretary of the Navy directed that the proceedings, findings, and sentence in the case be set aside.

However, attention was pointed to the fact that this case is no bar to another trial for the same offense, since before there can be former jeopardy the court before which the former proceedings were conducted must have been a duly constituted and legally competent court (See sec. 298, Naval Courts and Boards; File 27217-5153, J. A. G., December 8, 1921).

EVIDENCE: DOCUMENTARY, ADMISSIBILITY OF.

In a recent general court-martial case the judge advocate offered in evidence for the prosecution a letter from the Major General Commandant, U. S. Marine Corps to the commanding officer, U. S. S. *Maryland*, which letter was apparently based upon another letter from the commanding officer, Marine Barracks, Philadelphia, Pa. The counsel for the accused failed to object to the introduction of the letter into evidence and it was so received.

In the opinion of this office the above letter was clearly incompetent to be admitted into evidence and the court should have rejected it on its own initiative in view of the counsel's failure to properly protect the accused's interests by interposing an objection. In this connection, attention is invited to the statement in C. M. O. 317, 1917, 3, that letters written by a third person to a third person or to the prosecutor are not admissible, and to the comment in C. M. O. 133, 1920, page 13, in regard to the inadmissibility in evidence of a letter from the Bureau of Navigation upon which the charges and specifications were based (File 26262-9217, J. A. G., Dec. 18, 1921; G. C. M. Rec. No. 54893).

EVIDENCE: OPINIONS OF WITNESSES, ADMISSIBILITY OF.

The general ruling in regard to opinion evidence is that a witness may testify as to whatever is presented to his senses. This is strictly matter of fact. What he has seen or heard or felt, he knows, in the sense in which the law requires

knowledge on the part of a witness testifying. But what he thinks in respect to the matters in issue [P. 9] is matter of opinion and he cannot state it. "It is for him to put before the jury the facts as he has perceived them by his senses, and for the jury to form an opinion concerning the facts in proof of which the evidence is offered" (McKelvey on Evidence, p. 219).

In this connection, however, it should be noted that it is often quite difficult to distinguish between matters of fact and opinion, and some conclusions of the mind, which appear at first blush to be opinion evidence, are treated as matters of fact in the law of evidence, for the reason that they are practically instantaneous conclusions of the mind and require no conclusion of judgment in their formation. Thus a witness may say that a person appeared drunk, or angry, or pleased. But the admissibility of such evidence does not extend to cases where its application would carry the witness into the expression of a real opinion upon matters which it is the jury's province to decide (McKelvey, p. 223; File 26251–28853, J. A. G., Dec. 6, 1921; G. C. M. Rec. No. 54783).

GENERAL COURT MARTIAL: RETURN OF RECORD FOR REVISION.

In a recent case, the convening authority returned the record of proceedings to the court, calling attention to section 346, Naval Courts and Boards, and directing the court to reconvene for the purpose of reconsidering its sentence. The court thereupon revoked its previous sentence, and sentenced the accused to the same sentence with the addition of a reduction in rating, to the rating of musician second class (sec. 346–347, Naval Courts and Boards, provide that reduction in rating should be adjudged in the case of a petty officer sentenced to confinement other than the confinement that may be adjudged by a summary court martial).

The action of the convening authority in returning the record to the court for a reconsideration of its sentence would appear to be in contravention of the President's established policy, as outlined in C. M. O. 309, page 2, wherein it is stated that no authority will return a record of trial to any military tribunal for reconsideration of the sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had, a circumstance that did not exist in this case because the provisions of Section 346, Naval Courts and Boards, are purely directory, and not mandatory (File 26262–9169, J. A. G., Nov. 23, 1921; G. C. M. Rec. No. 54792).

IMMEDIATE SUPERIOR IN COMMAND: EFFECT OF ACTION BY, ON ACTION OF CONVENING AUTHORITY BY WHOM SENTENCE WAS MITIGATED.

In reviewing a recent summary court-martial case, it is noted that the immediate superior in command approved the proceedings, findings, and sentence in the case of _____, but disapproved the mitigation of the sentence of the convening authority.

Article 33 of the Articles for the Government of the Navy reads in part as follows: "The officer ordering a summary court martial shall [P. 10] have power to remit, in part or altogether, the sentence of the court" and in the legal exercise of his power, the convening authority remitted the bad conduct discharge on condition that _____ during a period of six months, conducts himself in such a manner as in the opinion of his commanding officer warrants his further retention in the service; and remitted the loss of pay in this case subject to the conditions specified in article 1877, Navy Regulations, 1920. This mitigation was a final definite action on the part of the convening authority. The action of the immediate superior in command disapproving the mitigation of the sentence by the convening authority shows that the immediate superior in command did not approve of the convening authority's mitigating the sentence but does not have the effect of nullifying the mitigation.

From the above, it will be seen that the discharge of _____ on October 26, 1921, in accordance with the summary-court-martial sentence of July 7, 1921, and the checking of the loss of pay outright, as shown by the notation of the supply officer on the record, were illegal (File 26287–8323, J. A. G., Dec. 8, 1921).

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JURISDICTION OF COURTS MARTIAL: CAN BE SUSTAINED IN COLLATERAL PROCEEDINGS.

Article 26 of the Articles for the Government of the Navy and subsequent statutory enactments provide that summary courts martial and deck courts may be ordered "upon petty officers and persons of inferior ratings, by the commander of any vessel or by the commandant of any navy yard, naval station, or marine barracks to which they belong."

It will be noted from the above that it is essential to the jurisdiction of such courts that the man to be tried be serving under the command of the convening authority.

In reviewing summary courts martial and deck courts received in the Department, it has been noted that frequently, when men have been tried on board ships or at shore stations other than the one at which the offense was committed, the specification does not set forth that the accused was a member of the command of the convening authority at the time of ordering the trial. The specification in cases of trial by such courts should always set forth that the accused is serving under the command of the officer ordering the trial and thus show jurisdiction on its face. However, in cases where the specification fails in this respect the jurisdiction of the court can still be sustained if it can be shown that the accused was in fact serving under the command of the convening authority at the time the trial was ordered. In a recent decision of the Supreme Court of the United States, it was held, in effect, that when the jurisdiction of a court martial is attacked in a collateral proceeding, it is sufficient to establish the court's jurisdiction by evidence not contained in the court-martial record and introduced for the first time in the collateral proceedings in which the jurisdiction of the court martial had been attacked (*Givens* v. *Zerbst*, 265 U. S. 11).

[P. 11] JURISDICTION: OVER OFFENSES COMMITTED IN A PRIOR ENLISTMENT.

Except in cases of offenses in violation of Article 14 of the Articles for the Government of the Navy, there is no authority of law giving jurisdiction to a court martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted (File 26251–29077, J. A. G., Dec. 17, 1921).

PLEA: IMPROPER, OF ACCUSED.

The accused in a recent case, upon arraignment, pleaded "guilty" to the first specification, "not guilty" to the second specification, and "not guilty" to the charge. Since a single specification is sufficient to support a charge, the proper plea to the charge in this case was "guilty."

However, the court found the charge and specifications to be in due form and technically correct and as no objection was made to the charge and specifications by the accused, his plea of guilty to the first specification precluded him from making any plea but "guilty" to the charge. It is presumed that the plea of "not guilty" was made through misunderstanding as to which plea was proper when different pleas had been made to each specification. It was the duty of the court to explain to the accused, upon his making this improper plea to the charge, the proper procedure, but in view of the foregoing its failure to act in this instance is not considered fatal (File 26262–9171, J. A. G., Nov. 23, 1921; G. C. M. Rec. No. 54795).

SPECIFICATION: DEFECTIVE.

In reviewing a recent deck court, it was noted that the specification alleges as follows:

Specification.—"In that ____ ______ U. S. Navy, permit himself to be driven in a motorcycle at high speed in the streets of the Navy Yard, Philadelphia, Pa."

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In the absence of any allegation to the effect that the accused had any responsibility in regard to or any control over the high speed of the motorcycle, the above specification was deemed insufficient (File 27217–5149 J. A. G., Dec. 8, 1921).

SPECIFICATIONS: EACH SPECIFICATION MUST SUPPORT CHARGE.

It is noted upon reviewing the record of proceedings in a recent case that the court found charge II "Using abusive, obscene, and profane language toward his superior officer" proved as laid, although neither specification, as found proved by the court, fully supports the charge. The words contained in the first specification of the charge which the accused is alleged to have uttered are clearly "obscene" and "abusive," but they are in no sense of the word "profane." Likewise, in the second specification, the words alleged to have been uttered by the accused, as found proved by the court [P. 12] are clearly "abusive," but are in no way "profane" nor "obscene." Winthrop's Military Law and Precedents, page 216, provides as follows with reference to specifications supporting charges under which laid:

> "Each of several specifications to be complete and independent. It should be noticed that where there are several specifications, the present rule is to be applied to the framing of each specification precisely as if it were the only specification in the case. While one good specification will sustain the charge, any number of defective specifications will fail to do so. Each specification, therefore, should be entire and sufficient per se. Independently of every other specification, and without borrowing from, or referring to, any other, each separate specification should contain all the allegations, substantial and formal, which are necessary and proper both to complete itself and to support the charge as laid."

The convening authority, in drawing up the charges and specifications, erred in placing the first specification, which as stated above, was obscene and abusive, under the charge "Using abusive, obscene, and profane language toward his superior officer." A new charge should have been prepared identical with the foregoing except that the word "profane" should have been omitted. The second specification, as prepared by the convening authority, fully supported the charge, and was properly laid under the full charge.

In view of the irregularities in the charges and specifications set forth above, the court should not have found the charges and specifications in due form and technically correct. Having failed to do this the only way for the court to have held the accused on this charge was to have excepted in its finding on the charge the words "obscene" and "profane" and then both specifications would have fully supported the charge. The form in Naval Courts and Boards, 1917, page 129, covering this charge does not require that the three parts be proved; any of the three essentials may be found not proved, and if there still remains at least one character of language set forth therein found proved, an offense cognizable by a naval court martial is alleged.

As the court before which this case was tried has been dissolved and it is now impracticable for it to be reconvened, the record of proceedings cannot be returned for reconsideration and in view of the foregoing, the findings on charge II and the specifications thereunder were set aside by the Department (File 26262–9139, J. A. G., Dec. 10, 1921; G. C. M. Rec. No. 54692).

SPECIFICATIONS: MULTIFARIOUS.

In reviewing the recent case of ------ ------, it is noted that the specification under the second charge "Scandalous conduct tending to the destruction of good morals" is multifarious, in that it alleges more than one offense, to wit: (1) Seduction, (2) Statutory rape (provided the age of consent in the Dominican Republic is more than fourteen years), and (3) Acts tending toward the spread of venereal disease.

[P. 13] As each of these offenses would support the charge of scandalous conduct, they should have been alleged in separate specifications under the one

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charge, in accordance with the provisions of section 65, Naval Courts and Boards. Failure to do so, however, is a mere formal defect, waived by the accused in failing to object through his counsel, to the form of the charges and specifications (File 26262–9142, J. A. G., Nov. 18, 1921; G. C. M. Rec. No. 54704).

SPECIFICATIONS: NO OFFENSE ALLEGED.

In reviewing the summary court martial in a recent case, it was noted that the specification alleged that the accused "having been ordered to the Pacific Coast Torpedo Station, Keyport, Wash., for a course of instruction in the torpedoman's school, did, on or about July 10, 1921, after having been informed by the Inspector of Ordnance in Charge, that he, the said ——, boatswain's mate second class, U. S. Navy, had insufficient time to serve to be allowed to take the course of instruction in the torpedoman's school, and he, the said ——, boatswain's mate second class, U. S. Navy, was further informed that in order to take the course of instruction in the torpedoman's school, it would be necessary for him, the said ——, boatswain's mate second class, U. S. Navy, to either extend his enlistment or sign an agreement to reenlist upon the expiration of his current enlistment, whereupon he, the said ——, boatswain's mate second class, U. S. Navy, did agree to sign an agreement to reenlist, and that on August 10, 1921, the said ——, upon being called before the Inspector of Ordnance in Charge, to sign the above referred to agreement to reenlist, did, then and there refuse to sign said agreement.

It is the opinion of the Department that the facts alleged in the specification fail to constitute an offense cognizable by naval court martial. The specification merely alleges that the accused, having promised to perform an act, he was in no wise bound by his oath of enlistment to perform, failed to keep his promise. The specification also implies that in return for this promise the Inspector of Ordnance in Charge promised on behalf of the Government that the accused would be allowed to take the course of instruction in the torpedoman's school. But even so, the only thing charged against the accused is a breach of contract. Although the accused might be liable to the Government in a civil court, provided the Government could prove that it had been pecuniarily damaged by his breach of contract, it is clear that this breach did not render him liable in a criminal case, and all court-martial procedure is of this character.

In view of the above, the Secretary of the Navy directed that the proceedings, findings, and sentence in the case of —— be set aside (File 26287–8343, J. A. G., Dec. 19, 1921).

STATEMENT OF ACCUSED: WEIGHT TO BE GIVEN TO.

In reviewing the case of —— ——, it is noted that he pleaded not guilty to the charge of "Desertion." The prosecution then established [P. 14] a prima facie case of desertion by the introduction of the proper documentary evidence, which established the fact of the accused's unauthorized absence and gave rise to a presumption of his intent to desert, from the long duration of this unauthorized absence. (See Naval Digest, "Desertion," pars. 63 to 75.) The defense offered no evidence, but the accused made an oral statement in explanation of his absence in which he implied that he had always intended to return to the naval service.

Section 311, Naval Courts and Boards, provides that an accused's unsworn statement cannot legally be acted upon as evidence by the court, nor can it be a vehicle of evidence, or properly embrace averments of material facts, which, if duly introduced, would be evidence, such averments being entitled to no evidential weight if they are improperly introduced in a statement. Under the circumstances, therefore, the court could not legally pay any attention whatsoever to the accused's statement in this case in arriving at a finding, although the statement contained averments of material facts, which, if believed and before the court as evidence, might have resulted in the accused's acquittal.

It is pointed out that the counsel for the accused failed to comply with the provisions of the above section in this case and that the accused's interests would have been better protected by the accused taking the stand as a witness

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in his own behalf, since the facts recited in his statement would then have been entitled to evidentiary weight. Section 253 (*a*) Naval Courts and Boards however, provides that the counsel shall explain the difference in effect and value between an unsworn statement and testimony as a witness to the accused before the trial. Since the law presumes that official duties are properly performed so long as such presumption is not relied upon as a substitute for proof of one of the material facts in issue (McKelvey on Evidence, page 112) it may be assumed that the counsel had explained the contents of section 253 (*a*) to the accused prior to the trial, and that the accused's failure to take the stand as a witness and testify to the facts recited in his statement was due to his desire not to subject himself to cross-examination (File 26251–J. A. G. Nov. 26, 1921; G. C. M. Rec. No. 54873).

SUMMARY COURT MARTIAL: RETURN OF RECORD FOR REVISION OF SENTENCE.

In reviewing a recent summary court martial, it was noted that the court sentence the accused "To lose pay amounting to one hundred and forty-four dollars ($144) and to be discharged from the U. S. naval service with a bad-conduct discharge" and that the convening authority returned the record to the court, ordering the court to reconvene for the purpose of reconsidering its sentence, which, in the opinion of the convening authority, was inadequate. The court, accordingly, revoked its former sentence and substituted therefore, "To lose pay amounting to one hundred and sixty-two dollars ($162) and to be discharged from the U. S. naval service with a bad-conduct discharge."

[P. 15] In this connection, attention is directed to Court Martial Order 309, 1919, in which the Department set forth that the President of the United States has directed with regard to this matter, as follows:

> "'No authority will return a record of trial to any military tribunal for reconsideration of—
>
> "'1. (*a*) An acquittal.
>
> "'(*b*) A finding of not guilty of any specification.
>
> "'(*c*) * * *.
>
> "'(*d*) The sentence originally imposed, with a view to increase its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.
>
> "'2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited. * * *' (G. O. No. 88, War Dept. July 14, 1919)."

Quoting further from Court Martial Order 309, 1919, it is stated that:

> "It would appear from the return of a naval case for consideration of an acquittal or to impose a more severe sentence upon a conviction would be in direct contravention of the President's published policy in the premises and of his mandate to courts of military service."

Court Martial Order 309, 1919, applies to summary courts martial in the same degree as it does to general courts martial and in no case should the record of a summary court martial be returned to the court for the imposition of a more severe sentence.

In view of the foregoing, the Secretary of the Navy directed that that portion of the sentence of the summary court martial in the case of the above-named man which involved loss of pay in excess of $144 be set aside (File 26287–S341, J. A. G. Dec. 10, 1921).

SUMMARY COURT MARTIAL: UNAUTHORIZED SENTENCE.

In reviewing the record of proceedings of a recent summary court martial, it was noted that confinement for a period of two months, to lose pay amounting to $144, and to be discharged from the naval service with a bad-conduct discharge, are adjudged in the sentence.

That portion of the act of February 16, 1909, section 8, quoted under article 30 of the Articles for the Government of the Navy, on page 37 of Naval Courts and Boards, reads in part as follows: "Courts authorized to impose the punish-

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ments prescribed in article 30 of the Articles for the Government of the Navy, may adjudge either a part or the whole, as may be appropriate, of any one of the punishments therein enumerated" and provides further that "Extra police duties, and loss of pay, not exceeding three months, may be added to any of the above-mentioned punishments." From the above, it is plainly understood that only one of the punishments enumerated in A. G. N. 30 may be adjudged as indicated in section 8 of said article.

In view of the above, the Secretary of the Navy directed that that portion of the sentence in the case of the above-named man which involves discharge from the U. S. naval service with a bad-conduct discharge be set aside (File 26287–8327, J. A. G. Dec. 9, 1921).

[P. 16] LINE OF DUTY AND MISCONDUCT CONSTRUED.

A man who had been sentenced to eighteen months' confinement in a naval prison, for an absence of several months, was found by a board of medical survey to be suffering from tuberculosis, chronic pulmonary. From the facts it appeared that the disease was incurred while he was serving sentence, no facts were presented to show that it was the result of his own misconduct or that it was in any way connected with the sentence imposed, nor that it had not been contracted while in a duty status. *Held:* In line of duty, not misconduct.

REDUCTION IN RATING.

To be included in sentences involving confinement.

Prisoners sentenced to confinement and corresponding accessories, forfeit all pay except a sum of three dollars a month for necessary prison expenses, and a further sum of twenty dollars to be paid on discharge.

It is not to be inferred from this that the pay of prisoners so sentenced does not become a charge against "Pay, Navy." On the contrary, the pay that would be due the prisoner except the three dollars per month for necessary prison expenses and the twenty dollars to be paid on discharge, is checked against "Pay, Navy" and credited to "Fines and forfeitures."

In order, therefore, that the amounts checked against "Pay, Navy" will be reduced to a minimum, the Department desires that general courts martial, in adjudging sentences involving confinement, include a reduction in rating to the lowest rating of that branch of the service to which the person convicted belongs.

In connection herewith, attention is invited to the classification for disratings as set forth in Court Martial Order No. 11, 1921.

REDUCTION TO NEXT INFERIOR RATING: CLASSIFICATION FOR MARINES.

The holding of the Department in File 26287–7138, J. A. G. Sept. 15, 1921, published in C. M. O. No. 9, 1921, page 12, is changed by C. M. O. No. 11, 1921.

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[P. 11] DECK COURT: ILLEGALLY CONSTITUTED.

In reviewing the deck court in the case of _____ it is noted that the specification was preferred by the commanding officer, U. S. S. _____, Lieutenant (J. G.) _____, U. S. Navy, who ordered Ensign _____, U. S. Navy, as deck court.

Section 469, Naval Courts and Boards, provides that "Officers shall not be ordered as deck-court officers who are below the rank of lieutenant in the Navy or captain in the Marine Corps, except that, in cases where there is no officer of such rank, or of higher rank, attached to the vessel, navy yard, station, or command, the commanding officer (if a commissioned officer) may act as deck-court officer. An officer empowered to order deck courts shall not designate himself for this duty unless he is the only commissioned officer attached to the vessel, navy yard, or station, or command, or unless the subordinate officers are below the specified rank, in which cases he shall constitute the deck court and finally

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determine the cases tried by him, and no order appointing the court need be issued * * *."

From the above, it follows that the deck court in this case had no jurisdiction, and the Secretary of the Navy therefore directed that the proceedings, finding, and sentence in the case be set aside (File 27217-5191, J. A. G., January 26, 1922).

DOCUMENTARY EVIDENCE: WRITTEN REPORTS OF PATROL OFFICERS, ADMISSIBILITY OF.

In reviewing the general court-martial case of _____, U. S. Navy, it is noted that the court admitted in evidence over objection of counsel for the accused, the written report of Lieutenant _____, patrol officer, prepared the day following that on which the offenses charged against the accused were committed. The court erred in overruling this objection as the testimony of Lieutenant _____ was the best evidence and as he apparently had a clear recollection of the events which transpired on the night in question. The report, which was secondary evidence, was inadmissible. Winthrop's Military Law and Precedents, volume 1, page 557, provides as follows with reference to the foregoing:

> "Where, however, a paper or book of this class or indeed any official papers, sets forth acts done, etc., by an officer or soldier signing the same or referred to therein, and such acts, etc., are material evidence, and can be proved by the officer or soldier himself in person as a witness, his testimony, as being the 'best evidence' of the facts, should be resorted to instead of the writing."

The above irregularity is not considered of sufficient gravity, however, to invalidate the proceedings, as the oral testimony of Lieutenant _____ sets forth substantially all the material allegations contained in this report (File 26262-9147, J. A. G., Dec. 16, 1921; G. C. M. Rec. No. 54706).

[P. 12] EVIDENCE: HANDWRITING EXPERT TESTIMONY.

Accused charged with forging pay receipt and found guilty. Fact that pay receipt was a forgery was clearly established but the only testimony connecting the accused with the forgery was the testimony of a handwriting expert who stated that in his opinion the handwriting on the pay receipt and the admitted handwriting of the accused, specimens of which had been introduced in evidence, were the same. Department held that while the testimony of a handwriting expert alone is sufficient in law to sustain a conviction on a charge of forgery, yet the Department has some hesitancy in giving unqualified acceptance to this character of evidence when unsupported by corroborative circumstances. Case was disapproved as a matter of policy (File 26251-28913, J. A. G., January 10, 1922; G. C. M. Rec. No. 55005).

EVIDENCE: ORAL REPORT MADE IN PRELIMINARY INVESTIGATION NOT GOOD.

In reviewing the summary court-martial case of _____, boatswain's mate first class, U. S. Navy, it is noted that the specification alleged that the accused "serving on board the U. S. S. _____, at the Navy Yard, Olongapo, P. I., and regularly detailed for duty with the target-repair party of the Destroyer Squadron, U. S. Asiatic Fleet, having, on November 6, 1921, been ordered by the officer in charge of said repair party, Gunner _____, U. S. Navy, to report on board the U. S. S. _____, at 5 p. m. on the aforesaid date, did neglect and fail to report in obedience thereto until at or about midnight of the aforesaid date; and the said _____, boatswain's mate first class, U. S. Navy, was thereby negligent in obeying orders." The accused pleaded not guilty, but the court found the specification proved.

The only matter offered in support of the allegation that the accused had been ordered by Gunner _____ to report on board the U. S. S. _____ at 5 p. m. on November 6, 1921, was the testimony of Lieutenant Commander _____, who stated that Gunner _____ had so reported to him at a mast held by Lieutenant

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Commander _____ in his capacity as commanding officer of the *Panther*, to which ship the accused was attached. Two witnesses, one called by the prosecution and the other by the defense, testified that Gunner _____ had not ordered the accused to report at 5 p. m. but had ordered him to report after supper, which the witnesses construed to mean sometime during the evening. Gunner _____ did not testify at the trial.

In this connection it is pointed out that an oral report made in the preliminary investigation of a case, such as a statement in a hearing at mast, is pure hearsay and is inadmissible unless it comes within some of the exceptions to the general rule rendering hearsay evidence objectionable. Hearsay evidence is objectionable for the reason that it lacks the guaranties of truthfulness and reliability which support direct testimony by a witness, e. g., the party who actually [P. 13] made the statement which is narrated by the witness on the stand was not himself on oath at the time he made the statement and he was not subject to cross-examination by the other side. Exceptions to the hearsay rule are allowed for the reason that the statements so admitted into evidence as exceptions were made under special circumstances providing a reasonable guaranty of their truthfulness. But an oral report, though made in the course of duty, has never been made an exception to the hearsay rule in the United States, and the Department has so ruled in previous cases. See C. M. O. 141, 1918, 21, where it was held that testimony by the commanding officer of a ship as to an official report made to him by a subordinate was pure hearsay and should have been excluded by the court. (See also Naval Digest, p. 280 (9).)

In this connection it is pointed out that the mere fact that Gunner _____ was unavailable as a witness did not render his previous statement at the mast admissible on the theory that there was no better evidence that could be secured. The general rule is that hearsay evidence does not become admissible by reason of the fact that the declarant is unavailable as a witness, and the best evidence rule does not mean that hearsay evidence is admissible just because no better evidence is to be found. What it does mean is that even before a hearsay declaration which comes within one of the exceptions to the hearsay rule, because of special circumstances giving it a badge of truthfulness, can be admitted in evidence, it must be shown, in the case of most of the exceptions, that the declarant is himself unavailable as a witness, thus making the hearsay evidence which comes within one of the exceptions to the rule excluding such evidence the best evidence available. Thus it can be seen that the idea often found in the service, that hearsay evidence is admissible so long as no better can be found, is erroneous, the real rule being that even hearsay evidence, which comes within one of the exceptions to the general restriction against such evidence must be the best evidence available before it becomes admissible.

In view of the foregoing, and of the fact that the prosecution offered no other evidence that would tend to prove the specification, the Secretary of the Navy directed that the findings and sentence in the case of the above-named man be set aside (File 26287–8415, J. A. G. January 23, 1922).

IMMEDIATE SUPERIOR IN COMMAND: PROPER ACTION OF, WHEN SPECIFICATION IS DEFECTIVE.

The Immediate Superior in Command in his action on a recent summary-court-martial case stated:

> "It is the opinion of the reviewing authority that the second specification in the foregoing case is insufficient and fails to state an offense against the accused. Even though the accused did willfully break the lock on the door of the office, he may have been authorized or even commanded to do so. If the accused had maliciously destroyed [P. 14] Government property or had broken open the door without authority when authority was necessary, it should have been so alleged in the specification. It is pointed out that the primary meaning of the word 'willfully' is 'intentionally' and that if it is desired to charge a person with having done an act 'criminally and maliciously' the specification should read 'willfully and maliciously.' (See C. M. O. No. 7, 1921, p. 14.)

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"Subject to the foregoing remarks and in order that the accused may not escape punishment the proceedings, findings, and sentence in the foregoing case of ——, hospital apprentice second class, U. S. Navy, are approved."

From this, it appears that the Immediate Superior in Command believed the specification to be fatally defective and if so, he should have disapproved the proceedings and findings thereon instead of merely pointing out the fatal defect (File 26287–8403, J. A. G., January 10, 1922).

SPECIFICATION: DEFECTIVE.

A specification laid under the charge "Conduct to the prejudice of good order and discipline" alleged that the accused had in his possession on board ship a deadly weapon, viz, a pistol. The Department held that the specification should have been laid under the charge "Violation of a lawful regulation issued by the Secretary of the Navy" for the reason that the alleged act of the accused was specifically prohibited by article 119, Navy Regulations, 1920. But, as the specification informed the accused with certainty of the offense charged against him, it was held that in the absence of an objection, the use of an improper charge had not prejudiced him and did not invalidate the proceedings (26262–9269, J. A. G., Dec. 19, 1921; G. C. M. Rec. No. 55007).

UNDER THE INFLUENCE OF INTOXICATING LIQUOR: WHAT CONSTITUTES.

In reviewing the summary court martial in the case of ——, it is noted that the accused was found guilty of but one specification, namely, the first, which read as follows:

"In that ——, hospital apprentice first class, U. S. Navy, attached to and on duty at the U. S. Naval Hospital, Chelsea, Mass., was at or about 9 p. m. October 15, 1921, while on duty in ward 1–1 of said hospital, under the influence of intoxicating liquor, and thereby incapacitated for the proper performance of duty."

The convening authority in commenting on the court's finding on this specification stated, in effect, that in his opinion, the finding was in error for the reason that there was no direct testimony to the effect that the accused was "incapacitated for the proper performace of duty." Notwithstanding the expression of the above opinion, however, the convening authority approved the finding of the court in this specification.

[P. 15] It appears from the record that Lieutenant —— Medical Corps, U. S. Navy, was the principal witness for the prosecution in connection with the specification in question. The gist of Lieutenant ——'s testimony in regard to the point at issue is contained in the following questions and answers taken from the record:

4. Q. Was he under the influence of liquor about 9 p. m. October 15, 1921, while in ward 1–1?

A. My opinion is that any man that takes a drink is under the influence of liquor, so I will say Yes, but I would not say he was drunk.

5. Q. From your examination of the man and your knowledge of the effects of liquor would you swear that this man was under the influence of liquor at that time, when you first saw him over in ward 1–1?

A. Yes, according to my definition any man who has been drinking is under the influence of liquor.

6. Q. Could you swear that his breath smelled of some intoxicant?

A. Yes.

7. Q. Did he show any other evidence of being under the influence of liquor?

A. No, sir, he was not noisy or insolent.

It will be noted from the above that Lieutenant ——'s testimony in support of the specification is based upon a distinction which he made in his mind between the meaning of the phrase "under the influence of intoxicating liquor" and the word "drunk." It is clear from a reading of the above-quoted

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excerpt from his testimony that this witness was under the impression that proof of the specification required only the establishment of the fact that the accused had partaken of intoxicating liquor, that it was immaterial how slight an amount of such liquor the accused had taken, and that it was also immaterial whether or not the drink had any visible effect upon him. The court apparently accepted this witness' version of this matter and found the specification proved on the strength of his testimony.

It may be true that as a matter of medical theory even the slightest indulgence in intoxicating liquor, or anything else for that matter, leaves some effect upon the human system, medically considered. However, in the opinion of the Department, such theory has no place in naval court-martial procedure. To hold otherwise would be equivalent to holding that in order to find persons in the naval service guilty of drunkenness at any time or place it would only be necessary to show that the person so charged had partaken of even the slightest amount of intoxicating liquor and his guilt would be established irrespective of the fact that such act was unaccompanied by any sensible impairment of the faculties. Such a proposition readily reduces itself to absurdity. However, it may be pointed out that one of the sample specifications contained on page 98 of [P. 16] Naval Courts and Boards in support of the charge of "Drunkenness" alleges merely that the accused was "under the influence of intoxicating liquor." This in itself shows that for the purposes of naval court-martial trials, the terms "Drunkenness" and "Under the influence of intoxicating liquor" are synonymous.

The real test in cases of this kind is set forth in C. M. O. 18, 1917, in which it is stated that "The Articles for the Government of the Navy do not require any particular degree of drunkenness, and it is considered that such charge is supported by showing incapacity for the full performance of duty as a result of indulgence in intoxicating liquor." The same court-martial order further defines drunkenness as "any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties." It follows from the above that the matter at issue in cases of drunkenness is whether or not the faculties have been sensibly impaired by indulgence in intoxicating liquor and, unless such impairment can be shown, it matters not whether the accused has partaken sparingly or freely.

In connection with the above, however, attention is invited to paragraph 118 (2) Navy Regulations, 1920, which provides:

> "The use or introduction for drinking purposes of alcoholic liquors on board any naval vessel, or within any navy yard or station, is strictly prohibited, and commanding officers will be held directly responsible for the enforcement of this order."

Accordingly it follows that in cases where, as in the present case, there appears to have been no impairment of the faculties, however slight, as a result of indulgence in intoxicating liquors, there still remains an offensive in violation of Navy Regulations, provided it can be shown that such indulgence took place on board a naval vessel or within any navy yard or station. In order for a court martial to take cognizance of this offense, however, it is of course necessary that the specification referred to the court set forth facts which constitute a violation of this regulation.

In view of the above, the finding on the first specification and, inasmuch as that is the only specification found proved by the court, the sentence in the case of the above-named man was set aside (File 26287-8384, J. A. G., Jan. 10, 1922).

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[P. 7] ACCUSED: IMPROPER PLEA OF.

Accused pleaded guilty to specification under "assaulting and striking another person in the Navy" with exception of words "willfully, maliciously, and without justifiable cause." *Held*, that inasmuch as words excepted were material allegations without which no offense was alleged, the judge advocate should have advised accused to change his plea to not guilty (File 26262-9304, J. A. G., January 14, 1922).

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BREAKING ARREST: EVIDENCE NECESSARY.

In reviewing the general-court-martial record of ------ ------, fireman third class, U. S. Navy, it is noted that the accused was charged with "Desertion" and "Breaking arrest" and that the only evidence offered to prove the latter was an extract from the accused's service record as follows:

"12/24/20. A. W. O. L. from 7:30 p. m. 12/24/20. While a P. A. L. awaiting trial by S. C. M. (A. O. L. from 7 a. m. 12/12/20 to 12 mid. 12/20/20—8 days 17 hrs.) Failed to return. Declared a deserter, etc.

"(S.) ------ ------."

The counsel for the accused called the attention of the court to Court-Martial Order 1, 1921, in his closing argument and the court acquitted the accused of "Breaking arrest" which action on the part of the court was entirely justified in view of the provisions of Court Martial 1, 1921, 14.

The Department has previously held that it is essential to the offense of "Breaking arrest" that the accused be placed under [P. 8] arrest by the lawful order of his commanding officer, duly made known to the accused (Court Martial Order 31, 1918, p. 2). In Court Martial Order 1, 1921, page 14, the Department held that there was nothing in an extract similar to the one above quoted to show that the accused understood he was under arrest and, since he could not be guilty of the offense charged unless he so understood his status, the Department held that an extract such as the one in this case was insufficient evidence to support a conviction on the charge of "Breaking arrest." The Department further held in Court Martial Order 4, 1921, page 10, that a service-record entry which would be sufficient to establish a prima facie case of "Breaking arrest" would be one which showed that the accused had been personally informed by proper authority that he was "under arrest" or that he was informed by proper authority that he was a prisoner at large.

After careful consideration of the court-martial orders cited above the Department is of the opinion that the statement in a service record that a man is a prisoner at large is a statement of fact, which necessarily includes within it the constituent fact that the man had been informed of his status, for otherwise he would not be a prisoner at large. The restraint placed on a prisoner at large is purely a moral restraint imposed by the order fixing the limits of the arrest and the assertion that a man is a prisoner at large must imply that such order was made known to the accused because, if no knowledge of the order had been imparted to the accused, his status would not be that of a prisoner at large. Since entries in service records are made contemporaneously with the facts recorded, and are made in the regular course of official duty, by an officer having personal knowledge of them, such entries constitute prima facie evidence of the facts stated therein (Naval Digest, p. 576). It would accordingly appear in this case that the entry in the service record that the accused was absent without proper authority while a prisoner at large shows that he was placed under a moral restraint by a competent order fixing the limits of his arrest, which order was made known to the accused.

Accordingly, in the opinion of the Department the extract heretofore quoted constituted sufficient evidence to establish a prima facie case of breaking arrest. In other words, in the absence of any rebutting evidence by the defense, the extract would be sufficient evidence to support a finding of guilty. (NOTE.—C. M. O. 1, 1921, p. 14, C. M. O. 4, 1921, p. 10, and C. M. O. 11, 1921, p. 11, are overruled by above; File 26251-29394, J. A. G., February 18, 1922; G. C. M. Rec. No. 55335.)

CHARACTER WITNESSES.

Except to the limited extent to which the character of the accused may be attacked for purposes of impeachment when he takes the stand in his own behalf, the prosecution is not entitled to introduce evidence of the bad character of the accused unless he has [P. 9] clearly and expressly put his character in issue by introducing evidence of good character (File 26251-29409, J. A. G.; Feb. 13, 1922).

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CHARGES AND SPECIFICATIONS: FAULTY SPECIFICATION.

A specification laid under the charge "Causing to be presented to a person in the naval service for approval and payment a claim against the United States knowing said claims to be false and fraudulent" alleged that the accused had initialed as correct a receipt for a special payment to a man, when he knew the man in question had no money due him on the books.

Held, that the above allegation did not show that the initialing person had caused to be presented to a person in the naval service for approval and payment a claim against the United States knowing said claim to be false and fraudulent.

The specification should have set out the procedure followed in the payment of special money requisitions on board the ship in question and should have shown that, as a direct result of the act of initialing, said pay receipt was presented to a person in the naval service for approval and payment. The Department accordingly set aside so much of the case as related to this specification (File 26262–9280, J. A. G., January 11, 1922; G. C. M. Rec. No. 55059).

CONFESSIONS.

The commandant of a naval district obtained a confession from an accused person by promising that, if the accused would confess his guilt, he would urge the Department to mitigate such sentence as might be adjudged by the general court martial which was to be convened in the accused's case.

Held, that the confession was not voluntary in the legal sense of the word, because obtained by a person in a position of authority over the accused, as a result of a promise that, if the accused would confess, efforts would be made to mitigate his punishment.

CROSS-EXAMINATION: IMPROPER.

Court overruled objection of judge advocate to a question which judge advocate claimed was improper cross-examination. Question was "Have you ever put a man on report before on the _____?" *Held*, that inasmuch as the question was not asked for purpose of testing the witness's power of observation, the accuracy of his memory or the connection of his statement, and as the point was not touched on in the direct examination, this question was improper on cross-examination and should have been directed stricken from the record. This question was held also to have been irrelevant (File 26262–9304, J. A. G., Jan. 14, 1922; G. C. M. Rec. No. 55132).

[P. 10] THEFT.

A specification alleging theft of property of the United States intended for the naval service should be laid under the charge "Stealing property of the United States intended for the naval service thereof" and not under the charge "Theft" (File 26262–9314, J. A. G., Feb. 1, 1922; G. C. M. Rec. No. 55161).

LINE OF DUTY AND MISCONDUCT.

While in an unauthorized leave status, _____ attempted suicide by shooting himself. At the time of shooting he was being detained by police of Butte, Mont., on insanity charge. Subsequently admitted to U. S. Naval Hospital, Puget Sound, Wash., his condition being diagnosed as "wound, puncture, lung 'A' (gunshot)," origin, "not duty; due to own misconduct, at an attempt of suicide above wounds were inflicted. X-ray shows three bullets." Diagnosis was later changed to "Meningitis, cerebrospinal" with "origin, not in the line of duty," which latter disease was given as cause of death following self-inflicted gunshot wounds.

Held, as there were no affirmative facts of record to justify conclusion that _____ was insane at the time of shooting himself, no change in entry from "not in line of duty" to "line of duty" was warranted in this case.

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[P. 1] Lieutenant Commander Andrew W. Carmichael, Construction Corps, N. S. Navy, was tried by general court martial at the U. S. Naval Station, Cavite, P. I., on January 7, 1922, by order of the Commander in Chief, U. S. Asiatic Fleet, and found guilty of the following charge and specification.

Charge.—Violation of a lawful regulation issued by the Secretary of the Navy.

Specification.—In that Lieutenant Commander Andrew W. Carmichael, Construction Corps, U. S. Navy, serving at the U. S. Naval Station, Olongapo, P. I., did, on or about November 13, 1921, without permission from proper authority, address and send, or cause to be sent, a communication to the Assistant Secretary of the Navy, in substance as follows: "Astnav Washington Managers request to radio certain facts refused and he threatened with court martial if he cables same Carmichael Manager."

Sentence

"The court, therefore, sentences him, Lieutenant Commander Andrew W. Carmichael, Construction Corps, U. S. Navy, to be publicly reprimanded by the Secretary of the Navy."

Action of Convening Authority

On January 23, 1922, the convening authority approved the proceedings, findings, and sentence, and forwarded the record to the Secretary of the Navy for his action with respect to the sentence.

Opinion and Recommendation of the Judge Advocate General of the Navy

On March 7, 1922, the Judge Advocate General of the Navy placed the following endorsement on the record.

> "Respectfully referred to the Chief of the Bureau of Navigation for comment as to disciplinary features, with the information that, in the opinion of this office, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant [P. 2] Commander Andrew W. Carmichael, Construction Corps, U. S. Navy, are legal. Attention is invited to the fact that the Department has expressed in previous years, its disapproval of the sentence adjudged in this case. It is pointed out, however, that Lieutenant Commander Carmichael will escape without any punishment whatsoever if the public reprimand is not carried into effect in this case."

Recommendation of the Chief of the Bureau of Navigation

"Forwarded recommending approval of the proceedings, findings, and sentence in the foregoing case of Lieutenant Commander Andrew W. Carmichael, Construction Corps, U. S. Navy."

Action of the Secretary of the Navy

The Secretary of the Navy approves the remarks of the Judge Advocate General concerning the undesirability of a public reprimand as a court-martial sentence. The publication of this court-martial order will be considered as the execution of the sentence of public reprimand adjudged in the foregoing case of Lieutenant Commander Andrew W. Carmichael, Construction Corps, U. S. Navy.

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[P. 9] CHARGES AND SPECIFICATIONS.

The charge of "Conduct to the prejudice of good order and discipline" was used in a case where the proper charge would have been "When on shore injuring the property of an inhabitant."

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Held, that although the above error was not fatal, yet the sentence should be reduced to the maximum allowed in time of peace for "When on shore injuring the property of an inhabitant" (File 26262–9395, J. A. G., Feb. 28, 1922; G. C. M. Rec. No. 55384).

CHARGES AND SPECIFICATIONS: TECHNICALLY INCORRECT.

In a recent court martial an accused was charged with "Fraud in violation of article 8 of the Articles for the Government of the Navy," the specification being as follows:

> "In that ------ ------, aviation machinist's mate, first class, U. S. Navy, attached to the ------ and serving with the Air Squadron, U. S. Pacific Fleet, at the Naval Air Station, San Diego, Calif., did, on or about January 11, 1922, obtain from the officer of the day of the said Naval Air Station, Ensign ------, U. S. Navy, a personal property pass for two suits of dungarees and a suitcase, and that the said ------ did later attempt to remove from the said Naval Air Station, in said suitcase, a stolen lap robe, which was the property of Commander ------, U. S. Navy, fraudulently using the said property pass for this purpose."

In the opinion of the Department, the court erred in finding the charge and specification thereunder in due form and technically correct for the reason that the specification does not support the charge. The specification sets forth in augmentative form that the accused obtained a property pass for the alleged purpose of removing certain articles from the naval station and later used such pass in an attempt to remove from the station articles other than those for the removal of which he has procured the pass. The gist of the [P. 10] offense, therefore, is that an effort was made to remove property from the naval station without proper authority. These acts which might properly have been laid under charge of "Conduct to the prejudice of good order and discipline" in no way support a charge of "Fraud in violation of article 8 of the Articles for the Government of the Navy" since it appears that no deceitful representations whatever were made to the owner of the property. Accordingly, the proceedings and findings upon this charge and the specification thereunder were set aside (File 26262–9426, J. A. G., March 15, 1922; G. C. M. Rec. No. 55443).

CONVENING AUTHORITY: IMPROPER ACTION OF.

In reviewing the record of the general court martial in the case of ------, seaman first class, U. S. Navy, it is noted that he was acquitted of the offense charged against him, but that the convening authority disapproved the acquittal for the reason shown in the following abstract from his action:

> "After a careful review of this case, the Squadron Commander is of the opinion that there was sufficient evidence available to establish the charge against the accused. In the board of investigation convened prior to the ordering of this court, ------ ------, seaman second class, U. S. Navy, ------ ------, trumpeter, U. S. M. C., and ------, seaman second class, U. S. Navy, and ------, yeoman first class, U. S. Navy, had all appeared before and had given material evidence before this board. It is not understood why the court failed to call these witnesses before it, as it appears to the Squadron Commander from the testimony they had previously given before the board of investigation above referred to, that these witnesses were in possession of facts sufficient to sustain the guilt of the accused had they been called upon to testify. The failure of the court to introduce these witnesses is probably the means of the accused's escaping well-merited punishment.
>
> "Subject to the above remarks, the proceedings, findings, and acquittal of the general court martial in the foregoing case of ------ seaman first class, U. S. Navy, are disapproved."

From the above, it appears that the convening authority disapproved the court's finding of not guilty solely for the reason that persons who had not testified at the trial might, if they had been called, have given sufficient evidence for the prosecution to have caused the court to have found the accused

guilty. In the opinion of the Department, a convening authority should consider only the matter that is in the record in deciding as to the propriety of the court's findings, since the court itself is bound to arrive at its finding solely on the evidence adduced and the accused has to defend himself only against the evidence offered by the prosecution, not against what the prosecution might have offered if it had desired to do so.

[P. 11] In this connection, it is pointed out that there is nothing in the record to show that the members of the court had any knowledge in regard to the board of investigation, as it was not introduced into evidence and it is the duty of members of a court martial not to attempt to form an opinion prior to the trial by conducting an independent investigation, as by reading over the record of a board of investigation. An examination of the record of the board of investigation shows that none of the officers who sat on the board were members of the court. Indeed, membership on the former would have disqualified them for membership on the latter. Therefore the court did not fail in its duty in not calling as witnesses persons who had testified before the board of investigation and the reflection of the convening authority on the court was improper.

If, in the opinion of the convening authority, the judge advocate had failed to handle his case properly, he was at liberty to reprimand the judge advocate or take such other action as he might deem appropriate. But the failure of the judge advocate to properly present his case should not be made the ground for disapproval by the convening authority of an acquittal which is justified by the record as it stands (File 26262-9404, J. A. G., March 2, 1922; G. C. M. Rec. No. 55398).

DECK COURT: CONVENING OF, BY WARRANT OFFICER.

A warrant officer not being a commissioned officer, cannot act as deck court officer and, consequently, in this case the court had no legal status, no jurisdiction, and its acts are null and void (File 27217-2559, J. A. G., March 27, 1922).

DECK COURT: IRREGULARITIES.

In reviewing a recent deck court, it was noted that the finding and sentence are typewritten. The finding and sentence of a deck court should always be in the handwriting of the deck court officer.

It is also noted that the deck court officer has failed to insert on the record the fact that he is the only officer of required rank authorized to act as deck court officer.

It is further noted that a portion of the sentence reads "LP remitted in accord with art. 1877 N. Reg. 1920." Such remission should not be made in the sentence of a deck court, since it is not within the power of the court to prescribe the manner in which a sentence shall be executed, and such power is peculiar to the convening authority alone in his action on the case (File 27217-5231, J. A. G., March 31, 1922).

[P. 12] DOCUMENTARY EVIDENCE: IMPROPERLY INTRODUCED.

In reviewing a recent general court-martial record, it was noted that documentary evidence was twice admitted before it had been identified. This is incorrect. A document should always be identified by the witness on the stand before it is offered in evidence.

These errors, however, do not invalidate the proceedings in the opinion of this office, for the reason that the accused did not object to the introduction of the documents which had not been properly identified, thereby admitting their genuineness (File 26251-29110, J. A. G., Feb. 15, 1922; G. C. M. Rec. No. 55153).

EVIDENCE: ADMISSIBILITY OF TESTIMONY.

The judge advocate did not introduce two important witnesses, giving as his reason for failing to do so, that these witnesses were notorious prostitutes and their testimony would be valueless. *Held*, that the judge advocate erred in not

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calling these witnesses. Even though they were notorious prostitutes, this fact would not necessarily render their testimony valueless. The credence to be given the testimony of witnesses of this character, and in fact of all witnesses, is for the court, and not the judge advocate, to decide (File 26262–9433, J. A. G., March 11, 1922; G. C. M. Rec. No. 55462).

EVIDENCE: HEARSAY, EXAMPLES OF.

In reviewing the record in a recent case, it was noted that the court improperly admitted in evidence a letter addressed to "Whom it may concern" stating that the accused was in a civil reformatory during a part of the period of his absence from the Navy. The judge advocate advised the court that the letter was not admissible, as it was an ex parte document not subject to cross-examination, but the court admitted it in evidence, stating that the letter was considered as corroborative of the testimony of the accused. Admission thereof was a clear violation of the rule against the admission of hearsay evidence. The letter was hearsay none the less because it was in writing. (See Naval Digest, p. 279, sec. 3, et seq., under "Hearsay evidence"; File 26251–29475, J. A. G., March 15, 1922; G. C. M. Rec. No. 55471.)

In a recent case it was noted that the prosecution introduced into evidence a letter from the Bureau of Navigation to this office, recommending ------'s trial by general court martial. This was clearly erroneous for the reason that the Bureau of Navigation had no first-hand knowledge of the offenses alleged to have been committed by the accused, and the letter was therefore pure hearsay (File 26251–29110, J. A. G., Feb. 15, 1922; G. C. M. Rec. No. 55153).

[P. 13] NOLLE PROSEQUI.

The judge advocate attempted to prove the charge by the introduction of unsworn testimony given before a board of investigation. Upon objection by the defense, this testimony was not admitted and the judge advocate, having no additional evidence in support of the charge, allowed the case to proceed to completion, with the result that the accused was acquitted. The department held that the judge advocate should have known that the above evidence was inadmissible, and instead of going to trial on this charge, should have communicated with the convening authority with a view to having the charge nolle prossed. The judge advocate, in effect, nolle prossed this charge himself, whereas the entry of a nolle prosequi is a prerogative of the convening authority and can not be exercised by the court or judge advocate. (See Section 60, Naval Courts and Boards, 1917; File 26251–29277, J. A. G., Feb. 26, 1922; G. C. M. Rec. No. 55223).

NOLLE PROSEQUI: IMPROPER ACTION OF JUDGE ADVOCATE.

In the case of ------, seaman first class, U. S. N., original charges and specifications were issued on January 16, 1922, charging him with: I. "Desertion," II. "Breaking arrest." and III. "Theft"(2 specifications). These charges and specifications were delivered to the accused January 19, 1922. On February 27, 1922, the judge advocate was authorized to enter a nolle prosequi as to charge III and the specifications thereunder and was directed to proceed with the trial on the remaining charges and specifications. From correspondence in the files of the Department, it appears that the reason for so doing was that the required witnesses were not promptly available. The trial was held March 2, 1922.

In reviewing the record of proceedings, it was noted that, instead of entering the nolle prosequi as to charge III and proceeding with the trial upon the remaining charges and specifications, as directed, the judge advocate improperly arraigned the accused upon all charges and specifications and then entered the nolle prosequi as to charge III. (See variation 2, sec. 57, p. 346, Naval Courts and Boards, 1917.) The accused having pleaded "not guilty" as to charge III, and there being no evidence before it in proof thereof, the court found the specifications "not proved" and the accused not guilty of the charge. The result of the error of the judge advocate is that the accused stands acquitted of the

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thefts with which he was charged and can successfully plead former jeopardy in bar of a new trial for those offenses. Entry of the nolle prosequi on charge III prior to his arraignment thereon would have enabled the Department to bring him to trial for those offenses should it have appeared desirable to do so (File 26251–29391, J. A. G., March 18, 1922; G. C. M. Rec. No. 55486).

[P. 14] PLEA: EFFECT OF PLEA OF "NOT GUILTY."

When the accused pleads not guilty, it devolves upon the prosecution to prove all the essential elements of the offense alleged, and the fact that the accused admits in open court certain, but not all, of the essential elements of the offense is not in itself sufficient to sustain conviction (File 27211–5256, J. A. G., March 24, 1922).

SUMMARY COURT MARTIAL: JURISDICTION.

In reviewing the summary court martial in the case of ------, it is noted that the offense embodied in the specification is alleged to have been committed between the dates of February 9, 1921, and February 12, 1921, at which time it is well established by the evidence before the court that the accused was holding a temporary warrant in the U. S. Navy.

Article 26 of the Articles for the Government of the Navy clearly enumerates the class of persons subject to trial by summary court martial, i. e., petty officers and enlisted men of the U. S. Navy. It, therefore, follows that inasmuch as the accused was at the time this offense was alleged to have been committed, neither a petty officer nor an enlisted man of the U. S. Navy, this court was entirely without jurisdiction in the premises (File 26287-9521, J. A. G., March 27, 1922).

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[P. 1] Chief Boatswain Emery F. Hosmer, U. S. Navy, was tried by general court martial at the Navy Yard, Boston, Mass., on February 20, 1922, by order of the Secretary of the Navy, and found guilty of the following charge and specifications:

Charge.—Violation of a lawful regulation issued by the Secretary of the Navy.

Specification 1.—In that Emery F. Hosmer, now a chief boatswain, formerly a lieutenant (junior grade), temporary, U. S. Navy, while serving as a lieutenant (junior grade), temporary, in command of the U. S. S. *Mahanna*, did, while serving as treasurer of the officers' mess on board said ship, during the period from about February 1, 1921 until about August 15, 1921, fail to render to said mess a statement of the accounts of said mess.

Specification 2.—In that Emery F. Hosmer, now a chief boatswain, formerly a lieutenant (junior grade), temporary, U. S. Navy, while serving as a lieutenant (junior grade), temporary, in command of the U. S. S. *Mahanna*, did, during the period from about January 1, 1921, until about September 8, 1921, fail to designate a board of officers to audit monthly the accounts of the treasurer of the officers' mess on board said ship.

SENTENCE

"The court, therefore, sentences him, Emery F. Hosmer, chief boatswain, U. S. Navy, to be publicly reprimanded by the Secretary of the Navy."

OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

The Judge Advocate General of the Navy placed the following endorsement on the record.

> "The proceedings, findings, and sentence of the general court martial in the foregoing case of Emery F. Hosmer, chief boatswain, U. S. Navy, being in the opinion of this office, legal, approval thereof is recommended.

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[P. 2] "Referred to the Chief of the Bureau of Navigation for comment as to disciplinary features. Attention is invited to the fact that the Department has often, in court-martial orders, expressed disapproval of a sentence of public reprimand. Attention is also invited to the fact that this officer had previously been tried and convicted by general court martial."

RECOMMENDATION OF THE CHIEF OF THE BUREAU OF NAVIGATION

"Forwarded recommending approval of the proceedings, findings, and sentence in the foregoing case of Emery F. Hosmer, chief boatswain, U. S. Navy."

ACTION OF THE SECRETARY OF THE NAVY

"The foregoing recommendations of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, are approved.

The publication of this court martial will be considered as the execution of the sentence of public reprimand adjudged in the foregoing case of Emery F. Hosmer, chief boatswain, U. S. Navy. He will be released from arrest and restored to duty.

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[P. 7] AIDERS AND ABETTORS.

Accused was convicted of the "Violation of a lawful regulation issued by the Secretary of the Navy," the specification alleging that he brought intoxicating liquor into the marine barracks. There was no evidence in the record to the effect that the accused brought liquor into the barracks, though he was with the party of which one member did bring liquor in. The court evidently arrived at its finding of guilty on the ground that, being present at the time the liquor in question was brought into the barracks by someone, the accused was guilty as a principal. In an offense of this character in order to make a party not actually committing the offense an aider and abettor and therefore a principal, it is necessary to prove that such party actively aided and abetted in the commission of the offense. No such active participation was shown under this charge. Clark's Criminal Law, page 103, in referring to parties to crime, states that:

> "Mere presence and neglect to prevent a felony will not of itself make one a principal in the second degree, and this is true even though the person so present is to be benefited by the deed."

Finding of guilty on this charge was, in view of the foregoing, set aside by the Department (File 26262-9361, J. A. G., March 8, 1922; G. C. M. Rec. No. 55279).

[P. 8] CONFESSIONS AND ADMISSIONS: WEIGHT OF UNCORROBORATED, EXTRAJUDICIAL AS EVIDENCE.

Accused was convicted of (I) "Violation of a lawful regulation issued by the Secretary of the Navy" (kept liquor in possession in navy yard) and (II) "Scandalous conduct tending to the destruction of good morals" (attempted to bribe sentry to permit passage of liquor through navy yard gate). In support of charge II the prosecution introduced in evidence a signed confession of the accused wherein he admitted his guilt of the offense alleged under this charge. The only other evidence brought in by the prosecution in support of charge II was the testimony of the officer who investigated the circumstances out of which the charges against the accused grew, wherein he testified that the accused admitted to him during the investigation that he had promised the sentry at the navy yard gate one quart of liquor if he would permit the accused to move a quantity of liquor, which was on a ship at the navy yard, through the gate at which the sentry was on guard and out of the navy yard.

In acting on this case, the Department stated that "it is a well-settled principle of the law of evidence that the uncorroborated extrajudicial admissions and confessions of a defendant will not sustain conviction (*U. S.* v. *Mayfield*, 59 Fed. 11; American and English Encyclopedia of Law, vol. 6, p. 592; *U. S.* v.

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Boese, 46 Fed. 917; *Martin* v. *U. S.*, 264 Fed. 950, and the cases cited thereunder). There was no corroborative evidence introduced at the trial in support of this charge and the prosecution has, therefore, failed legally to prove the offense alleged under this charge." The finding of the court on charge II was disapproved in view of the foregoing (File 26251–29379–c, J. A. G., March 31, 1922; G. C. M. Rec. No. 55474).

DECK COURT: ILLEGAL.

In reviewing a recent deck court, it was noted that Lieutenant (J. G.) ------ ------, U. S. Navy, acted as deck court officer and that the convening authority was Lieutenant Commander ------ ------, U. S. Navy. Such procedure was contrary to Naval Courts and Boards, section 469, which provides that "Officers shall not be ordered as deck court officers who are below the rank of lieutenant in the Navy or captain in the Marine Corps, except that in cases where there are no officers of such rank or of higher rank attached to the vessel, navy yard, station, or command, the commanding officer (if a commissioned officer) may act as deck court officer." Therefore, if in this case there was an officer attached to the vessel of, or above the rank of lieutenant in the Navy or captain in the Marine Corps, such officer should have been ordered as the deck court officer. If there was no other officer of the rank required by section 469 attached to the vessel, then the convening authority should himself have acted as deck court officer and have placed on the record the appropriate notation to show that he was the only officer of the required rank attached to the vessel. (See Section 469; File 27217–5267, J. A. G., April 3, 1922.)

[P. 9] DESERTION: PROOF NECESSARY.

An accused was tried upon the charge of "Desertion," the specification alleging that the unauthorized absence began on or about May 7, 1921, and was terminated by surrender on or about January 16, 1922.

The accused pleaded not guilty, whereupon the judge advocate took the stand for the prosecution, introduced the service record of the accused in evidence and read therefrom an extract relating to the beginning of the unauthorized absence of the accused. No other evidence was introduced by the prosecution and none was offered by the defense.

The Department has held that a prima facie case of desertion is established when the prosecution proves the unauthorized absence and the fact of apprehension and delivery or surrender of the accused, with an absence of such duration as to justify an inference that the accused intended permanently to abandon the naval service. (See Naval Digest, p. 178, sec. 102.) As the evidence adduced in this case, however, does not show when the accused surrendered or was delivered to the naval authorities, the specification was found proved without any evidence to support the allegation of the surrender of the accused. Furthermore, there is no proof of absence of long duration to justify an inference that the accused intended permanently to abandon the service (File 26251–29459, J. A. G., April 4, 1922; G. C. M. Rec. No. 55540).

EVIDENCE THAT FAILS TO SUPPORT THE ALLEGATION.

An accused was charged with "Using abusive and profane language toward his superior officer." The only evidence offered by the prosecution to prove the above charge was the testimony of the officer to whom the language was alleged to have been spoken by the accused. From his testimony it appeared that the accused's language was not addressed to a person in the naval service, who was the accused's superior, but to a civilian.

Held, that the evidence adduced at the trial did not prove the offense alleged against the accused. The Department accordingly set aside the court's finding of guilty on this charge (File 26262–9441, J. A. G., March 18, 1922; G. C. M. Rec. No. 55470).

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ADMISSION IN EVIDENCE: HEARSAY STATEMENTS MADE BY ALLEGED ACCOMPLICE AFTER COMMISSION OF OFFENSE.

At the trial of a man convicted of "Theft" a written memorandum, made by the executive officer of that vessel on which the accused was stationed shortly after the theft occurred, was introduced in evidence by the prosecution, the executive officer testifying that he could not remember the facts covered in this memorandum, but that it was in his own handwriting and was correct when made. This memorandum contained statements made to the executive officer by the accused and his alleged accomplice shortly after the [P. 10] accomplice had been discovered attempting to leave the vessel with the camera the accused is alleged to have stolen. It appeared that the statements of the accomplice were made when the accused was not present. Counsel moved to strike from the record the whole memorandum on the ground that it was hearsay, but the court overruled this objection.

In acting on this case the Department stated that it is true that a memorandum is admissible in evidence where is was made by the witness, or under his direction, at a time when the facts stated therein were fresh in his mind, and the witness cannot, at the time of trial, testify to such facts as of his own recollection (Naval Courts and Boards, sec. 145). However, this does not mean that any statements whatsoever contained in such memorandum are otherwise admissible, it simply means that evidence which would otherwise be admissible but which the witness has forgotten, can be admitted in the shape of a memorandum prepared under the conditions set forth in the preceding sentences.

The statements in the memorandum of the accomplice made as related above were hearsay in so far as the accused was concerned and as they did not fall within any exception to the hearsay rule were inadmissible. The court, therefore, should have sustained the objection of counsel in so far as it applied to the statements made to the executive officer by the accomplice (File 26262–9445, J. A. G., March 23, 1922; G. C. M. Rec. No. 55482).

SUMMARY COURT MARTIAL: RETURN OF RECORD TO COURT OF REVISION.

In reviewing the summary court martial in the case of ------ ------, it was noted that the accused was sentenced to "lose pay amounting to sixty-seven (67) dollars." The convening authority then returned the record of proceedings to the court for the purpose of reconsidering its sentence which, in the opinion of the convening authority, was not adequate for the offense found proved. The court thereupon revoked its former sentence and substituted therefor a sentence of "reduction to the next inferior rating and to lose pay amounting to sixty-one dollars." The convening authority approved the proceedings, finding, and sentence in revision.

The action of the convening authority in reconvening the court for the purpose of increasing its sentence was in contravention of the President's established policy and of his mandate to courts of the military service, as outlined in Court-Martial Order 309, 1919, page 2.

In view of the above, the Department directed that the proceedings, finding, and sentence in revision in the case of the above-named man be set aside (File 26287–6562, J. A. G., April 5, 1922).

[P. 11] CONFIRMATION: EXERCISE OF POWER BY SENATE.

"The Senate, in confirming appointments, is not exercising a judicial but an executive function. It does not have to give a hearing or make an investigation before lawful action, and if it chooses to accept the President's nomination as assurance that there is a vacancy to which the appointment proposal can be made, and acts on that assurance, the legal effect of the confirmation is not affected" (*Wallace* v. *U. S.*, U. S. Supreme Court April 10, 1922).

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DESERTION: "IN TIME OF WAR."

The Attorney General in an opinion dated February 27, 1922, held that:

Article 61 of the Articles for the Government of the Navy applies to desertion from the Navy "in time of war."

The period of limitation prescribed by article 61 commences to run from the date of desertion and not the date of expiration of enlistment.

The period of desertion must be deducted from the contract period of enlistment and the latter extended (if desired by the Navy Department) until the enlisted man has fully served the term for which he contracted.

An enlisted man who deserted from the Navy in time of war is amenable to trial by a naval court martial after the end of the term for which he enlisted, provided such trial is not barred by any statute of limitations (File 26251–26615:8, J. A. G., February 27, 1922).

HABEAS CORPUS: ROBBERY.

In the case of *Collins and Marshall* v. *McDonald*, Mr. Justice Clark, of the U. S. Supreme Court, in delivering the opinion of the court said:

> "In February 1920, Roy Marshall, a private in the United States Army, serving at Vladivostok, Siberia, was tried for robbery by a court martial there convened, was found guilty and was sentenced to imprisonment in the penitentiary at McNeil's Island.
>
> "Seven months later, when Marshall was at the Disciplinary Barracks at Alcatraz Island, awaiting transportation to McNeil's Island, a petition for a writ of habeas corpus was filed in his behalf by his attorney, G. D. Collins, in the District Court for the Northern District of California.
>
> "In response to a rule to show cause why the writ should not be issued, Colonel J. D. McDonald, Commandant of the Disciplinary Barracks, filed a demurrer to the petition on two grounds: (1) That [P. 12] the petition did not state facts sufficient to entitle petitioner to the writ, and (2) That the court did not have jurisdiction to entertain the petition.
>
> "This demurrer was sustained without opinion, and the case is here for review on direct appeal from the District Court, based on sufficient constitutional grounds.
>
> "If the District Court had issued the writ as prayed for, the only questions it would have been competent for it to hear and determine would have been, Did the court martial which tried and condemned the prisoner have jurisdiction of his person and of the offense charged, and was the sentence imposed within the scope of its lawful powers?' 'The single inquiry, the test, is jurisdiction. That being established the habeas corpus must be denied and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged., *In re Grimley, petitioner*, 137 U. S. 147, 150; *Johnson* v. *Sayre*, 158 U. S. 109, 118; *Carter* v. *McClaughry*, 183 U. S. 365, 368; *Mullan* v. *United States*, 212 U. S. 516, 520; *Ex parte Reed*, 100 U. S. 13, 23. But, the court martial being a special statutory tribunal, with limited powers, its judgment is open to collateral attack, and unless facts essential to sustain its jurisdiction appear, it must be held not to exist. *McClaughry* v. *Deming*, 186 U. S. 49, 62, 63; *Givens* v. *Zerbst*, 255 U. S. 11, 19.
>
> "Thus, the question for decision here is, Does the petition show want of jurisdiction in the court martial over the person of the accused and over the offense with which he was charged and for which he was sentenced?
>
> "Neither the constitution, the convening, nor the regularity of the proceedings of the court martial in this case, is assailed, and that the prisoner was a private in the Army of the United States is admitted. The only allegation in the petition of sufficient substance to deserve notice is that the judgment is void for want of jurisdiction in the court to render it, because the specifications do not charge any crime known to the laws of the United States, in that it does not appear therein that the property alleged to have been taken was not the property of the accused, and also

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because it is not averred therein that the property was in the care, possession, and custody, or control of the person from whose possession it is alleged to have been taken.

"The only part of the charge appearing in the petition is a copy of three specifications, the first of which reads:

"'*Specification I.*—In that private Roy W. Marshall, Company K, 31st Infantry, Private Gilbert Frey, Company K, 31st Infantry, Private Gerald E. Troxler, Company K, 31st Infantry, and Private James F. Hyde, Company K, 31st Infantry, acting jointly and in pursuance of a common intent, did, at Vladivostok, Siberia, on or about the 14th day of January 1920, by putting him in fear, feloniously take from the presence of Van Fun Un, 40 Koreaskay Street, Vladivostok, Siberia, the sum of about ten thousand (10,000) roubles, value about fifty dollars ($50).'

"The second and third specifications differ from the first only in the name and place of residence in Vladivostok of the person robbed and as to the value of the property taken.

[P. 13] "The argument in support of the contention of the prisoner is that the allegation that the property was taken 'from the presence of' the persons named does not imply that it was taken unlawfully from the presence, possession, or custody of another or that it was not at the time the property of the accused.

"The jurisdiction of the court martial was derived from the act of Congress embodying the Articles of War, which, it is declared, shall, at all times and in all places, govern the Armies of the United States (39 Stat. 650, 670), and the charge of robbery was certainly framed under article 93 thereof, providing that: 'Any person subject to military law who commits * * * robbery shall be punished as a court martial shall direct.'

"The sufficient answer to this contention that the specifications do not charge any crime known to the laws of the United States is that section 284 of the Federal Criminal Code, providing for the punishment of robbery, reads: 'Whoever by force and violence or by putting in fear shall feloniously take from the person or presence of another anything of value shall be imprisoned not more than fifteen years.'

"This has been accepted as an accurate and authoritative definition of robbery from Blackstone, book IV, p. 243 (Cooley's Edition), to Bishop's New Criminal Law, vol. 11, sections 1177, 1178. Taking property from the presence of another feloniously and by putting him in fear is equivalent to taking it from his personal protection and is, in law, a taking from the person. Men do not feloniously put others in fear for the purpose of seizing their own property.

"It is not necessary that the charge in court-martial proceedings should be framed with the technical precision of a common law indictment and we cannot doubt that the one in this case clearly shows jurisdiction in the court over the accused and over the offense with which he was charged, and that the latter was sufficiently described to advise defendant of the time and place and circumstances under which it was claimed he had committed the crime to enable him to make any defense he may have had.

"It is also charged that there was no evidence of guilt before the court martial other than the confession of the accused, which it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record and, at most, was an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceedings. Cases, supra.

"The remaining allegations are trivial.

"For the reason that the petition did not state facts sufficient to entitle petitioner to the writ of habeas corpus, the judgment of the District Court is affirmed."

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[P. 8] CHARGES AND SPECIFICATIONS: ESSENTIAL ALLEGATIONS OMITTED, RENDER SPECIFICATION FATALLY DEFECTIVE.

In reviewing the record of a recent general court martial, it was noted that the charge was "Violation of a lawful regulation issued by the Secretary of the Navy" and that the specification under the charge alleged that the accused, "_____ steerage cook, U. S. Navy, while so serving on board the _____, at Guantanamo Bay, Cuba, did, on or about February 13, 1922, take on board said ship alcoholic liquor."

Article 118 (1), Navy Regulations, 1920, provides that,

> "No person in the naval service shall take or keep any alcoholic liquors or any intoxicating or narcotic substances on board ships of the Navy or within the limits of naval stations, marine barracks, or any other place under the exclusive jurisdiction of the Navy Department except as authorized for medical purposes, nor shall any such liquors, intoxicants, or substances be sold or given to said persons or issued to them except for medical purposes, within such places."

In the opinion of this office the above-quoted specification does not allege an act that is an offense in violation of article 118 (1), [P. 9] Navy Regulations, for the reason that this regulation does not prohibit the mere taking of liquor on board except as authorized for medical purposes. For the act of bringing liquor on board to constitute a violation of article 118, the specification must therefore show that the liquor was not brought on board for authorized medical purposes; otherwise, no offense is stated. This is in accord with the general rule of criminal pleading that in alleging a purely statutory offense (and a violation of navy regulations is of this character), such exceptions must be negatived as form part of the definition of the offense. This rule is stated in Clark's Hand-Book of Criminal Procedure, page 273, as follows: "* * * an offense must be accurately and clearly described, and, if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading; but, if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is a matter of defense, and must be shown by the other party, though it be in the same section, or even in the succeeding sentence."

It is pointed out that if the convening authority had followed the specimen specification on page 131, Naval Courts and Boards, in this case, the specification would have been sufficient, for the reason that the words "without proper authority" used in the specification on page 131 negative the exception to the prohibition against bringing liquor on board a naval vessel, i. e., the exception in the case of liquor authorized to be brought on board for medical purposes. Although a blind adherence to forms is not to be desired, and officers should not hesitate to exercise their initiative when new problems arise, nevertheless, officers should, in cases such as this which are covered by established forms, follow such forms, for the reason that a deviation therefrom may, as here, lead to the omission from the specification of some essential allegation. Case was set aside by the Department, but attention was invited to the fact that conviction upon a fatally defective specification does not constitute former jeopardy (File 26262–9478, JAG, April 17, 1922; G. C. M. Rec. No. 55584).

FAILING TO USE HIS UTMOST EXERTIONS TO DETECT, APPREHEND, AND BRING TO PUNISHMENT ALL OFFENDERS: NOT PROPER TO SO CHARGE WHEN THE ACCUSED WAS IMPLICATED IN THE ORIGINAL OFFENSE.

An accused was charged inter alia with "Theft" and "Failing to use his utmost exertions to detect, apprehend, and bring to punishment all offenders" and was convicted of both charges. By comparing the specifications under both charges, it was noted that the theft the accused was charged with having failed to prevent was the theft in which he himself was a principal.

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[P. 10] In the opinion of the Department, it could not have been the intention of Congress in providing for the charge "Failing to use his utmost exertions to detect, apprehend, and bring to punishment all offenders" in section 17 of article 8 of the Articles for the Government of the Navy, that such charge should be used against a person who had himself committed the offense which he had not brought to the attention of the proper authorities. Obviously, the article in question was designed to apply only to a person in the naval service, other than one who was implicated in the principal offense. The finding on this charge was therefore set aside (File 26262–9513, May 9, 1922; G. C. M. Rec. No. 55848; 26262–9514, May 5, 1922; G. C. M. Rec. No. 55849; 26262–9468, May 4, 1922; G. C. M. Rec. No. 55556).

HEARSAY EVIDENCE: ADMISSIBILITY OF TESTIMONY OF WITNESS, WHO HAD SECURED HIS INFORMATION FROM EXAMINATION OF ACCOUNTS OF A CIVILIAN FIRM.

In reviewing a recent general court martial, it was noted that the first two specifications under charge I, "Scandalous conduct tending to the destruction of good morals," allege in substance that the accused falsely reported in writing to his commanding officer, that he, as treasurer of the chief petty officers' mess on board the U. S. S. _____, had expended from the mess funds certain sums of money for the payment of supplies bought for the mess from _____, _____, whereas in fact he, the accused, had made no such expenditure. The 5th and 6th specifications under charge I allege that the accused embezzled the sums that specifications 1 and 2 allege he had falsely reported that he had expended.

The only evidence offered by the prosecution to prove that the accused had not made the payments to _____ referred to in the first and second specifications was that contained in the testimony of Lieutenant _____ and Pay Clerk _____. Lieutenant _____ testified that he had been a member of a board of investigation to investigate the affairs of the chief petty officers' mess and that as a result of his investigation, he believed the amounts in question had never been paid. The source of Lieutenant _____'s belief is shown by his answers to questions 58 and 60, pages 12 and 13. From these, it will be seen that Lieutenant _____ testified not as to facts within his own knowledge but merely gave his opinion, the basis of which was the unsworn statement of _____ whom the accused never had an opportunity to confront or cross-examine at the board of investigation.

Pay Clerk _____ testified that he had made an examination of _____'s account books, that he found them to have the appearance of reliability, and that they did not contain any entry of the payment of the sums set forth in specifications 1 and 2 on the dates [P. 11] therein specified, but tallied, on the other hand, with a bill presented by _____ for payment of his running account. Thus it appears that this witness, like Lieutenant _____, had no personal knowledge of the facts at issue, but testified merely as to what was entered in _____'s books. Account books are, of course, a form of hearsay but they form one of the exceptions to the general rule against the admissibility of hearsay evidence, provided the account books comply with certain requisites, in which case they may be admitted in evidence as proof of the facts stated in them, under the exception to the hearsay rule usually known as "entries in the regular course of business."

For such an entry to be admissible independently of the testimony of the entrant it must first be established that the person who made the entry is dead, insane, or permanently beyond the jurisdiction of the court or that there is some other sufficiently good reason rendering it impossible to procure such person's testimony. Next, the handwriting of the entrant must be proved, and then it must be shown that the entries were made at or near the time of the transaction, that they were regularly and fairly made, that they were the original entries that took some permanent form, that the entrant was the person who regularly made such entries as a part of his duties, in the business, and that the entrant either had personal knowledge of the facts recorded, at the time he made the entry, or such knowledge was imparted to him by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books. (In this connection, see section 199, Naval Courts and Boards.)

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As no evidence was introduced on any of the points mentioned in paragraph 4, it is very doubtful whether _____'s account books could have been properly admitted into evidence if they had actually been offered, i. e., there is nothing to show that they would form an exception to the general rule against hearsay evidence. It necessarily follows, therefore, that if the books themselves could not have been proved to have a sufficient guarantee of truthfulness to be admitted into evidence notwithstanding their hearsay character, Pay Clerk _____'s testimony as to what the books recited was clearly incompetent, being nothing more than the mounting of hearsay upon hearsay.

On the other hand, it was brought out at the trial by two officers who had been members of the ship's board of audit that satisfactory receipts had been presented to the auditing board by the accused to support his report that the bills of _____ had been paid; that the audit was carefully conducted and that though it would have been possible for a forged receipted bill to have been accepted by the board, such action was rather improbable. These receipts could not be found at the time of the trial.

In considering the question of the sufficiency of the purely hearsay evidence of Lieutenant _____ and Pay Clerk _____ to support [P. 12] the conviction of the accused, it should be pointed out that the accused did not object specifically to the damaging testimony of these two witnesses as to the nonpayment of _____'s bills. Such being the case, the general rule of the civil courts undoubtedly is that the unobjected hearsay becomes admissible and competent evidence. But in all cases there is a certain discretion left to the judge concerning the admission of the testimony. The rule on this point is as follows:

> "*Exclusion by court on its own motion.*—It is not ordinarily the duty of the court to exclude of its own motion incompetent evidence to which no objection is made. Such action is, however, discretionally with the court, and if the evidence is incompetent, the court may, of its own motion, exclude it or strike it out at any time before the jury retire" (16 Corpus Juris, sec. 2219; see p. 124, Naval Digest (78).

As has been pointed out in paragraph 6, there was evidence tending to contradict that of Lieutenant _____ and Pay Clerk _____. Moreover, the accused's valid objection to other incompetent hearsay testimony of Lieutenant _____ had been previously overruled. (See question 46, p. 11.) Also the accused had objected to the introduction into evidence of a bill of _____'s, which appeared to be a compilation of his running account with the chief petty officers' mess, at the beginning of Pay Clerk _____'s testimony on the ground that the bill was hearsay. Though such was the case, it was admitted by the court to refresh the witness' memory. The court's ruling on this point does not appear to be objectionable, but _____'s testimony concerning _____'s account books is so frequently interwoven with references to this bill that it would seem that the judge advocate and the witness made an improper use of the document introduced merely to refresh the witness' memory by making the document a material and integral part of the witness' evidence. The fact that the court permitted this to be done after the accused had objected to the bill itself being used in evidence would tend to make the accused believe that further objections to hearsay evidence would be useless. In view of all these facts some doubt is felt as to the legality of the accused's conviction of the offenses charged in specifications 1 and 2 of charge I. If insufficient evidence was offered to prove that he failed to pay _____ the sums specified, it necessarily follows that it was not satisfactorily proved that he converted such sums to his own use.

The Department accordingly set aside the findings on specifications 1, 2, 5, and 6 of charge I and on the charge (File 26262-9460, J. A. G., May 3, 1922; G. C. M. Rec. No. 55535).

[P. 13] THEFT: EVIDENCE HELD INSUFFICIENT.

In a recent general court martial one of the charges against the accused was the theft of a Ford automobile.

> "The evidence offered at the trial tended to prove the following facts: That the accused and another marine took a Ford automobile while the driver was in a store and started to drive off with it; that the driver over-

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took the car and jumped on the running board; the accused pushed the driver off, and the latter was hurt in falling; that the accused did not stop the automobile at that time, but came back in about five minutes, put the driver in the back seat and started off again toward the town of Sumay, Guam; that on the way to Sumay an inner tube blew out and the car had to be stopped; that some more marines came along in another car and took the driver to the hospital, one of these new marines taking possession of the car the accused was charged with stealing; that the accused then left; that the accused was drunk during the entire incident."

The Department held:

That one of the essential elements of theft, viz, the intent to permanently deprive the owner of the article in question, was not proved beyond a reasonable doubt and that it appeared that the accused was guilty rather of "joy riding." The findings on this charge were accordingly set aside (File 26262–9440, J. A. G., March 24, 1922; G. C. M. Rec. No. 55469).

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[P. 9] DECK COURT: DEFECTIVE SPECIFICATION.

In reviewing a recent deck court, it was noted that the specification reads as follows:

"In that ------ ------, attached to and serving at ------ ------, Washington, D. C. ------ ------, did, on various occasions during the period from May 1st to May 29th, 1922, the exact dates being undeterminable, loan money to another person in the service (in violation of a lawful order of the Secretary of the Navy, article 85, chapter 2, section 2, Navy Regulations)."

It is the opinion of the Department that the facts alleged in the specification do not support the conclusion that the accused committed an act prohibited by article 85 of the Navy Regulations, for the reason that it is not stated that the money was loaned for the profit or benefit of the accused. The proceedings, findings, and sentence were set aside (File 27217–5335, J. A. G., June 26, 1922).

DRUNKENNESS: AS A DEFENSE—SPECIFIC INTENT.

In the case of ------ ------, ship's cook, first class, U. S. Navy, who was tried by order of the Commander, Control Force, U. S. Atlantic Fleet, upon charges of (I) "Drunkenness", (II) "Using abusive and obscene language toward another person in the service", (III) "Using abusive, obscene, and profane language toward his superior officer," (IV) "Disobeying the lawful order of his superior officer," and (V) "Assaulting and striking another person in the Navy," the accused pleaded guilty to all charges and specifications and was upon such pleas found guilty and sentenced to confinement for one (1) year, dishonorable discharge and accessories.

The accused made a statement as follows:

"At 2 a. m., I was sitting on the mine tracks and had about a pint of whisky left, and that is the last thing I remember. What I did must be true, or people would not say so. I will let my record speak for my previous good conduct. I don't know anything about what I did or said between 2 a. m. and 8:30 a. m."

The above statement is obviously not clear, but there is to be inferred a conclusion that the accused meant that he was so drunk he did not remember committing the offenses set forth under charges II, III, IV, and V, although it is not alleged that his acts were committed within the hours named in the statement.

It is a general rule of law that voluntary drunkenness is not an excuse for crime committed in that condition (Court-Martial Order 25, 1914; p. 3; Naval Digest, p. 193, sec. 20). But the question of whether or not the accused was drunk and the degree of such drunkenness at the time of the commission of the acts alleged may be material to an important element of the offense in some cases. Thus there are crimes which can be committed only where a peculiar and

distinctive intent concurs with the act, and this intent could not well be [P. 10] possessed or entertained by a person whose senses are deadened. In such cases evidence of the drunken condition of the accused at the time of the commission of the alleged crime is admissible, not to excuse or extenuate the act as such, but to aid in determining whether in view of the state of his mind the accused was capable of entertaining the specific intent with which it was necessary that the act be done in order to constitute the offense as charged. Thus, in cases of murder in the first degree, larceny, robbery, or burglary, which require for their commission a specific intent, evidence of drunkenness is admissible for the purpose of rebutting such intent. The acts constituting burglary, for example, must be committed with the intent to perpetrate a felony upon the entered premises in order to sustain a charge of burglary. If such intent is successfully rebutted the same acts would constitute only a trespass. (See Naval Digest, p. 195, sec. 49.)

But even in the cases mentioned above, drunkenness will constitute a defense only where it is shown that the accused was by drink so entirely deprived of his reason that he did not have the mental capacity to entertain the necessary specific intent required to constitute the crime (12 Cyc. 172) and the burden of showing such to have been the case, being a matter of defense, rests upon the accused (Court Martial Order 19, 1912, p. 7). In the event that the court believed that the accused was too drunk to entertain the required intent, he may still be properly convicted of an offense less in degree consisting of the same acts but not requiring a specific intent. Thus, striking another person in the naval service requires no specific intent and is a lesser included offense in striking a superior officer. Furthermore, where premeditation and intent first exists, followed by voluntary drunkenness, the necessary intent to commit the crime will be presumed whatever state of drunkenness may have existed at the time of its commission.

From the above, it may seem that, even in a case where specific intent must be proved, when the defense of drunkenness is set up the prosecution may properly introduce evidence in rebuttal to show that the accused, even though under the influence of intoxicants, was not so entirely deprived of his reason as necessarily to have been incapable of entertaining the specific intent necessary to constitute the offense. Moreover, great caution should be exercised in accepting drunkenness as a defense and the court should be satisfied beyond a reasonable doubt that the accused committed the unlawful act while so intoxicated that he was unable to entertain the necessary specific intent.

As we have seen that in cases involving, as a necessary element to constitute the offense, a certain knowledge, or a specific intent, the drunkenness of the accused, if clearly shown in evidence to have been such as to have incapacitated the accused from having the requisite knowledge or intent, will be treated as constituting a defense to the specific offense charged, it is now in order to consider in what military offenses a specific intent is a necessary element.

[P. 11] Offenses involving a disregard of certain obligations toward superior officers are such as to require a specific knowledge or intent, inasmuch as the gravamen of the offense lies in disrespect to or disobedience of the superior as distinguished from similar acts toward those of a rank equal or inferior to the accused. The offense necessarily involves knowledge and understanding, or circumstances clearly such that the accused must have known or understood that the person to whom he was disrespectful or whom he disobeyed or assaulted or struck was a superior. For other miltary offenses in which a specific intent is necessary, see Winthrop's Military Law and Precedents, page 441.

The case in hand aptly illustrates the principles involved. Charges II and V do not require a specific knowledge or intent while charges III and IV involve knowledge on the part of the accused that the person to whom he used abusive, obscene, and profane language, and whom he disobeyed, was a superior. The defense of drunkenness was therefore available as to charges III and IV while not available as to charges II and IV.

In view of the above, it is the opinion of this office that the court erred in not having the statement of the accused, who was not represented by counsel, clarified insofar as charges III and IV were concerned, and in not proceeding as set forth in sections 310 and 312, Naval Courts and Boards, 1917. It is therefore recommended that the proceedings and findings upon charges III and IV and the specifications thereunder be set aside.

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In view of the action of the convening authority in reducing the period of confinement to six (6) months, it is recommended that the corresponding accessories be reduced accordingly.

Subject to the foregoing remarks, the Department approved the proceedings and findings upon charges I, II, and V and the specifications thereunder, and the sentence (File 26262–9569, J. A. G., May 27, 1922; G. C. M. Rec. No. 55970).

FRAUD: ALLEGATIONS NECESSARY TO SUPPORT CHARGE.

In reviewing the recent case of ------ ------, mess attendant, second class, U. S. Navy, it is noted that he was charged with (I) "Forgery" and (II) "Fraud in violation of article 8 of the Articles for the Government of the Navy." The specification of charge II alleged that the accused—

> "Serving on board the U. S. S. ------, at the Navy Yard, New York, N. Y., did, on or about March 4, 1922, on board the said ship, prepare in his own handwriting a pay receipt for the sum of one hundred twelve dollars ($112) and did sign the name of one ------ ------, mess attendant first class, U. S. Navy, to the said pay receipt, well knowing that the said pay receipt was to be used for fraudulent purposes."

The accused pleaded not guilty, but was found guilty on both charges.

[P. 12] In the opinion of the Department, the specification under charge II fails to allege the commission of an act of fraud on the part of the accused and is therefore fatally defective. For a specification to allege fraud it must show affirmatively that the accused had (1) made a false representation of some existing or past fact to the person concerned with intent to defraud; (2) that the accused knew such representation to be false; (3) that the person concerned had believed and relied upon such false representation; and (4) that said person concerned had actually been defrauded by, and parted with something of value in consequence of, such false representation (Naval Digest, p. 245). In this case the specification does not even allege that the accused had made a false representation and does not contain a single one of the four essentials of fraud (File 26262–9590, J. A. G. May 20, 1922; G. C. M. Rec. No. 56014).

SENTENCE: IRREGULAR AND UNDESIRABLE.

In reviewing the record of a recent general court martial, it was noted that the court adjudged a sentence of reduction in rating, eighteen (18) months' confinement, and dishonorable discharge, but failed to specify in the sentence that the accused was to suffer all other accessories of such a sentence as prescribed by section 349, Naval Courts and Boards. Thus it can be seen that the accused would be entitled to the full pay of his rating and would not be liable to hard labor during the period of confinement adjudged in his case. Accordingly, it would not be desirable to have him serve his confinement in a naval prison, where his status would be different from and distinctly superior to that of all the other prisoners; nor would it be desirable to execute so long a period of confinement at the ship or station to which the accused might be attached, both on account of the period of confinement and because of the fact that men whose dishonorable discharges have not been conditionally remitted should not be allowed to serve their confinement at places other than regular naval prisons. The court has therefore adjudged an irregular, undesirable sentence, impracticable to execute, and contrary to the known policy of the Department.

In view of the foregoing, the Department directed that the period of confinement be remitted and the accused immediately discharged in accordance with the remaining terms of the sentence (File 26251–29638, J. A. G. June 3, 1922; G. C. M. Rec. No. 56088).

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SPECIFICATIONS: DEFECTIVE.

In reviewing the general court-martial case of _____ _____, private, U. S. Marine Corps, it is noted that specification 1 of charge II, "Conduct to the prejudice of good order and discipline" alleges that the accused "serving at the marine barracks, _____ _____, did, at or about 8 o'clock p. m., on or about December 21, 1921, in [P. 13] the district of _____ _____, willfully without justifiable cause, and with criminal intent, cover his face with a handkerchief, or other cloth, for the purpose of disguising his features, and concealing his true identity."

In the opinion of the Department, the above specification is fatally defective, for the reason that it fails to state any offense known to the law. The specification in substance alleges that the accused covered his face with some sort of cloth, with a criminal intent, for the purpose of concealing his identity. Since covering one's face with a handkerchief is not in violation of any law, regulation or custom of the service, it follows that such act is not unlawful or prohibited, even though done with a criminal intent. To constitute a crime, both criminal intent and a prohibited act must concur, and one cannot be punished for his criminal intent alone, because a criminal intent, without the doing of a prohibited act is not an offense. (See Court Martial Order 5, 1921, p. 12.)

Specification 3, charge II, alleges an assault by the accused on certain inhabitants of Guam by pointing a loaded rifle at these persons. Specification 4 alleges that after pointing the rifle, the accused said, "Hands up, everybody, or I will shoot." In the opinion of this office, specification 4 fails to allege a new offense, separate from the assualt with a deadly weapon alleged in specification 3, but merely sets out language which aggravates the offense in specification 3 and does not amount to anything more than a continuation of that offense. The new facts alleged in specification 4 should have been made a part of specification 3. Specification 5 alleges the wounding of a native by the accused by shooting the native with his rifle. It would appear that the assault with a dangerous weapon alleged in specifications 3 and 4 and the shooting in specification 5, which latter would appear to constitute either "assault with intent to kill" or "assault with a deadly weapon and wounding" would have been more properly chargeable under one of these specific charges. But this office has frequently held that the use of a general charge, which is actually supported by the specifications, in the place of the proper specific charge, does not vitiate the proceedings in the absence of objection by the accused, so long as the specifications are definite and inform the accused with certainty of the offense he is called upon to clear himself of (File 26262–9504, J. A. G., June 5, 1922; G. C. M. Rec. No. 55627).

THEFT: PROOF OF ALL ELEMENTS NECESSARY TO WARRANT CONVICTION.

In reviewing a recent general court martial, it was noted that the accused pleaded guilty to the charges of (I) "Absence from station and duty after leave had expired" and (II) "Theft," but that the accused by his counsel made a statement in substance that there was no intention on the part of the accused to profit from the stolen car, and that it was the accused's intention after making a visit to relatives to return with the car as soon as possible.

[P. 14] In larceny, it is necessary to prove (1) that the accused took and carried away the property, (2) from the actual or constructive possession of the owner, (3) without the consent of the owner, (4) with the fraudulent intent to deprive the owner permanently of his property or interest in the goods, or of their value or a part of their value. In the opinion of this office, the accused's statement was inconsistent with his plea of guilty to the charge of "Theft" in that his statement asserted his innocence of one of these essential elements of theft, namely, the fraudulent intent to deprive the owner permanently of his property or interest in the goods.

Under these curcumstances, it becomes the duty of the court to follow the procedure outlined in sections 310 and 312, Naval Courts and Boards, and the failure of the court to do so constitutes a fatal error which necessitates setting aside the conviction on the charge of "Theft" (File 26262–9597, J. A. G., May 26, 1922; G. C. M. Rec. No. 56022).

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WITNESS: COMPETENCY OF WIFE TO TESTIFY IN CASES OF BIGAMY.

In reviewing the general court-martial case of _____, yeoman first class, U. S. Navy, it is noted that he was charged in two specifications under "Scandalous conduct tending to the destruction of good morals" with having contracted two bigamous marriages. To prove the marriage to _____, whom the specifications described as the first and legal wife, the prosecution put _____, or rather Mrs. _____, on the stand. The counsel for the accused at once objected to Mrs. _____ testifying against her husband in a criminal proceeding in the absence of some statutory enactment, and that there was no such Federal statute allowing a wife to testify in the trial of her husband for bigamy. The court overruled this objection, and ruled that Mrs. _____ was competent to testify until the fact of her marriage to _____ had been proved.

In the opinion of this office, the court's decision in overruling the counsel's objection, was correct. As a matter of fact, the counsel for the accused erred in stating there was no statute making the wife a competent witness in such a case, for section 1466, U. S. Compiled Statutes, 1918, provides as follows:

> "Husband or wife of defendant in prosecution for bigamy * * *. In any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, [P. 15] deemed confidential at common law (March 3, 1887, ch. 397, par. 1, 24 Stat. 635)."

The above statute was originally the first section of the Edmunds-Tucker Act, 24 Stat. 635, amending the Edmunds Act, 22 Stat. 30, which in turn amended section 5352, Revised Statutes, section 5352 incorporated into the Revised Statutes the act of July 1, 1862, 12 Stat. 501, the title of which was "An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah." The Edmunds Act defined and penalized the offense of polygamy, made the previous practice or belief in the practice of polygamy a valid ground of challenge of a prospective juror in the trial of such an offense, disqualified as voters and made ineligible for public office all polygamists, and declared certain offices in the Territory of Utah to be vacant. The syllabus in the case of *Cannon* v. *U. S.*, 116 U. S. 55, refers to the Edmunds Act as the "act of Congress in regard to polygamy in Utah." The Edmunds-Tucker Act is significantly described in the margin of the Statutes at Large, which are "Edited, printed, and published by authority of Congress, under the direction of the Secretary of the State," as the "Anti-Polygamy Act." In addition to section 1, the act provided for the annulment of various acts of the legislature of the Territory of Utah, the obvious intent of the act being to limit and restrict the Mormon Church in Utah and to prevent that Territory from aiding the Mormon Church to evade the antipolygamy policy of the Federal Government. Thus the Mormon Church and the Perpetual Emigrating Fund Co., which had been incorporated by Utah, were dissolved as corporations.

From the foregoing, it appears that the purpose of Congress in passing the statute quoted in paragraph 2 was to widen the field of available competent evidence which could be used in the prosecution of the offense of polygamy, which, of course, includes bigamy. As stated in section 134, Naval Courts and Boards, husband and wife were both absolutely incompetent at common law to testify for or against the other except in a case of personal violence committed by the one against the other. The statute is not absolutely clear and could mean that Congress had changed the common-law rule in either one of two ways: (1) so that a husband or wife could testify against the other in a trial for the offenses specified in the statute if the spouse being tried consented; (2) or that a husband or wife could testify against the other if the witness was willing to so testify, regardless of the objection of the accused spouse. This office knows

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of no construction having been placed on this statute by the Federal courts and is of the opinion that, in the light of the manifest intention of Congress to wipe out the polygamy widely prevalent at the time of the passage of the act in certain parts of the country, such intention being clearly shown by the other parts of the Edmunds-Tucker Act previously referred to, it must have been the intention [P. 16] of Congress to make the spouse whose testimony was sought a competent witness, provided the witness consented to testifying, even though the accused spouse should object. Adopting this construction of section 1466, U. S. Compiled Statutes, 1918, it will be seen that the wife of the accused was competent to testify to any of the facts in issue in the case, if she desired to be a witness, even in the face of an objection by the accused.

It is further noted from the evidence adduced at the trial that the third wife knew of the prior marriages at the time she went through the form of a marriage with the accused. This is not a defense to a prosecution for bigmany, however (7 Corpus Juris, p. 1165), the reason being that bigamy is not an offense so much against an innocent spouse as it is against the marital relationship (*Bassett* v. *U. S.*, 137, U. S. 496).

In view of the foregoing, the proceedings, findings, and sentence were approved (File 26251-29360, J. A. G., May 24, 1922; G. C. M. Rec. No. 55982).

LINE OF DUTY AND MISCONDUCT: CONSTRUED.

In the following cases, the Department has held that the disability was incurred in line of duty and not the result of misconduct.

M, a yeoman, while in the hospital undergoing treatment for disability due to his own misconduct, as a result of the treatment, died from arsenic poisoning. *Held*, That where the patient's death is due to treatment administered to him by proper medical authority, it was incurred in line of duty (J. A. G., File 26543–213, April 29, 1918; 29372–13, October 10, 1921; file 29372–3A, December 15, 1921).

H, Bmkr 1 cl., while cutting tubes in a firebox was struck by a maul on the muscle of the left arm. His arm became sore, but not seriously so, and no treatment other than first aid was given him. The same accident occurred several times and finally the arm became so sore that he was sent to the hospital for treatment. Physical examination was negative but an X-ray showed a definite periostitis with bony proliferation in the middle of the left humerus in such a position as to cause pressure on the radial nerve, but surgical interference was not considered advisable. *Held*, The disability complained of originated in line of duty, regardless of the fact that the periostitis, in the opinion of the board, existed prior to the date of his enlistment in the naval service. (See File 9657– [P. 17] 390, May 19, 1921; 29372–8, Sept. 13, 1921; 29372–4, December 10, 1921; File 29372–37, J. A. G., Dec. 27, 1921.)

McC, ensign (T), while a seaman, U. S. Navy, serving on board the _____ for training, fell from the combing of a hatch and injured his hip. The disability has been variously diagnosed and up to April 2, 1920, was recognized as having its origin in line of duty. From subsequent entries in his medical record it appears that the medical officers were advised "That the burden of proof that the alleged disability was incurred in line of duty is on the individual" and that under this instruction they found on August 20, 1921, that the claimant was suffering from curvature of the spine, origin not in line of duty, not the result of his own misconduct. *Held*, That the disability complained of had its origin in line of duty, and that the fact that he was injured while serving on board the _____ is fully established. Attention was invited to the fact that when an individual is admitted into the naval service after having passed the prescribed physical examinations, the presumption is that he was physically qualified in every respect for admission to the naval service and that the burden of proof is upon those who would show otherwise. (See case of Rodney G. Clark, apprentice seaman, U. S. Navy, File 29372–9, September 12, 1921.)

M, F 3 cl, enlisted in the naval service September 30, 1920, and on July 12, 1921, was found by a board of medical survey to be suffering from astigmatism. The facts presented showed that he had worn glasses for several years. That just prior to his entrance into the naval service he had consulted an optome-

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trist who prescribed lenses for reading, the lenses of both eyes being spheres. It is obvious that the prescription of the optometrist had no reference to astigmatism. *Held*, That while the facts in this case show that this man apparently suffered from eye trouble for many years prior to his enlistment, there are no facts showing that he had astigmatism prior to his entrance into the service. On the contrary, the facts show that he was examined by a naval medical officer for the purpose of determining his qualifications for enlistment and no astigmatism found, and also that his examination for glasses by a creditable optometrist just prior to his enlistment failed to show any astigmatism. The disability was held to have been incurred in line of duty. See File 29372–9, Sept. 13, 1921; 7657–390:40, May 19, 1921; File 29372–4, December 10, 1921.)

B, private, enlisted April 28, 1921, and on October 1, 1921, was admitted to the field hospital, diagnosis endocarditis, chronic, origin, in line of duty disability not the result of his own misconduct. On October 25, 1921, a board of medical survey found him to be suffering from endocarditis, chronic, origin not in line of duty. The facts set forth by the board were as follows: "The disability complained of existed prior to enlistment. No definite assignable cause. History of rheumatism 6 years ago. Has had two or three [P. 18] fainting spells since onset of trouble. Complains of shortness of breath and slight periodical pain. Physical examination reveals systolic murmur at apex not transmitted at the present time. Blood pressure 130–80." In the opinion of the Department the fact that B suffered from an attack of acute rheumatism some 6 years prior to his enlistment into the naval service cannot be accepted as definitely establishing the fact that he was suffering from endocarditis at that time. The disability from which he is now suffering must be shown by positive facts to have existed prior to his enlistment. *Held*, That a particular disability discovered for the first time after claimant had entered the naval service must be held to have had its origin in line of duty (File 29372–25, November 30, 1921).

H, while on authorized liberty was riding down a steep hill, at the bottom of which there was a cross road, on a motorcycle at a moderate rate of speed. When near the foot of the hill, an automobile swept around from the cross road at a high rate of speed making a wide circle to the left-hand side of the road down which H was riding and demolished his motorcycle, inflicting severe injuries. *Held*, Line of duty and not misconduct.

T, enrolled in the Naval Reserve Force June 20, 1917, and was found physically qualified for naval service. On April 22, 1919, he was commissioned ensign (T), U. S. Navy, at which time an entry was made in his health record noting a moderate degree of flat feet, but no request for waiver was made. On July 29, 1921, a board of medical survey found him to be suffering from pes planus, origin not in line of duty and not the result of his own misconduct. There are no facts presented, nor in the record of the Department, showing that he suffered from the disability complained of prior to his enrollment on June 20, 1919. *Held*, Line of duty. (See File 7657–390L40, May 19, 1921; 29372–9, Sept. 13, 1921; 26253–1117, June 14, 1921; File 29372–11, October 4, 1921.)

C, ex-MM2c, serving on board the U. S. S. _____, was struck on the head by an unknown assailant as he descended from a street car while ashore in Liverpool, March 23, 1918, on authorized liberty. It appears that he was not intoxicated and that the assault was wholly unprovoked. He was discharged from the naval service August 17, 1918, for physical disability as a result of injury received.

On August 21, 1919, the Attorney General rendered an opinion (32 Op. Atty. Gen. 12) supplemented by his opinion of June 2, 1920 (File 26250–1491:1), which holds, among other things, that when a member of the naval service is injured while on authorized leave of absence said injury must be considered as having been incurred in line of duty unless it is caused (1) by his own willful misconduct or (2) some act or course of conduct of his disconnected with his military duties. Under the foregoing opinions of the Attorney General as applied by the Department in its recent opinions, the Department held that the physical disability of the above man was received in line of duty.

[P. 19] In the following cases, the Department has held that the disability complained of was not incurred in line of duty:

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B, F1c, while riding his motorcycle at a speed of about 40 miles per hour, at 2 a. m., September 4, 1916, collided with an automobile and sustained a severe injury to his foot and ankle. As a result of his injury he was on June 2, 1917, discharged from the naval service by reason of physical disability, origin not in line of duty. *Held,* Not line of duty (File 29372–7, J. A. G., August 31, 1921).

D, SC4c, was found by a board of medical survey to be suffering from epilepsy, the facts contained in the survey indicating that disability was due to influences antedating his enlistment. The statement of the man indicates that in his opinion the condition was probably caused by "eleven months duty on the firing line with the 26th Division, U. S. Army."

The Department has held that, as there are no facts from which it can be deduced that this disability was caused by an incident of the service other than that it was officially discovered by the Medical Corps of the Navy, for the first time subsequent to his enlistment, which fact is not deemed sufficient to overcome the other facts as set forth by the Board of Medical Survey, the disability was not incurred in line of duty (File 29372–6, J. A. G., September 9, 1921).

In the following cases, the Department has held that the disability complained of was not incurred in line of duty and was due to misconduct:

A, stated that he had a very severe attack of indigestion and took some whiskey and water not as a beverage "but merely to stop intense cramps." He further stated that he was not accustomed to taking whiskey and that it apparently poisoned him. Shortly after taking it he was admitted to the hospital. The diagnosis made was poison, alcohol acute, not in line of duty and due to his own misconduct, i. e., intemperate use of intoxicating liquor.

The Department after a careful consideration of the facts presented approved the entry given above and stated that "it is the duty of all members of the naval service to avoid the use of drugs and intoxicating beverages for medicinal purposes unless regularly prescribed by members of the Medical Corps, except in those cases of emergency where the services of members of said corps are not available (File 29372–29, J. A. G., November 30, 1921).

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[P. 7] CHARGES AND SPECIFICATIONS: NOT IN DUE FORM AND TECHNICALLY CORRECT.

In reviewing the record of proceedings in the case of _____ _____, it is noted that he was convicted of: (I) "Drunkenness on duty," (II) "Using abusive, obscene, profane, and threatening language toward his superior officer," and (III) "Assaulting and striking his superior officer," and was sentenced to be confined for a period of eight (8) years, dishonorable discharge and accessories. [P. 8] The convening authority approved the proceedings, findings, and sentence on June 10, 1922, but in view of the previous good record of the accused reduced the period of confinement with corresponding accessories to five (5) years.

The court found charge II, "Using abusive, obscene, profane, and threatening language toward his superior officer," and its supporting specification proved as laid although the specification does not fully support the charge. The words contained in the specification in question which the accused is alleged to have uttered are clearly "abusive," "obscene," and "threatening" but they are in no sense of the word "profane." Winthrop's Military Law and Precedents, volume 1, page 216, provides as follows with reference to specifications supporting charges under which laid:

> "Lastly, the specification, in its statement of facts should set forth such facts as will be sufficient, if proved, to sustain, not only the specific charge in contradistinction to any other, but also such charge in its entirety. A specification stating facts which will establish only a portion of the offense charged, or a secondary or incidental offense, will be as insufficient in law as if it stated facts representing an offense of a totally different nature. A familiar instance of a specification not sustaining in its entirety the charge, would be in which the charge being desertion, the specification alleged an absence without leave only; or one where under a charge of

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'robbery,' the specification described a larceny only, the averment as to the use of force, etc., being omitted. The fact that the court may find guilty of a lesser offense will not excuse the pleader from the observance of this rule."

The convening authority in drawing up the charges and specifications in this case erred in placing the specification on charge II, under the full charge "Using abusive, obscene, profane, and threatening language toward his superior officer," but should have charged the accused merely with "Using abusive, obscene, and threatening language to his superior officer."

In view of the irregularity set out in paragraph 3, the court should have found charge II and its supporting specification to have been not in due form and technically correct and should have communicated with the convening authority with a view of having the error in question corrected before proceeding with the trial. Having failed to do so, the only way for the court to have held the accused on this charge was to have excepted in its findings on the charge the word "profane," and then the specification would have fully supported the charge. The form in Naval Courts and Boards, page 129, covering this charge does not require that the three parts named be proved but if there still remains at least one character of language set forth which is found proved, an offense cognizable by naval court martial is alleged.

The court found charge III "Assaulting and striking his superior officer" and its supporting specification proved as laid although there is no such a specific charge cognizable under the Articles for the Government of the Navy. The charge for the sample specification on page 86, Naval Courts and Boards, which was evidently [P. 9] followed in this case was struck out by Change No. 2, Naval Courts and Boards, and the sample specification inserted under the charge "Assaulting and striking another person in the Navy."

In view of the irregularity set out in above paragraph, the court should have found charge III not in due form and technically correct and should have communicated with the convening authority with a view to having the error in question corrected before proceeding with the trial. However, in the opinion of the Department, such error is not fatal inasmuch as the offense of "Assaulting and striking another person in the Navy" and "Assaulting and striking his superior officer" is the same offense, due to the fact that a superior officer is another person in the Navy. Therefore, the only question involved is as to the limitation of punishment for the offense of "striking another person in the Navy," which is confinement for three (3) months.

The limitation of punishment for charge I, "Drunkenness on duty," is confinement for one (1) year and dishonorable discharge and for charge III, "Assaulting and striking another person in the Navy," is confinement for three (3) months. As these two charges are the only ones remaining against the accused, and as the total limitation of punishment for these offenses is one (1) year and three (3) months confinement, dishonorable discharge and accessories, it is apparent that the confinement adjudged in excess of one (1) year and three (3) months is illegal (File 26262–9691, JAG, June 29, 1922).

RECORD OF PROCEEDINGS: FATAL OMISSIONS AND IRREGULARITIES—EXAMPLE OF.

------ ------, fireman second class, U. S. Navy, was convicted of "Disobeying the lawful order of his superior officer" (2 specifications) and sentenced to be confined for a period of two years, dishonorable discharge, and accessories. The Commandant, Naval Station, Cavite and Olongapo, P. I., approved the proceedings, findings, and sentence on January 5, 1922, mitigated the sentence in accordance with paragraph 13, Prison Manual, and designated the naval prison, Cavite, P. I., as the place of confinement.

The record in this case fails to indicate that the accused stated that he was ready for trial and that he was arraigned. If these required steps were not in fact carried out at the trial their omission constituted fatal defects and the setting aside of the proceedings, finding, and setence in this case must necessarily follow (Naval Digest, arraignment 7, 10; *Shelp* v. *U. S.*, 81 Fed. 701). If, however, the failure to include the entries in question in the record was merely a clerical error, the record could be returned to the court which, upon

being reconvened, could have caused these omissions in the record to be supplied (Naval Digest, arraignment 12; Davis, Military Law, p. 159). The Department did return the record to the convening authority with the request that the court be reconvened, if practicable, for the purpose of correcting the record if the omissions referred to above were clerical errors, otherwise to have set forth a [P. 10] statement of the true facts in the record of proceedings in revision. The court having been dissolved and it being impracticable to reconvene it, the convening authority returned the record to the Department with statements from the president and the judge advocate of the court before which the case was tried. One of these statements was to the effect that the president believed that the judge advocate complied with all the necessary requirements at the trial and the other to the effect that the judge advocate "was positive that all the preliminary steps were taken by the judge advocate and should have been entered in the record before the words 'The prosecution began.'"

In an opinion submitted by the Attorney General to the Secretary of War (23 Op. Atty. Gen. 23), in reference to an Army court-martial case, the question as to whether or not the Secretary of War could legally accept (as against the record which shows the contrary) certain affidavits as evidence that the witness mentioned in them testified at the trial, was decided in the negative. In his opinion the Attorney General stated:

> "The court and the judge advocate are required by law to keep a true record of the proceedings. This is not made the duty of any other officer or servant of the Government. The responsibility and the power both belong to these officers, and not to any other. The manner in which the record shall be kept is defined by law, and where it shall be filed and preserved is particularly prescribed. Whence is derived any authority on the part of the Secretary of War or even the President as Commander in Chief to alter or amend such a record? Can either of them do it while the court is in session? Manifestly not. Could the commanding officer compel the court to find any particular verdict or make any order or ruling in a case upon any matter within the jurisdiction of the court? Could he, for instance, require it to adjourn, or to refuse to hear a certain witness, or to rule in a particular way upon any question arising in the course of a trial? If the court, on application to make an alteration or amendment of the record should refuse to do so, could the commander lawfully compel it to be done?
>
> "How can the Secretary of War have any greater authority to change the solemn certified record of a court martial than the commanding officer by whom the court has been ordered to assemble?
>
> "The record is that which the court certify to have transpired on the trial and embodies the action of the court. The fact that the court in due and legal form announces that it did so-and-so or that so-and-so transpired, makes that the record and the fact, and *no one except the court itself can lawfully alter that record.* If it were to be held otherwise, there is not a record filed in the War Office that could not be subject to attack by ex parte affidavits, and that, too, at a time when the officers of the court might be dead or scattered to the ends of the earth and unable to defend the solemn certificates which they made; and all the judgments of courts martial as filed and acted on would be open to perpetual contradiction on subsequent assertions of interested parties which it would be impossible to meet or disprove."

[P. 11] The following provisions from Davis Military Law which were apparently used by the Attorney General as the basis for his decision, also bear directly upon the points under discussion:

> "Where the record of a trial, as forwarded to the reviewing authority for his action, is deemed by him to exhibit some error, omission, or other defect in the proceedings capable of being supplied or remedied by the court, the court may be reconvened by the order of the reviewing officer for the purpose of correcting the record in the faulty particular provided a correction be practicable. In case of an omission, the object, of course, is that the record may be made to conform with the fact. If the fact is that the proceeding apparently merely omitted to be recorded was actually not had, the proposed correction cannot of course be made. The amend-

ment can only be made by the court when duly reconvened for the purpose, and when made must be the act of the court as such. A correction made by the president or other member, or by the judge advocate, independently of the court, and by means of an erasure or interlineation, or otherwise, is unauthorized and a grave irregularity. The correction must be wholly made and recorded in and by the formal proceedings upon the revision. The record of the correction, as thus made, will refer of course to the page or part of the record of the trial in which the omission or defect occurs; but this part of the record must be left precisely as it stands. The court is no more authorized to correct the same by erasure or interlineation on the page, or by the substitution for the defective portion of a rewritten corrected statement, than would be the judge advocate or a member. Where the court has been dissolved or, by reason of any casualty or exigency of the service, cannot practically be reconvened, there can of course be no correction of its proceedings."

While the provisions of the preceding paragraph refer to an Army court martial, they apply equally to a Navy court martial since the same duties are imposed by law upon the members and judge advocates of both. In this connection, section 237, Naval Courts and Boards, 1917, provides that "the members of a court, who sign its proceedings, as well as the judge advocate, are responsible for the correctness of same."

It is clear from the foregoing that the statement of the president and the judge advocate of the court cannot be accepted as sufficient to legally supply the omissions in the record. As we have seen, the only way in which the record in this case could legally be corrected provided the omissions referred to above were clerical errors, would be to reconvene the court before which the case was tried and have it authorize the necessary corrections in its proceedings in revision. Since this action cannot now be taken and as we have seen that the proceedings of the court as they stand recorded are fatally defective and therefore illegal, it follows that the findings and sentence are also illegal and they were, therefore, set aside by the Department (File 26262–9389, J. A. G., June 26, 1922; G. C. M. Rec. No. 55341).

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[P. 8] I. ACCOMPLICES: LIABILITY OF FOR ACTS OF FELLOW ACCOMPLICES.
II. ACCESSORIES BEFORE THE FACT: CAN BE HELD AS PRINCIPALS.

Thirty-three marines were tried in joinder on the charge of "Manslaughter" for the killing of three Nicaraguan policemen during an affray which occurred in the city of Managua between marines and Nicaraguan civilians and police. From the evidence adduced at the trial the facts appear to be as follows:

On the afternoon of December 8, 1921, word was passed among the members of the legation guard stationed at the marine barracks, Managua, Nicaragua, that there was to be a fight in town that night between the marines on the one hand and Nicaraguan civilians and police on the other, and that the members of the liberty party were to form the marine contingent. The reason for planning this fight was that sometime previously several marines when in the city of Managua, alone, had been arrested and badly beaten by the Nicaraguan police and the marines desired to revenge themselves for this treatment. At about 7:45 p. m. of the night in question about thirty-six marines, consisting of three corporals and about thirty-three privates, met at the cantina of one Conchita where they lined up and divided into three groups, one corporal being included in each group. These groups then proceeded by different routes to the cantina of one Chavela Cruz, just outside of which there took place an affray which resulted in the deaths of the three Nicaraguan policemen named in the specification of charge I. It was the original plan to "jump the second police station," but for some reason not shown in the record this was not done though it seems it was the intention to proceed to [P. 9] the police station after the affray at the cantina of Chavela Cruz. Most of the marines in the three groups above mentioned were armed with sticks or stalks of sugarcane.

It appears further that three of the marines went ahead of the rest of the party to the cantina of Chavela Cruz and went inside and became involved in a fight with a captain of the President's guard. About this time the others

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arrived outside the cantina and the fight which started inside spread to the outside and the members of the three groups then engaged themselves in a brawl with Nicaraguan civilians. During this part of the affray, it seems, no firearms of any sort were brought into play, the marines using sticks and sugarcane with which they were armed as their weapons. A few minutes after the affray with the civilians started several of the native police became cognizant of the trouble and, upon their appearance on the scene, the marines stopped fighting the civilians and transferred their attentions to the police. One of the police, Abdulio Gomez, came toward the scene of the fighting from the south of the cantina firing his pistol in the air as he approached, apparently for the purpose of frightening the marines into abandoning the affray. Shortly afterward three other police, Manuel Gomez, Guadalupe Valverde, and Paraza, by name, approached from the north of the cantina. It appears that at least three of the marines had firearms and that Abdulio Gomez, Manuel Gomez, and Guadalupe Valverde were fired at and shot by marines shortly after their arrival at the scene of the affray. All three of the policemen just named died as a result of the injuries thus sustained.

The specification of charge I, "Manslaughter" sets forth in substance that each of the accused did "at about 7:45 p. m., December 8, 1921, feloniously and willfully and without justifiable cause, and in concert one with another, shoot, with deadly weapons, to wit, firearms, at Abdulio Gomez, Manuel Gomez, and Guadalupe Valverde, policemen of the aforesaid city, and did then and there inflict mortal wounds in and upon the body of Abdulio Gomez, the body of Manuel Gomez, and the body of Guadalupe Valverde, of which said mortal wounds so inflicted as aforesaid, the said Abdulio Gomez, Manuel Gomez, and Guadalupe Valverde died, between the hours of 8 p. m. and midnight on the date aforesaid."

There was no evidence adduced at the trial tending to show that certain of the accused had firearms in their possession during the affray and there is accordingly no basis for finding that they were personally instrumental in killing any of the policemen named in the specification. It is necessary therefore to consider their liability as accomplices by reason of their presence and general participation in the affray.

The law with reference to the liability of one party for the results of the acts of his fellow conspirators or accomplices while engaged in the commission of an unlawful act, is as follows:

> **[P. 10]** "*Combining in unlawful acts resulting in homicide.*—Any unlawful act which from its nature or the manner in which it is usually done will necessarily or probably endanger human life, is an act which if agreed to be committed by several persons and actually committed or attempted by one or more of them, will render all the participants criminally responsible for the death of a human being occurring in its accomplishment. Hence it is a principle of universal recognition that where several persons have conspired or agreed to commit an unlawful act, and in its perpetration or in the attempt to accomplish it a criminal homicide has been committed by one of the participants, the killing being a natural and probable consequence of the unlawful purpose sought to be accomplished or of the means used to consummate the illegal design, all the persons participating in the original agreement or conspiracy and in the acts done in pursuance thereof, even though they entertained no intent to kill and the death of a human being was beyond their contemplation, are criminally responsible for the homicide and guilty as principal offenders. In legal contemplation the act of one is the act of all, and it is immaterial which one of the conspirators committed the homicidal act. The basis of the principle is that every man must be held accountable for the natural and probable consequences of his acts or of indiscriminate forces which he sets in motion; and that where several persons combine to accomplish an illegal purpose each must be considered as resolving to use whatever means may become necessary to carry out that purpose, and likewise as assenting to whatever means may be used by his associates to effect the common design" (Am. & Eng. Encyc. of Law, vol. 21, p. 121).

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And so in the following cases it was stated that:

"If several persons enter into a conspiracy to disturb a meeting and thus provoke a difficulty, and to resist all opposers, even to the use of deadly weapons, and one of them kills a person in the difficulty provoked, the others are responsible for the homicide" (*Bibby* v. *State*, 65 S. W. 193; Texas Criminal Appeals, 68 L. R. A. 197).

"The principle which underlies and controls cases of this character is the elementary and very familiar doctrine, applicable alike to crimes and mere civil injuries, that every person must be presumed to intend, and is accordingly held responsible for the probable consequences of his own acts or conduct. When, therefore, one enters into an agreement with others to do an unlawful act, he impliedly assents to the use of such means by his coconspirators as are necessary, ordinary, or usual to the accomplishment of an act of that character. But beyond this his implied liability cannot be extended. So, if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his coconspirators may do in furtherance of the common design, whether he is present or not. But, where the lawful act agreed to be done is not of a dangerous or [P. 11] homicidal character, and its accomplishment does nor necessarily or probably require the use of force or violence, which may result in the taking of life unlawfully, no such criminal liability will attach merely from the fact of having been a party to such agreement" (*Lamb* v. *People*, 96 Ill. 72).

"When a number of felonious rioters were associated together, engaged in a common resistance against officers of justice attempting to restrain them, and one of them killed an officer, all are involved in the common guilt of the homicide" (Riots of 1844, 2 Clark (Pa.) 275; 68 L. R. A. 197).

"When, on a prosecution for homicide, committed while several persons were engaged and apparently cooperating in a riot in the nighttime, there is evidence from which the jury could rightly find that the accused was one of the rioters, and some evidence tending to show that the mortal wound was inflicted by him, though there is also evidence tending to show that it may have been inflicted by the hand of another member of the riotous party, a conviction of murder is warranted" (*Burgess v. State*, 93 Ga. 304; 68 L. R. A. 198).

A summary of the subject matter of the above citations, namely, the law with reference to the liability of one party for the results of the acts of his fellow conspirators or accomplices while engaged in the commission of an unlawful act, is given in 21 Cyc. 689 as follows:

"There may be liability for a homicide committed in the execution of a common design, although the plan did not involve taking life. It is often said that all who aid and abet the doing of an unlawful act are liable for homicide proximately resulting therefrom, and a natural and probable consequence thereof, although not contemplated by the parties, or even forbidden by defendant. Under this rule, those who have aided and abetted in an abortion, burglary, robbery, and grand larceny, resisting arrest with dangerous weapons, procuring and using deadly weapons in escaping from custody, breach of the peace involving personal violence and the use of deadly weapons, or assault involving danger to life as from the use of dangerous weapons or an attack by several, have been held responsible for homicide committed by their accomplices in the furtherance of the common object. The distinction is sometimes made that if the common design is to commit a trespass or minor offense, the accomplices are not liable for a homicide committed by the principal unless it was a plain and direct consequence of the design; but if the common design was to commit a felony they are liable although the homicide results collaterally therefrom."

And further, on page 691 of this same volume, it is stated:

"But if a common design does not contemplate the commission of a homicide, and is of such nature that a homicide will not be a natural or probable result, the participation in that design is not of itself sufficient to

make one liable for a homicide committed, concurrently with the execution of the common plan, by the independent act of a confederate growing out of his private malice, or other cause having no connection with the common object, unless the accomplice was present aiding and abetting the homicide itself."

[P. 12] II

Certain of the accused in this case, who were convicted by the court, were not seen at the affray in question, but were shown to have been parties to the arrangements preliminary thereto. In 16 Corpus Juris, page 134, it is stated:

"There are several things that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) that he was not present when the offense was committed; (3) that the principal committed the crime."

In view of this citation of law these marines would at least be "accessories before the fact" in regard to the subsequent affray. And in view of the provisions of article 332 of the U. S. Criminal Code (sec. 10506, U. S. Compiled Statutes, 1918), which in effect makes an accessory before the fact a principal, it is apparent that these marines are liable as principals for the results of the affray. Section 332 of the Criminal Code provides as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The Department further stated that under the circumstances of this case and in particular view of what was brought out in evidence as having taken place during the preliminary arrangements it is not essential to the conviction of any of these accused on the charge of "Manslaughter" that they be shown to have been present during the actual affray. It is sufficient that the courts should have believed them to have been present at and party to the preliminary arrangements on the night in question, provided that it was not established that any of the accused coming within this category withdrew from the affair there planned prior to its consummation. In this connection the following citation from 16 Corpus Juris, page 133, is pertinent.

"Where the perpetration of a felony has been entered upon, one who has aided and encouraged its commission may nevertheless, before its completion, withdraw all his aid and encouragement and escape criminal liability for the completed felony; but his withdrawal must be evidenced by acts or words showing to his confederates that he disapproves or opposes the contemplated crime. Thus his mere flight from the place of the crime before its completion, although his conspirators have knowledge thereof, will not relieve him from liability for the consummated crime" (File 26262–9493, J. A. G., May 23, 1922).

DRUNKENNESS: AS A DEFENSE.

In the case of ------ ------, commissary steward, U. S. Navy who was tried by order of the Commander Mine Squadron Two, U. S. Pacific Fleet, upon charges of: (I) "Disobeying the lawful order of his superior officer," (II) "Falsehood," (III) "Drunkenness," and (IV) "Disrespectful in language and deportment to his superior officer [P. 13] while in the execution of his office," the accused pleaded guilty to all the charges and specifications. He made a statement, however, which was to the effect that he was so drunk at the time of the commission of the above offense that he did not remember committing those set out under charges I, II, and IV.

It is a general rule of law that voluntary drunkenness is not an excuse for crime committed in that condition (C. M. O. 25–1914, p. 3; Naval Digest, p. 193, sec. 20). But the question of whether or not the accused was drunk and the degree of such drunkenness at the time of the commission of the acts alleged may be material to another important factor in some cases. Thus there are

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crimes which can be consummated only where a peculiar and distinctive intent or conscious deliberation or premeditation has concurred with the act which could not well be possessed or entertained by a person deeply under the influence of intoxicants. In such cases evidence of the drunken condition of the accused at the time of the commission of the alleged crime is admissible not to excuse or extenuate the acts as such, but to aid in determining whether in view of the state of his mind the accused was capable of entertaining the specific intent or premeditation necessary to change the nature or degree of his offense. Thus, in cases of murder, larceny, robbery, or burglary, which require for their commission a specific intent, evidence of drunkenness is admissible as indicating whether the offender was capable of entertaining this intent. The acts constituting burglary for example if with the intent to commit a felony upon the entered premises constitute no more than a trespass if the specific intent is lacking. (See Naval Digest, p. 195, sec. 49.)

But even in those cases drunkenness will constitute a defense only where it is shown that the accused was by drink so deprived of his reason that he did not have the mental capacity to entertain the necessary specific intent required to constitute the crime (12 Cyc. 172) and the burden of showing such to have been the case, being a matter of defense, rests upon the accused (C. M. O. 19–1912, p. 7). Furthermore, where premeditation and intent first exist, followed by voluntary drunkenness and the commission of the crime during such state of drunkenness, the necessary intent to commit the crime will be presumed whatever state of drunkenness may have existed at the time of its commission and in such cases if the drunken act has involved a disorder or neglect of duty prejudicial to good order and discipline, and such will almost invariably be the fact, the accused may be convicted of an offense under the latter charge (Winthorp, 2d Ed. p. 441). So also may the accused be properly convicted of an offense less in degree consisting of the same acts of the accused but not requiring a specific intent.

From the above it may be seen that when the defense of drunkenness is interposed the prosecution may properly introduce evidence in rebuttal to show that the accused, even though under the influence of intoxicants, was not so entirely deprived of his reason as necessarily to have been incapable of entertaining the specific [P. 14] intent necessary to constitute the offense. The reason for this rule is apparent when it is known that drunkenness is easily simulated and is sometimes resorted to for the purpose of stimulating the nerves to the point of committing the act.

In military cases involving, as necessary to constitute the offense, a certain knowledge, or a deliberate purpose or a specific intent, the drunkenness of the accused, if clearly shown in the evidence to have been such as to have incapacitated the accused from having the requisite knowledge, purpose, or intent, will ordinarily be treated as constituting a defense to the specific offense charged.

Offenses involving a disregard of certain obligations toward superior officers are such as to require a specific knowledge inasmuch as the gravamen of the offense lies in disrespect to, or disobedience of the superior as distinguished from similar acts toward those of a rank equal or inferior to the accused. The offense necessarily involves knowledge and understanding, or circumstances clearly such that the accused must have known or understood, that the person to whom he was disrespectful, or whom he disobeyed, was a superior.

The offense of falsehood requires a knowledge or specific intent inasmuch as the gravamen of this offense lies in that the statement made was knowingly false and intended to deceive.

The case in hand aptly illustrates the principles involved. Charges I and IV involve knowledge on the part of the accused that the person whose order he disobeyed, and to whom he was disrespectful in language and deportment was a superior officer. Charge II involves knowledge on the part of the accused that the statement he made was knowingly false and intended to deceive. The defense of drunkenness was therefore available to charges I, II, and IV.

In view of the above it is the opinion of the Department that the court erred in not clarifying the statement of the accused, who was not represented by counsel, insofar as charges I, II, and IV were concerned, and proceeding as set forth in sections 310 and 312, Naval Courts and Boards, 1917. The Depart-

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ment therefore set aside the proceedings and findings upon charges I, II, and IV and the specifications thereunder (File 26262–9738, J. A. G., July 21, 1922. G. C. M. Rec. No. 56290).

EVIDENCE: ADMISSIBILITY OF "CERTIFICATE OF DIFFERENCES," CERTIFIED BY GENERAL ACCOUNTING OFFICE.

In reviewing the case of Ensign _____ _____ (SC), U. S. Naval Reserve Force, it is noted that the prosecution offered in evidence a "certificate of differences" prepared by the General Accounting Office as copies of the accounts of the accused. This certificate was offered for the purpose of establishing the fact that there was a shortage in the accounts of the accused and thus setting up a prima facie case of embezzlement, which was the basis of the offenses set forth in the specifications laid under charge I. The introduction of this certificate into evidence was objected to by counsel for the [P. 15] accused upon the ground that the person who prepared the accounts was not present and could therefore not be cross-examined. This objection was sustained by the court with the result that the only evidence before the court that the accused had received any moneys of the United States was the uncertain testimony of Lieutenant S. to the effect that he (S.) thought the accused had received about $10,000 but did not of his own knowledge know that such was the case.

Since the certificate in question was certified under the seal of the General Accounting Office to be a true copy of the accounts on file in that office, the same was admissible in evidence as provided in Revised Statutes 886 and 887 (Comp. Statutes, 1918, sec. 1498 and 1500) as amended by the act of July 31, 1894, and March 2, 1895 (Comp. Stat. sec. 1499), and by the Budget and Accounting Act of 1921, section 306.

Section 886 of the Revised Statutes provides—"When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department * * * or when the suit involves the accounts of the War or Navy Departments, certified by the auditors respectively charged with the examination of these accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the case shall be authorized to grant judgment and award execution accordingly. * * *."

The Budget and Accounting Act of 1921 provides that copies of papers, etc., of the General Accounting Office, certified by the Comptroller General or an Assistant Comptroller General and under the seal of the office "shall be received in evidence with the same effect as the copies and transcripts referred to" in section 886 of the Revised Statutes.

Revised Statutes 887 (Comp. 1500) provides:

> "Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided in the preceding section."

In Naval Digest, page 212, section 27, under "Embezzlement," it is stated that—

> "When shortage is proved, pay officer is prima facie guilty and must show, as a matter of defense, absence of negligence or culpability on his part. Not necessary for the Government to prove what has become of the missing funds."

In view of the above, it is the opinion of the Department that the erroneous ruling of the court to the effect that the above-mentioned "certificate of differences" was not admissible into evidence prevented the prosecution from properly presenting its case in support of the specifications alleged under charge I. The Department [P. 16] accordingly disapproved the proceedings and acquittal on charge I (File 26251–29685, J. A. G., Aug. 18, 1922; G. C. M. Rec. No. 56306).

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IMMEDIATE SUPERIOR IN COMMAND: SENIOR OFFICER PRESENT ACTS AS SUCH, ON SUMMARY COURTS MARTIAL CONVENED BY COMMANDING OFFICERS WHO ARE THEMSELVES SENIOR OFFICERS IN THE CHAIN OF COMMAND OF THE ORGANIZATIONS TO WHICH THEY BELONG.

In a recent letter received by the Department, an officer states that he holds two (2) distinct offices namely that of Commanding Officer of the U. S. S. *Aroostook*, and that of Commander Aircraft Squadrons, Battle Fleet, and makes the point that in his latter capacity he is immediate superior in command of himself in his former capacity, and therefore he should act twice upon the records of summary courts martial convened by himself as Commanding Officer of the U. S. S. *Aroostook*, or, in other words, that he should act upon the record once as convening authority and again as immediate superior in command.

It can readily be seen that such procedure if followed would not accomplish the purpose for which a summary court-martial record is intended to be referred by a convening authority to his immediate superior in command. A reading of the act of August 29, 1916, which established such procedure, makes it clear that the purpose of such reference is to obtain two (2) reviews of the records of summary courts martial whenever possible before the sentence is carried into effect. The only exception made is in the case where the convening authority is also the senior officer present, in which case it is obviously impracticable to secure an additional review by an officer senior to the convening authority.

Accordingly it is the opinion of the Department that he should either take action upon the record as senior officer present, if such is his status, or, after taking action as convening authority, forward it to the officer who is his immediate superior in command. In this connection it may be pointed out, as there appears to be some doubt on the subject, that the senior officer present is the immediate superior in command of all the commanding officers present who are themselves the senior officers in the chain of command in the organizations to which they belong (File 26287–8878, J. A. G., Aug. 1, 1922).

JUDICIAL NOTICE: LOCAL ORDERS OR REGULATIONS OF A SHIP OR STATION.

Naval courts martial may take judicial notice of Navy Regulations, etc., but this does not extend to the local regulations of a particular ship or station. Where it is alleged that a certain act is in violation of a local ship's order, then it is necessary, in cases where the accused pleads "not guilty," to prove the existence of such a ship's order (File 26287–8907, J. A. G., Aug. 4, 1922).

JUDGE ADVOCATE: IMPROPER ACTION OF.

It was noted from the evidence adduced in a recent case that, although the accused had counsel and the trial had actually begun, [P. 17] the judge advocate without the knowledge of the counsel visited the accused, in his place of confinement, in company with another officer, and asked the accused certain questions of a nature such as to presume that certain evidence already presented by the defense was false, and that further persistence in his plea of not guilty was useless. This action on the part of the judge advocate was irregular and highly objectionable. Section 253 of Naval Courts and Boards states in part, "* * * Whenever an accused has secured counsel, all negotiations by the judge advocate should be conducted through that counsel" and "* * * The judge advocate should scrupulously avoid even the slightest suggestion to the accused that he plead guilty to anything charged against him * * *" (File 26262–9797 J. A. G., Aug. 17, 1922, G. C. M. Rec. No. 56408).

RESISTING ARREST: DEFECTIVE SPECIFICATION.

The specification under the charge of "Resisting arrest" alleged that each of the accused "did, while in desertion, in the vicinity of St. Gregory, near the town of Diriamba, Republic of Nicaragua, at or about 7:00 p. m., January 25, 1922, while an attempt was being made by lawful authorities of the Republic

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of Nicaragua, to place the said A, B, and R, under arrest, in concert one with another, forcibly resist arrest."

It will be noted that the specification above quoted in support of the charge of resisting arrest merely alleges that the resistance occurred while the accused were in desertion and while an attempt was being made to place them under arrest by the lawful authorities of Nicaragua. It must be especially noted that no allegation was made to the effect that the attempted arrest was, in fact, lawful, but that it was merely alleged that such attempt was being made by the lawful authorities of the Republic of Nicaragua. Nor does the additional allegation that the marines named were at the time "in desertion" in itself justify the conclusion that an attempt made to arrest such marines by the lawful authorities of the Republic of Nicaragua necessarily constituted an attempt to make a lawful arrest. The specification laid under the charge "Resisting arrest" was therefore defective and did not properly support the charge. As in the opinion of the Department the court erred in finding this specification in due form and technically correct, the preceedings and findings thereon were consequently set aside (File 26262–9489, J. A. G., June 2, 1922; G. C. M. Rec. No. 55598).

THEFT: NUMBER OF SPECIFICATIONS.

In a recent case the charge of "theft" was supported by four specifications, each of which grew out of the same act of stealing a handbag and its contents, a separate specification being prepared for the handbag and each article therein contained. An unnecessary multiplication of specifications for the same offense serves to increase the limitation of punishment, which is prejudicial to the accused and to be avoided for that and other reasons. The offense should [P. 18] have been alleged under one specification setting out all the different articles the accused was alleged to have stolen as a result of the single act of taking the handbag (File 26262–9695, J. A. G., July 12, 1922; G. C. M. Rec. No. 56208).

SUSPENSION OF ACCOUNTS OF SUPPLY OFFICERS: CHECKAGE OF PAY ON COURT-MARTIAL SENTENCES.

The Department has of late received a number of letters from supply officers stating that their accounts have been suspended in various amounts by the Comptroller General for failure to furnish proper vouchers supporting checkages of pay as result of sentences of courts martial. These supply officers have requested the Department to furnish them data as to the nature of offenses in particular cases; the date and hour of departure and the date and hour of return in cases of unauthorized absence; statements as to whether the unauthorized absence was "over leave," or "without leave"; and other information which they have failed to furnish the Comptroller General when sending in their accounts.

Inasmuch as the above data are all contained in the court-martial records which are referred to supply officers in cases involving loss of pay, attention is invited to the fact that while the Department is always glad to be of assistance in supplying necessary data, yet in view of its limited clerical force, it is desirous of eliminating, as far as possible, correspondence which would not be necessary if required data were taken from records at the time that action is taken.

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[P. 1] Lieutenant Daniel W. Tomlinson, U. S. Navy, was tried by general court martial at the U. S. Naval Air Station, San Diego, Calif., on March 28, 1922, and acquitted of the following charge and specification.

Charge.—Manslaughter.

Specification.—In that Daniel W. Tomlinson, now a lieutenant, U. S. Navy, while so serving at the United States Naval Air Station, San Diego, Calif., well knowing that a lawful order, issued by the Chief of Naval Operations, U. S. Navy, establishing rules for the prevention of accidents to aircraft, required that a motor-driven aircraft overtaking any other keep out of the way of the

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overtaken aircraft by altering its own course to the right and that such change of course, be made as soon as it becomes apparent that, if the overtaking aircraft pursue its course, it will pass the overtaken aircraft at a distance of less than two hundred meters, did, on or about October 31, 1921, while making a test flight as pilot of a motor-driven aircraft, without proper authority and with knowledge of the danger involved, attempt to join a formation of four motor-driven aircraft in the air in the vicinity of said station, and he, the said Lieutenant Tomlinson, while attempting to join said formation and overtaking another motor-driven aircraft in the said formation, which said aircraft was being piloted by Lieutenant Winthrop E. Blackwell, United States Naval Reserve Force, did willfully, negligently, and with a disregard for the lives and safety of others, fail to alter his course to the right as soon as it became apparent that the aircraft of which he was pilot would pass at a distance of less than two hundred meters from the aircraft being overtaken as aforesaid, and did then and there attempt to pass said latter aircraft so close that the aircraft piloted by him and the aircraft piloted by the said Lieutenant Blackwell collided and fell to the earth, as a result of which collision and fall the said Lieutenant Blackwell received injuries from which he died on the date aforesaid, and he, the said Lieutenant Tomlinson, did therein and thereby cause the aforesaid collision and death.

[P. 2] OPINION AND RECOMMENDATION OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

"The evidence adduced in the foregoing case of Lieutenant Daniel W. Tomlinson, U. S. Navy, shows clearly that the accused had approached and was following a formation of airplanes, which was executing battle maneuvers in the air, at a distance of about four hundred (400) feet, or within a distance of two hundred (200) meters. The Rules for the Prevention of Accidents to Aircraft (exhibit 3) require certain maneuvers to avoid collision upon approaching within two hundred (200) meters.

"Maneuvering in formation with aircraft is dangerous in itself; it requires close attention to the incidents within the formation, and leaves little or no time available for attention to matters outside the formation. Therefore, when the rules require certain maneuvers to avoid collision upon approaching a single airplane, it should be apparent that the necessity for strict adherence to these rules is even greater when approaching a formation the movements of which could not possibly be foreseen. In fact, even in the absence of any rules, common prudence should indicate the necessity of giving such a formation as wide a berth as possible.

"The evidence to the effect that after the collision the airplane of the deceased descended from about thirty-eight hundred (3,800) feet in broad spirals to within about two hundred (200) feet of the ground and then 'crashed' is unimportant since it is clearly shown that his airplane must have been so damaged by the collision as to render it uncontrollable and there can be no doubt but that the death of Lieutenant Blackwell was a result of the collision.

"Accordingly, it would appear that the main question before the court to decide, was whether the failure of Lieutenant Tomlinson to adhere to the existing rules in this instance constituted negligence of such a character as to amount to a 'disregard for the lives and safety of others' as alleged in the specification.

"On this point Lieutenant H., called by the prosecution as an expert, testified as follows:

"'I consider that it would be safe to pass a formation at twice the distance between places in the formation. That is if the distance were fifty feet, it would be safe to pass at one hundred feet' (Record p. 36 and p. 41).

"This is clearly not in harmony with the inferences to be drawn from the requirements of rule 25, Rules for the Prevention of Accidents to Aircraft (exhibit 3).

"Lieutenant H. also considered (p. 45) that an overtaking airplane becomes an overtaken plane when an airplane within a formation gets behind a stranger, who has been following the formation, by reason of losing speed in crossing the slip stream of an airplane in the formation, notwithstanding the provisions of paragraph 28 of the Rules for the Prevention of Accidents to Aircraft (exhibit No. 3).

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[P. 3] "This office considers that the acquittal of Lieutenant Tomlinson was based largely on the above testimony of Lieutenant H. whom the court had accepted as an expert and that the acquittal may have been justified provided the testimony of Lieutenant H. on the above points was sound. However, this office finds it difficult to believe that the opinions expressed by Lieutenant H. in regard to the above points were in fact sound and recommends a disapproval of the court's findings in this case, provided the Bureau of Aeronautics concurs in the above remarks insofar as they relate to technical matters.

"Subject to the foregoing remarks the record is respectfully referred to the Chief of the Bureau of Navigation for comment with the request that the record be also referred to the Chief of the Bureau of Aeronautics for comment in regard to the technical features of the case."

ENDORSEMENT OF THE CHIEF OF BUREAU OF AERONAUTICS

"This Bureau concurs in the opinions as set forth in this case by the Judge Advocate General.

"This Bureau does not consider Lieut. H. in any way qualified to testify as an expert regarding planes of the type concerned in this case. The maneuverability of planes of the types set forth on page 35, question 3, cannot be in any way compared with the Vought type (planes concerned in this case).

"The type of planes in which Lieutenant H. was qualified at the time his testimony was given, are all comparatively slow, being principally primary training and patrol classes. Records show that practically all Lieutenant H's flying experience, previous to his testimony, was gained in boats or float seaplanes, and, at the time he testified, he was undergoing a course of primary instruction in land planes preparatory to taking advanced land-plane training, which was to qualify him in the class of planes concerned in this case and in maneuvers similar to those which the formation of planes was practicing when the stranger plane appeared and collided with a plane in the formation. Records further show that Lieutenant H was qualified in this advanced land-plane training course in the latter part of June 1922, indicating that he was not qualified to engage in maneuvers, similar to those which his testimony as an expert concerned, until approximately three months after his testimony was given."

ENDORSEMENT OF CHIEF OF BUREAU OF NAVIGATION

"This Bureau concurs in the opinion of the Judge Advocate General as set forth in the first endorsement on this record and for the reasons given therein recommends that the proceedings in the foregoing case of Daniel W. Tomlinson, U. S. Navy, be approved and the findings disapproved."

[P. 4] ACTION OF THE SECRETARY OF THE NAVY

"In view of the recommendation of the Judge Advocate General, concurred in by the Chief of the Bureau of Navigation, the proceedings in the foregoing case of Daniel E. Tomlinson, lieutenant, U. S. Navy, are approved, but the finding and acquittal are disapproved."

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[P. 6] FINDINGS: FAILURE OF COURT TO MAKE NECESSARY EXCEPTIONS AND SUBSTITUTIONS IN ITS FINDINGS ON THE SPECIFICATIONS.

In a recent general court-martial case it was noted that although the evidence adduced at the trial failed to support the specification of the charge as laid, the court, in its findings, did not make the necessary exceptions and substitutions in the specification to correspond to the facts brought out in evidence.

The specification of the charge, "Breaking arrest," alleged that the accused did "after having been placed under arrest by ------ H ------, boatswain's mate second class, U. S. Navy, a member of the shore patrol * * * break his arrest and leave the custody of the said patrol and attempt to escape." The specification was found proved as alleged above yet the evidence clearly indicated that although ------ H ------, referred to in the specification as having placed the accused under arrest, was a member of the patrol present

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at the time of the arrest of the accused, another member of the patrol actually placed the accused under arrest.

As it was considered impracticable for certain reasons to return the record to the court in order that the court might take the necessary action in its findings in revision to cause the specification in question to correspond to the evidence adduced at the trial in the particular referred to above, the Department set aside the findings on the charge and its supporting specification (File 26262–9817, J. A. G., Sept. 16, 1922; G. C. M. Rec. No. 56449).

GUILTY KNOWLEDGE: HOW EVIDENCED.

In a recent case the specification alleged that the accused did—

> "on or about June 10, 1922, on board the U. S. S. _____, * * * feloniously and willfully receive and have in his possession one Bosch magneto, number 2 R. of the value of about seventy dollars ($70) the property of the United States intended for the naval service thereof, which said article had then lately before by one _____ _____, seaman first class, U. S. Navy, attached to said ship, been feloniously stolen from storeroom A one hundred ten of said ship, the said _____ _____ then and there well knowing the said article to have been feloniously stolen."

[P. 7] The convening authority approved the proceedings, but disapproved the finding and sentence on the ground that there was insufficient evidence before the court to indicate that the accused knew that the magneto in question was stolen. In this connection he quoted a portion of Court-Martial Order No. 6 of 1921 as follows:

> "that subsequent knowledge or belief by the accused that the article had been stolen is not enough but that guilty knowledge must exist at the time of the receiving."

A further perusal of this court-martial order on the same point discloses the fact that a court is justified, though not required, to draw an inference of guilty knowledge on the part of the accused when, in connection with the proof of the accused's possession and of the fact that the goods were actually stolen at the time of his receiving, additional evidence is offered that—

> (1) The accused bought the article at a price so low that it would tend to arouse suspicion in the mind of the ordinary man as to the genuineness of the seller's title, accompanied by lack of any inquiry on the part of the accused.
>
> * * * * * * *
>
> (3) That the accused denied receipt or possession of the article, which is shortly afterwards found in his possession, coupled with the failure of the accused to rebut this prima facie (evidence) of receiving.
>
> (4) That the transfer to the accused was made furtively at a strange hour of the night or in an unusual place, not ordinarily frequented by the parties to the transaction.

The above are three of the eight examples cited.

There was evidence before the court tending to establish the three points above quoted, as follows:

> (1) That the accused admitted to Ensign _____ _____ that the magneto in question had been given to him by _____ _____, an enlisted man on said ship, and there was no evidence adduced showing that the accused made any inquiry concerning the title of the magneto.
>
> * * * * * * *
>
> (3) That the accused denied to Ensign _____ _____, any knowledge of this magneto.
>
> (4) That the transfer of the magneto from the U. S. S. _____ to the barge on which the accused was coxswain, was not made openly but was accomplished by an enlisted man on the said ship; carrying it over a boom concealed in a sea bag; this transfer was effected by direction of the accused.

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In view of the foregoing, it was the opinion of the Department that the disapproval of the finding and sentence in this case by the convening authority was based upon a misinterpretation of Court-Martial Order No. 6 of 1921 (File 26262–9800, J. A. G., August 21, 1922; G. C. M. Rec. No. 56413).

CONVERSION: FALSIFICATION OF ACCOUNTS IS EVIDENCE THEREOF.

An accused was recently tried for having embezzled and converted to his own use and benefit fifty dollars ($50) of a company mess fund [P. 8] at a marine barracks. The accused took the stand and testified that on a certain date he drew a check on the account of the company mess fund to the amount of fifty dollars ($50) for the purpose of securing money for his personal use. He admitted that he had wilfully failed to make any entry of this transaction on the check stub or in the company fund records. The Department held that this was a falsification of records to such an extent as would establish a prima facie conversion of the aforesaid money and in this connection quoted Wharton's Criminal Law, paragraph 1300, as follows:

> "Insolvency, flight, falsification of accounts, or refusal to pay, are the usual and most effective evidences of conversion, though these are not the sole facts from which embezzlement can be inferred" (File 26251–29771, J. A. G., Aug. 15, 1922; G. C. M. Rec. No. 56369).

JUDGE ADVOCATE: IMPROPER ACTION OF.

In attempting to prove a specification in a recent case, the judge advocate took the stand and testified that the prosecuting witness, Major _____ _____, had been transferred but that some time prior to the trial he had had the accused in the presence of himself and Major _____ _____, and that Major _____ _____ had made certain statements tending to point toward the guilt of the accused of the offense alleged in the specification. The counsel for the accused objected to the admission of this testimony into evidence upon the ground that it was hearsay. The court overruled the objection. Upon cross-examination the judge advocate stated that at the time of the questioning of Major _____ _____, as above described, counsel had been appointed for the accused but that he did not notify counsel of this procedure. As the interview with Major _____ _____ took place in the absence of and without the knowledge of counsel, and inasmuch as the counsel was not afforded an opportunity to cross-examine this prospective witness, it is the opinion of the department that the court erred in not sustaining the objection of the counsel of the accused to the admission of this testimony. However, due to the fact that the accused was acquitted on this specification, it is not considered that his rights were prejudiced by this ruling (File 26251–29641, J. A. G., Sept. 15, 1922; G. C. M. Rec. No. 56322).

MULTIPLICITY OF TRIALS: UNDESIRABLE.

When it is desired to charge the accused with two or more separate offenses on the same date, they should be made the subject of but one trial with two or more separate specifications.

To permit the same court on the same date, in separate trials, to try an accused for separate offenses has the effect of increasing the punishment that the court may by law adjudge. If the offenses committed are of such gravity that the limitation of punishment that the court may impose is inadequate, then resort should be had to a higher court with greater powers (File 26287–8957, J. A. G., Sept. 6, 1922).

[P. 9] SPECIFICATION: AS FOUND PROVED ALLEGES NO OFFENSE.

An accused was tried upon a specification alleging that he "did on or about July 3, 1922, create a disturbance in a street, exact name unknown, in the city of Panama, Republic of Panama, and was thereupon publicly arrested by a Panamanian policeman and confined in the police station of said city, thereby

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bringing discredit to the U. S. naval service." The court found "The specification proved in part, proved except the words "did on or about July 3, 1922, create a disturbance in a street, exact name unknown, in the city of Panama, Republic of Panama,' which words are not proved."

The Department held that the specification as found proved was insufficient and did not allege an offense against the accused. The court in excepting the above words from the specification removed the words constituting the gist of the offense and should properly have acquitted the accused (File 26287–8972, J. A. G., Sept 9, 1922).

STATEMENT OF ACCUSED: INCONSISTENT.

An accused after pleading guilty to being disrespectful in language and deportment to his superior officer, who was in the execution of his office, made an oral statement to the effect that he did not recognize him and as he was in civilian clothes had no way of knowing him to be an officer.

The Department held that the above statement was inconsistent with the accused's plea of guilty for the reason that one of the essential elements in any offense involving disrespect to his superior officer is knowledge on the part of the accused that the act was committed against or the word spoken to his superior officer. This matter was more fully discussed in Court-Martial Order 6, 1921. A statement by the accused that he did not recognize the members of the party as being officers and had no way of doing so inasmuch as they were in civilian clothes, implies a lack of knowledge that he had committed any offense against a superior officer and thereby denies one of the essential elements of such an offense. It was, therefore, the duty of the court to follow the procedure outlined in sections 310 and 312, Naval Courts and Boards, and its failure to do so constitutes, in the opinion of the Department, a fatal error (File 26287–8965, J. A. G., Sept 12, 1922).

VENEREAL DISEASE: CONCEALMENT OF, AN OFFENSE.

In a recent case the specification read as follows:

> "In that ------, U. S. Navy, serving on board the U. S. S. ------, did, after having been instructed in accordance with Navy General Order Number 69, fail to report exposure and to take prophylactic treatment, on or about September 20, 1922, and did through his own misconduct, contract a venereal disease."

General Order 69 of September 16, 1921, superseded General Order 29 of January 5, 1921, which latter order was thereupon canceled.

[P. 10] A careful reading and comparison of the above orders discloses several important differences in phraseology. General Order 29 states "that failure to report exposure will be regarded as disobedience of orders;" it also states that "where proper instructions have been given, failure to report exposure and take prophylactic treatment shall be regarded as cause for disciplinary action for disobedience of orders, and men developing venereal diseases who have not reported exposure promptly upon returning to ship or station shall be reported to the commanding officer in every instance." Neither of the above provisions are included in General Order 69. Thus it is seen that the disciplinary features embodied in General Order 29 were omitted from General Order 69 and in construing the latter, due consideration must be given to this omission.

It is the opinion of the department that General Order 69, in superseding General Order 29, was intended to repeal the disciplinary features of the latter, and to be merely explanatory in character and to set forth matters of instruction, advice, and warning on the subject of exposure to venereal diseases.

Accordingly, it would seem that, in view of the advisory, rather than mandatory, character of General Order 69, disciplinary action cannot properly be based upon the failure to comply with the terms thereof. However, attention is invited to the fact that concealment of an infectious or communicable disease, which endangers the health of others, may be made the subject of trial by court martial on the ground that such concealment under the conditions pre-

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vailing in a military service, is an offense in itself and can be recognized as such even in the absence of express prohibition.

In view of the foregoing, it is not considered that the specification alleges an offense, and the Secretary of the Navy directed that the proceedings, findings, and sentence be set aside (File 27217–5426C, J. A. G.).

CIVILIAN WATCHMEN: JURISDICTION OF, WHEN PROTECTING GOVERNMENT PROPERTY.

The Department has held that individuals, whether members of its military forces or civilian watchmen, employed by the Federal Government to protect personal property of the United States in a navy yard annex, are clothed with authority to protect said property even by force and that they are not amenable to the jurisdiction of State officials for the proper performance of their duties in the protection of such property regardless of the fact that it may be [P. 11] situated on the soil of a state. (See *Ex parte Siebold* (100 U. S. 371), *In re Neagle*, (135 U. S. 1), *In re Debs*, (158 U. S. 564) ; File 5267–1223, J. A. G., July 17, 1922).

DIVORCE: "A MENSA ET THORO" AS AFFECTING RIGHT OF WIDOW TO SIX MONTHS' GRATUITY UNDER ACT OF JUNE 4, 1920.

A divorce "a mensa et thoro" is a limited divorce which merely suspends the marriage relation and modifies its duties and obligations, leaving the bond in full force, and a woman who has been granted such a divorce in case of the death of the husband is in law and in fact his widow and as such is entitled to the gratuity as authorized by this act (File 26543–332, J. A. G., May 31, 1922).

"FLYING OFFICERS": MEANING OF TERM IN ACT OF JULY 12, 1921.

The Department held that the term "Flying Officers" as employed in section 8 of the act of July 12, 1921, means a "duly qualified naval aviator" (File 26983–1260, J. A. G., March 31, 1922).

JURISDICTION: OF GENERAL COURT MARTIAL TO TRY RETIRED ENLISTED MAN.

It has heretofore been held by this Department (August 27, 1909, File No. 7657–57), that a retired enlisted man is not amenable to trial by court martial for violation of the laws and regulations governing the Navy. The foregoing opinion was based upon a decision of the Court of Claims in the case of *Murphy* v. *United States* (38 Ct. Cls. 511) reaffirmed by 39 Ct. Cls. 178, which held that enlisted men after retirement are not a part of the Army. (See also File No. 7657–186, J. A. G., May 20, 1913.)

The foregoing decision of the Department relative to the jurisdiction of naval courts martial over retired enlisted men of the Navy is founded upon two fundamental propositions; first, naval courts martial being courts of special and limited jurisdiction have no power to proceed except in cases where they are specially empowered by statute to do so. As stated by Judge Sanborn in the case of *Deming* v. *McClaughry* (113 Fed. 639) :

> "The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgements are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown. A court martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it."

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and second, that no statute exists which either directly or indirectly provides that retired enlisted men are subject to the rules and articles for the government of the Navy or that they are amenable to trial by a naval court martial. The absence of a legislative provision [P. 12] making retired enlisted men of the Navy subject to the rules and Articles for the Government of the Navy and to trial by general court martial is all the more significant when it is understood that Congress deemed it necessary to specifically provide by statute that retired officers of the Navy "shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and Articles for the Government of the Navy and to trial by general court martial" (R. S. 1457).

Since courts martial are courts of limited jurisdiction and have no power or jurisdiction which the statutes do not confer upon them, in the absence of any provisions of law making retired enlisted men subject to the rules and Articles for the Government of the Navy and to trial by general court martial, it can only be concluded that Congress does not intend that retired enlisted men shall be subject to the jurisdiction of courts martial for offenses committed when not on active duty.

Under the provisions of the act of March 3, 1915 (38 Stat. 941), the Secretary of the Navy is authorized "in time of war, or when in the opinion of the President, war is threatened" to call any enlisted man on the retired list into active service for such duty as he may be able to perform. The foregoing was reenacted in substance by the act of August 29, 1916 (39 Stat. 591) which provides, relative to this subject, as follows:

> "The Secretary of the Navy is authorized in time of war or when a national emergency exists to call any enlisted man on the retired list into active service for such duty as he may be able to perform."

From an examination of these provisions of law the department is of the opinion that they in nowise render a retired enlisted man subject to the rules and Articles for the Government of the Navy and to trial by general court martial, except when serving under an order of the Secretary of the Navy "in time of war or when a national emergency exists" for such duty as they may be able to perform. And, further, that said provisions of law do not authorize the Secretary of the Navy to recall a retired enlisted man into active service except "in time of war or when a national emergency exists." These conclusions appear too obvious to require further consideration.

The Department held, first, that the Secretary of the Navy is not authorized to call the above-named man to active duty for the purpose of bringing him within the jurisdiction of a court martial and that the only circumstances under which he may be called to active duty is "in time of war or when a national emergency exists"; and, second, that a retired enlisted man who is not serving under a call to active duty issued in time of war or when a national emergency exists is not subject to the jurisdiction of a court martial for offenses committed while on the retired list (File 7657–1387, J. A. G., July 29, 1922).

[P. 13] MIDSHIPMEN: STATUS OF.

"* * * Midshipmen are not enlisted men nor are they commissioned officers, but they are nevertheless officers appointed by the President as authorized by Congress" (File 5252–137 :12–1, J. A. G., May 19, 1922).

NAVAL RESERVE FORCE: DATE ACTIVE DUTY IS EFFECTED.

A, enrolled in the Naval Reserve Force for flight training and on May 16, 1917, started flight training pursuant to oral orders from the Department. Written orders were later issued to date from May 19, 1917. The Department held that A was on active duty from May 16, 1917, instead of May 19, 1917, the date shown in the written orders (File 29372–83, J. A. G., May 3, 1922).

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NAVAL RESERVE FORCE: PHYSICAL EXAMINATION OF MEMBERS PRIOR TO ENROLLMENT.

The Department held that no individual should be enrolled or reenrolled in the Naval Reserve Force until it had been determined that he is physically qualified to perform all his duties in time of war; that this physical examination may be conducted by a duly qualified Regular or Reserve officer of the Medical Corps of the Navy and that a board of medical officers is not required. A civilian physician is not authorized to conduct such examination (File 26521–494, J. A. G., June 16, 1922).

PROMOTION BY SELECTION: PRECEDENCE IN RANK OF OFFICERS GIVEN THE SAME DATE OF COMMISSION, BUT SELECTED BY DIFFERENT SELECTION BOARDS.

Officers promoted on the recommendation of one board of selection take precedence over other officers recommended for promotion to the same rank by a subsequent selection board, even though they may be commissioned to rank from the same date (File 11130–84, J. A. G., June 15, 1922).

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[P. 8] CHARGE: NOT SPECIFICALLY AUTHORIZED.

In reviewing a recent case it was noted that the accused was found guilty of the charge "Disrespectful in language and deportment toward a foreign officer" and that the specification set forth in support of the above charge alleged that the accused was disrespectful both in language and manner to a Lieutenant Colonel M, of the Allied Police Control in Constantinople, Turkey.

There can be no doubt but that the specification in this case sets forth an offense cognizable by naval court martial. However, the charge under which the specification is laid cannot be found among the specific charges set forth in the Articles for the Government of the Navy nor is it included among the charges for which a limitation of punishment in time of peace is laid down by the President. The charge of "Disrespectful in language and deportment toward a foreign officer" does, however, accurately describe the offense alleged in the specification.

It is the opinion of the Department that the specification in this case should properly have been laid under the general charge of "Conduct to the prejudice of good order and discipline," but that the action of the convening authority in selecting instead a more specific charge, which, while descriptive, is nowhere specifically authorized does not constitute a fatal irregularity, and that, inasmuch as the sentence adjudged in this case is well within the limitation of punishment prescribed for the general charge under which the specification should properly have been laid, the proceedings, findings, and sentence were approved (File 26262–9889A, J. A. G., Oct. 20, 1922; G. C. M. Rec. No. 56623).

FINDINGS: EXCEPTIONS AND SUBSTITUTIONS.

In a recent case an accused was convicted among other things of "Using abusive, obscene, and threatening language toward his superior officer," the specification alleging that the accused used certain language toward his superior officer, a part of which was "He is afraid to let me ride in the stern sheets, afraid I'll get his gun away from him," and while holding in his hand a thwart plug use certain threatening, abusive, and obscene language the gist of which was set-out in the specification in question. No evidence whatever appears in the record to the effect that the accused used the words "He is afraid to let me ride in the stern sheets, afraid I'll get his gun away from him," or that he held a thwart plug in his hand while making the threatening, abusive, and obscene remarks referred to above. The court in its findings, however, failed to except those parts of the specification referred to above which were [P. 9] not proved and therefore the specification as it now stands was not in fact fully proved.

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Had the court excepted, as it should have done, the words in the specification which were not proved, there would have remained sufficient allegations to support the charge. The failure of the court to take this action, however, necessitated one of two actions, either to return the record to the court in order that it might, in its findings in revision, make the necessary exceptions to cause the specification in question to correspond to the evidence adduced at the trial, or to set aside the findings of the court. As several months had elapsed since the trial of this case and as it would perhaps have been impracticable to reconvene the court before which this case was tried, the Department set aside the findings of the court on this charge and supporting specification (File 26262–9815, J. A. G., Sept. 16, 1922; G. C. M. Rec. No. 56447).

INADEQUATE SENTENCES: ACTION OF CONVENING AUTHORITY.

In a recent case the convening authority disapproved the entire sentence on the ground that it was entirely inadequate to the offenses found proved. In this connection it is pointed out that the policy of the Department in cases where an inadequate sentence has been adjudged is to comment on the failure of the court to prescribe a proper sentence but to approve the sentence adjudged in order that the accused may not wholly escape punishment (File 26262–9849A, J. A. G., Sept. 26, 1922, G. C. M. No. 56514).

MEMBER OF COURT: MATERIAL WITNESS.

In reviewing a recent summary court martial it was noted that the accused pleaded "not guilty" to a specification alleging unauthorized possession of intoxicating liquor and that the only witness for the prosecution was the senior member of the court. In this connection a portion of section 139 (a), Naval Courts and Boards, is quoted:

> "An officer who is ordered to duty as a member of a court martial and who knows, or has due reasons to believe, that he will be called as a material witness in a case to be tried before the court of which he is made a member should immediately so advise the convening authority and upon receipt of such information such officer should be relieved from duty on said court."

It is true that the accused in this case was represented by an officer whom he had requested to act as counsel and was given two opportunities to object to the member who testified against him but failed to avail himself of these opportunities. Such failure would cure any technical irregularity arising from the fact that the above-quoted provision of Naval Courts and Boards had not been complied with. However, for the reasons hereinafter stated, it is believed that the participation of the member in question in the vote as to the findings of the court leaves in doubt the substantial question as to whether the accused received a fair and impartial trial.

[P. 10] The main point at issue in this case was whether certain bottles found in the possession of the accused contained intoxicating liquor. The prosecution's case rested solely upon the testimony of the senior member of the court, who stated while on the stand, that in his opinion the bottles in question contained a fluid which was unquestionably an intoxicating liquor. The accused, on the other hand testified that he purchased the bottles in question from a bumboat, and believed that they contained a nonintoxicating liquor. Without going into the merits of this contention on the part of the accused, it is believed that it can safely be said that the prosecution's witness above referred to, for reasons which are obvious, could hardly be expected to pass impartially upon the issue thus raised.

The Department therefore directed that the findings and sentence in this case be set aside (File 26287–9052C, J. A. G., October 23, 1922).

[C. M. O. No. 10—1922]

MISSING SHIP: SAMPLE SPECIFICATION FOR OFFENSE.

Owing to the difficulty which arises in connection with the proof of the offense of "missing ship" in certain cases by reason of the inclusion in the specification under this charge of clauses alleging a knowledge on the part of the accused of the sailing of the ship and the intention to avoid duty thereon, the following sample specification which will soon appear in the new edition of Naval Courts and Boards is prescribed:

> "In that J_____ K. L_____, now a seaman first class, U. S. Navy, while so serving on board the U. S. S. _____, well knowing that said ship was to sail on or about August 30, 1921, did, on said date, without authority, deliberately and willfully, in order to avoid duty thereon, miss said ship when she sailed as aforesaid."

As intentional missing of ship is the gravamen of the offense set forth in the above specification it is legally essential that it contain allegations imputing to the accused both the knowledge of the ship's sailing and the intention to miss such sailing. However, it should be pointed out in this connection that proof of general knowledge of the prospective sailing of the vessel would justify the assumption by a court of the necessary specific knowledge and intention on the part of an accused.

In the event, however, that a convening authority feels that conviction of the offense of missing ship is doubtful in any particular case, it is suggested that, instead of making such act the subject of a separate specification, he might include in the specification alleging absence over or without leave a clause in aggravation setting forth that, as a result of his unauthorized absence, the accused missed the sailing of his ship (File 26504–472D, J. A. G., Oct. 21, 1922).

SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS: CHANGE IN SAMPLE SPECIFICATION ON PAGE 117, NAVAL COURTS AND BOARDS, 1917.

The following sample specification which will appear in a new edition of "Naval Courts and Boards" shortly to be issued, has been [P. 11] substituted for the corresponding one appearing in the present edition of this publication.

> "In that G_____ H. I_____, now a boatswain's mate second class, and J_____ K. L_____, now a seaman second class, U. S. Navy, while so serving on board the U. S. S. _____, did, on May 13, 1922, in the ordnance storeroom of said ship, willfully and knowingly lie together with indecent, lewd, and lascivious intent, each with his person indecently exposed and in contact with that of the other."

It is directed that this specification be used in all future cases when it is desired to charge the offense alleged herein.

SUMMARY COURT MARTIAL: JURISDICTION.

In reviewing a recent summary court martial it was noted that the accused was tried on a specification preferred by the commanding officer of the vessel to which he was attached but before a court convened by the commandant of a naval station.

Article 26 of the Articles for the Government of the Navy, provides that "Summary courts martial may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy yard, naval station, or marine barracks to which they belong." Ordering the court to convene, and preferring the specification and referring the same to a particular court for trial, are the acts necessary to order a summary court martial upon an accused, and it is clear that article 26 contemplates that all these acts be performed by the same commanding officer or his successor in office. A court convened by the commanding officer of a station would therefore be without jurisdiction to try a case where the specification is preferred by the commanding officer of a vessel.

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Attention is directed to section 407, Naval Courts and Boards, wherein it is provided that "When a trial by summary court martial is decided upon, and a sufficient number of officers of the proper rank to compose the court are not under the command of the convening authority, the latter shall request the senior officer present to detail the additional officers necessary."

In view of the above, the Department directed that the proceedings, finding, and sentence in this case be set aside (File 26287–9038, J. A. G., Oct. 14, 1922).

[P. 12] CIVILIANS: POWERS OF NAVAL AUTHORITIES TO ARREST AND SEARCH.

The following opinion of the Judge Advocate General relative to the Marine Barracks, Quantico, Va., which was approved by the Secretary of the Navy, is published for information:

1. "The papers in this case present for my opinion seven questions * * *, which * * * are quoted and answered below. The word "reservation" as used in the answers is intended to describe the entire limits of your command, including the public road referred to in question 3. The answers are necessarily general, as no specific cases are presented for consideration. The facts in any actual case which may hereafter arise and which may not appear to be clearly covered by this opinion should be presented to the Department for instructions.

> "Q. Has the Commanding Officer of the Guard Company (Post Guard), acting in his official capacity whereby he is charged with the maintenance of law and order as set forth in all orders issued by the various authorities of the Marine Corps, Navy, and of the Post, the legal right to order his subordinates to stop and search any person or vehicle, either civilian or military, which he or they (members of the Guard) have reason to suspect or believe are engaged in the transportation of intoxicating liquors in violation of Acts of the Assembly of the State of Virginia and the Constitution of the United States and of the Revised Statutes of the United States?"

A. 1. The Commanding Officer of the guard company has not the legal right to search civilian persons and vehicles on suspicion that they are engaged in the illegal transportation of intoxicating liquor. He may, however, be empowered by the post commander to search suspicious civilians and their effects provided they consent thereto, and to prevent private persons from entering the reservation if they refuse to submit to such search.

Likewise, persons in the naval service may not be subjected to unreasonable search of their persons or effects. If under your command, you may cause them to be searched where there is reasonable ground for such action; if not under your command and not on duty, you may cause them to be searched with their consent as in the case of civilians; if not under your command but traveling to or through the reservation on duty, you may not cause them or their effects to be searched unless authorized to do so by the Secretary of the Navy, which authority might be embodied in general rules on the subject applicable to all places under naval jurisdiction.

> "Q. 2. Has the Commanding Officer of the Guard Company acting in his official capacity or his subordinates acting under his orders, the legal right to hold in confinement until such time as may be convenient to bring them before the Federal Commissioner or at either Fredericksburg or Alexandria, Va. [P. 13] any civilian of either sex or color who may be apprehended in the act of violating any State or Federal law while sojourning or stopping on the Government Reservation?"

A. 2. This question is covered by the decision of the Secretary of the Navy, February 24, 1920 (C. M. O. 48–1920, pp. 9 and 10), and by the following extract from an opinion of this office, October 19, 1921 (File No. 5267–1116), to the Commandant, Navy Yard, Norfolk, Va., which was approved by the Secretary of the Navy on October 26, 1921:

> "The civil authorities of the State of Virginia are not authorized to serve process upon, or arrest any person in the naval or civil service of the United States within the limits of the Norfolk Navy Yard for violation

of regulations of said yard or breaking the laws of the United States thereon. Punishment for such offenses lies within the province of the Federal authorities, either naval or civil, and not with the State authorities. In the case of commission of such an offense within the Navy Yard by a civilian, the naval authorities entrusted with the administration of the Navy Yard and the maintenance of peace and good order thereon are not only empowered, but they are expected to arrest, detain, and hold such civilian until they have reported the facts to the Federal civil authorities and given them an opportunity to take the offender into custody."

"Q. 3. Under which jurisdiction, State or Federal, does the concrete road leading from the Triangle Garage on the Washington-Richmond Highway to the town of Quantico, Va., passing through the Government Reservation between the two aforementioned places, come under as regards violation of State or Federal laws pertaining in particular to violations of the liquor laws?"

A. 3. The said concrete road is part of "Tract No. 3. Land needed for the Permanent United States Marine Corps Base at Quantico, Va.," taken over by the President of the United States by proclamation dated November 4, 1918, together with improvements, easements, and other rights whatsoever, "including rights in streets and alleys and public and private ways" appurtenant or appertaining thereto, with the exception of the right-of-way of the Richmond, Fredericksburg & Potomac R. R. lying within the boundaries thereof.

The Naval Appropriation Act of July 1, 1918, pursuant to which the President's proclamation above set forth was issued, provided "that upon the taking over of said property by the President as aforesaid the title to all property as taken over shall immediately vest in the United States."

[P. 14] An act entitled "General Act of Cessions of the Virginia Legislature," approved March 14, 1918 (Acts of Assembly, 1918, p. 598) reads in part as follows:

"Be it enacted by the General Assembly of Virginia:

"(1) That the consent of the State of Virginia is hereby given in accordance with seventeenth clause, eighth section, of the first article of the Constitution of the United States to the acquisition by the United States, by purchase, condemnation, lease, or in any other manner whatsoever, of any land, or right or interest therein in this State, required for sites for customhouses, courthouses, post offices, arsenals, depots, terminals, cantonments, military or naval camps or bases or stations, aviation fields or stations, radio stations, storage places, target ranges, or for any other military or naval purposes whatsoever of the Government.

"(2) That exclusive jurisdiction in and over any lands, or buildings, any right or interest which has been so acquired by the United States, whether before or after the passage of this act, shall be and the same is hereby ceded to the United States for all purposes herein provided, * * *.

"(3) The jurisdiction ceded shall not vest until the United States shall have acquired the title to, or possession of the said lands, or rights, or interest therein, by purchase, condemnation, lease, or otherwise; and so long as the said lands, or any rights, or interest therein are held in fee simple by the United States, and no longer, such rights, or interest, as the case may be, shall continue exempt and exonerated, from all State, county, and municipal taxation, assessment, or other charges, which may be levied or imposed under the authority of this State."

As the road under consideration, insofar as it lies within the boundaries of the reservation, was taken over by the United States under the proclamation hereinbefore mentioned, and as the above quoted act of the Virginia Legislature embodies its consent to such taking and expressly cedes to the United States "exclusive jurisdiction" in and over any lands theretofore or thereafter acquired by the United States for the purposes mentioned in section 1 of said act, it follows that the said concrete road within the boundaries of the reservation comes under the exclusive jurisdction of the United States for all purposes, irrespective of ownership and jurisdiction at the time of taking (*Stockton v. Balto. etc. R. Co.*, 32 Fed. Rep. 9; 140 U. S. 699).

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"Q. 4. Has the Commanding Officer of the Guard Company, similar to the gist of the first questions above, the authority to stop and search any vessel of any description whatsoever, which may touch on the West shore of the Potomac River between Quantico Creek and Chappawamsic Creek, all of which is so far as is known to the officer in question, to be part of the Government Reservation?"

[P. 15] A. 4. The principles set forth above in answers to questions 1 and 2 apply to vessels entering or attempting to enter the limits of the reservation under your command, and to persons entering or attempting to enter the reservation by water.

"Q. 5. Have the authorities of the Marine Barracks, Quantico, Va., any jurisdiction of any kind whatsoever over any area adjacent to the reservation and beyond the actual limits of the reservation proper?

NOTE.—Information from a reliable source is to the effect that Judge Brent of the Circuit Court of Virginia for this district, sitting at Manassas, Va., has ruled that the Federal authorities have jurisdiction for (1,000) one thousand feet in any direction from the actual limits or boundary of the Marine Barracks reservation, Quantico, Va."

A. 5. This question is covered by Court Martial Order No. 48–1920 (p. 9), relating to the authority of officers of the Navy and Marine Corps to make arrests, and particularly by the following statement in said order:

"They are not, however, authorized to arrest civilians except on the Government Reservation. Outside of the Government Reservation, within the zone prescribed by general orders or outside of said zone, arrests should be made by the civil authorities."

The jurisdiction of the Marine Corps authorities at Quantico does not extend beyond the limits of the reservation. In 1917 the Commanding Officer, Marine Barracks, Quantico, Va., recommended that the Marine Corps exercise military control over an area within 1,000 yards of the reservation. The proposition was submitted to this office for an opinion as to its legality and it was held that the Navy Department "cannot lawfully take over control of the area within 1,000 yards of the camp at Quantico" (Opinion J. A. G., July 17, 1917: File 28787–6).

This office has no information relative to the alleged ruling of Judge Brent referred to in your letter.

"Q. 6. Can the civil authorities of the State of Virginia, either State or local, deputize any member of the military forces of the United States to act with them in enforcing or preventing violations of the laws of the State of Virginia?"

A. 6. In answer to a similar question presented by the Commander, Submarine Base, New London, Conn., it was held by this office, September 8, 1920 (File No. 28864–669), that "there is no statute or regulation prohibiting enlisted men on active duty from accepting appointments of the nature indicated," that is, designations "as special State police to enforce motor laws on the highway within the Base," and that the action to be taken involved a question of policy. The Chief of the Bureau of Navigation reported in said case that "it would be highly undesirable to sanction such appointments to petty officers in the Navy," as in his opinion "the duties **[P. 16]** involved could not but be incompatible with their paramount duties as petty officers of the Navy," which report was communicated to the commander of the submarine base, and so far as the files of this office disclose no further action was taken in the matter.

It would follow from the foregoing that, if consistent with the laws of Virginia, enlisted men of the Marine Corps may legally be deputized by the civil authorities of the State of Virginia, provided the obligations assumed by them are so restricted as not to prove incompatible, in the opinion of the Secretary of the Navy, with their paramount duties as members of the Marine Corps.

In this connection it is noted from the Department's files (14560–194) that on April 13, 1917, the Secretary of the Navy recommended to the Attorney General that certin chief petty officers of the Navy "be appointed Special

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Deputy United States Marshals, to serve without compensation from the Department of Justice, the appointments to continue in force and effect only during such time that the men named are attached to and serving at the Naval Training Station, Great Lakes, Ill.," it being stated that the purpose of such recommendation was to empower the said chief petty officers "to make arrests of prowlers and other suspicious characters who may be observed in the station and who could easily escape from the jurisdiction of the military authorities, as these petty officers would not be empowered to take them into custody as soon as they would leave the naval reservation."

In the same communication to the Department of Justice reference was made to a letter of that Department dated June 9, 1910, in which it was reported that the United States marshal at Chicago, Ill., has been authorized to appoint as special deputy United States marshals, without compensation from any appropriation under the control of the Department of Justice, certain watchmen employed at the above-named naval training station.

So far as concerns offenses in violation of Federal statutes committed by civilians in the vicinity of the post under your command, their arrest might be accomplished either by civilian employees or enlisted men on duty at said post if properly appointed as special deputy United States marshals in the manner indicated by the precedents cited.

> "Q. 7. Can the authorities of this post take cognizance of acts committed on the reservation which are in violation of the laws of the State of Virginia and which are not covered by any act or statute of the United States or expressly forbidden by orders of the Secretary of the Navy, or other authority of the Marine Corps competent to issue orders governing and regulating this post? If so, before which administrator of justice should they (persons committing acts) be brought, the Federal Commissioner or the local Justice of the Peace?"

[P. 17] A. 7. This question is covered by section 289 of the United States Criminal Code (act of Mar. 4, 1909, 35 Stat. 1145), which reads as follows:

> "SEC. 289. Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territory, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District."

Section 272 of the Criminal Code, to which reference is made in the section above quoted, describes, among other places, "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

These sections of the Criminal Code make operative, within the limits of your command, penal laws of the State of Virginia which were in force on March 4, 1909, insofar as such laws relate to acts not otherwise punishable by Federal statutes. However, the authorities of the State of Virginia do not possess jurisdiction to punish such acts, which, the same as all other offenses committed by civilians in places under the exclusive jurisdiction of the United States, are punishable only by Federal courts. Such offenders should accordingly be delivered to the proper civil authorities of the United States, if such offenders are civilians, if in the naval service, they should be proceeded against in accordance with the Articles for the Government of the Navy (File 28787–54, J. A. G., October 11, 1922).

[C. M. O. No. 10—1922]

COMMISSIONED WARRANT OFFICERS: COMPUTATION OF COMMISSIONED SERVICE.

The Department held that the date of commission is the proper date to use in computing the service of a commissioned warrant officer for the purpose of determining whether or not he has completed the required amount of commissioned service to authorize him to receive the pay of the next higher pay period (File 17789–102, J. A. G., Sept. 19, 1922).

MARK OF DESERTION: MAY BE REMOVED IN CASES WHERE MAN WAS INSANE AT TIME OF DESERTION.

A man while suffering from "dementia praecox," as evidenced by pronounced mental derangement, absented himself and an entry of [P. 18] desertion was made on his service record. The Department held that a man suffering from such mental derangement is not legally capable of having the necessary intent to permanently abandon the service, therefore the mark of desertion was entered through error and should be removed (File 29372–116, J. A. G., Sept. 12, 1922).

NAVAL BANDS: PARTICIPATING IN CIVIC CELEBRATIONS.

The prohibition contained in the act of June 3, 1916, is against enlisted men in the active service of the Navy interfering with the customary employment and regular engagement of local musicians of the place where the services are to be rendered and not against the said enlisted men giving concerts in a particular locality where civilian musicians from other localities might secure an engagement in case the services of the Naval band could not be had. In localities where local civilian musicians are not customarily employed and regularly engaged in the giving of band concerts the Department held, that the giving of concerts by a Navy band did not interfere with the local civilian musicians within the meaning of the Act above referred to (File 4924–676, J. A. G., Sept. 9, 1922).

NAVAL RESERVE FORCE: EFFECT OF DISENROLLMENT ON CONFIRMED COMMISSIONS.

Held, That the disenrollment of an officer of the Naval Reserve Force, who holds a confirmed commission, carries with it the revocation of that commission (File 29371–2:24–1, J. A. G., Sept. 12, 1922).

REDUCTION OF THE ENLISTED PERSONNEL OF THE NAVY: PROVISIONS OF THE ACT OF JULY 1, 1922, RELATING THERETO.

The question was presented as to whether under the provisions of the above act, an enlisted man who has served more than 14 years can be discharged for physical disability incurred in line of duty. *Held*, Enlisted men who on July 1, 1922, had more than 12 years' but less than 16 years' service shall be permitted to reenlist and continue serving until eligible for transfer to the Fleet Naval Reserve after 16 years' service, without reference to their physical or other qualifications (File 26254–3581:3, J. A. G., Aug. 29, 1922).

TELEGRAMS: MESSAGES GRANTING LEAVE, ETC., STATUS OF.

The question was presented as to the character of telegrams sent out by a commanding officer in reply to communications received from individuals in the naval service requesting extension of leave. The Department held that such telegrams addressed by a proper authority either authorizing an extension of leave or denying such extension are official business and not strictly personal nor for the convenience or in the interest of the sender, and should be transmitted at Government expense (File 4460–347, J. A. G., Sept. 27, 1922).

[C. M. O. No. 11—1922]

C. M. O. 11—1922

[P. 7] I. CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN: NECESSARY ALLEGATIONS.

II. BOARD OF INVESTIGATION, TESTIMONY BEFORE: ERRONEOUSLY ADMITTED IN EVIDENCE BEFORE A GENERAL COURT MARTIAL.

In a recent case an accused was convicted of (I) "Drunkenness," and (II) "Conduct unbecoming an officer and a gentleman." The specification laid in support of charge II, "Conduct unbecoming an officer and a gentleman" reads as follows:

> "In that Lieutenant _____ U. S. Navy, serving on board the U. S. S. _____, then at Gravesend, England, was, between the hours of 8 p. m., and 9 p. m., on Saturday, September 2, 1922, on a public crowded street, in the city of London, England, under the influence of intoxicating liquor to such an extent, and did at the time and place aforesaid misconduct himself in such a manner, as to cause his arrest by the police of said city, and his delivery to the Bow Street Police Station, London, wherein he was detained for appearance at 10:30 a. m., on Monday, September 4, 1922, before a Magistrate, under the charge of "Drunk and riotous," and wherein he remained until about 7 p. m., September 3, 1922, at which time he was delivered to Commander _____ U. S. Navy, Executive Officer of the U. S. S. _____, upon the written request of Captain _____, U. S. Navy, Commanding Officer of the U. S. S. _____."

In its action on this case the Department stated that so much of the above specification as follows the allegation that the accused "did at the time and place aforesaid misconduct himself in such a manner as to cause his arrest by the police of said city" is pure surplusage and should properly have been omitted entirely from the specification. It may further be stated that the gravamen of the offense laid in the above specification lies in the allegation to the effect that the accused was on a public crowded street in London under the influence of intoxicating liquor and so misconducted himself as to necessitate his arrest by the police of that city. For present purposes nothing more need be considered.

In Court Martial Order No. 7, 1921, the charge of "Conduct unbecoming an officer and a gentleman" was considered at some length and there was given a general definition of this charge, together with a number of illustrations of specific offenses which have been properly laid under this charge. Briefly stated, "Conduct unbecoming an officer and a gentleman" is defined as conduct "which is dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." It therefore follows that a specification laid under this charge should allege in some detail the nature of the misconduct with which the accused is charged in order that the court may determine whether or not the misconduct in question [P. 8] comes within the scope of the definition of "Conduct unbecoming an officer and a gentleman." The mere allegation that the misconduct with which the accused is charged resulted in his arrest by the police does not sufficiently serve this purpose.

The court, however, in the foregoing case passed the above specification as being in due form and technically correct and after finding the accused guilty of "Conduct unbecoming an officer and a gentleman," together with "Drunkenness," sentenced him to lose 10 numbers in his grade.

Aside from certain oral testimony which tended to establish only that part of the specification laid under charge II which has been referred to above as surplusage and therefore not entitled to consideration, the only evidence on record to support the court's findings in this case is an extract from the record of the Board of Investigation previously held to inquire into the subject matter of the present trial. The extract in question comprises the testimony of several witnesses before the board of investigation. This testimony was taken under oath and the accused in the present case was present before the Board as a defendant and had an opportunity to cross-examine the witnesses whose recorded testimony before the board was received in evidence in his later court-martial trial.

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The accused objected from the outset to the introduction into evidence before the court martial of testimony given before the above-mentioned board of investigation. The court, however, overruled this objection apparently on the theory that oral testimony could not be obtained from the witnesses in question who had testified before the board for the reason that it was impracticable to secure their attendance.

Section 198 (b) Naval Courts and Boards, provides that the recorded testimony of witnesses before a board of investigation, given under the conditions hereinbefore stated, may be received in evidence against an accused before a subsequent court martial in cases where the witnesses in question have since died or are absent by the procurement of the accused. But the same section distinctly states that "such testimony cannot be so received in evidence where the witnesses are absent otherwise than through the connivance or by the procurement of the accused, even though they are beyond the jurisdiction of the court."

In view of the above and inasmuch as no attempt was made to show that any witnesses before the board of investigation above referred to were either dead or absent through the procurement of the accused, the Department held that the court was in error in overruling the objection of the accused to the admission into evidence of the recorded testimony of several witnesses before the board of investigation which had previously inquired into the subject matter of the present trial. As the evidence thus introduced was of material importance and in fact essential to support the court's findings on both charges, it necessarily follows that the interests of the accused were vitally affected by the above ruling and that the [P. 9] Court's error in so ruling was fatal to the proceedings of this case (File 26262–9892, J. A. G., Nov. 2, 1922; G. C. M. Rec. No. 56624).

EVIDENCE: HEARSAY, IMPROPERLY ADMITTED.

In a recent case counsel for the accused objected on several occasions to certain testimony being given by a witness for the prosecution, on the ground that this testimony constituted hearsay. The testimony in question was to the effect that other officers reported officially to the witness certain matters relating to the offenses for which the accused was being tried. The judge advocate replied to the objections of counsel by stating that "the testimony given by the witness is not hearsay since it is corroborating the testimony of another witness, and, furthermore, the facts that the witness is testifying to were apparently ascertained by him in his investigation of the case now under trial." The court then stated, in overruling counsel's objection, that the witness "is competent to testify as to facts which he learned during the investigation of the case."

It appears that the opinion exists generally throughout the service that knowledge of matters obtained during an official investigation are excepted from the general rules of evidence and may be testified to at a court-martial trial even though based upon hearsay. This opinion is absolutely erroneous. An oral report made during the preliminary investigation of a case is pure hearsay and is therefore inadmissible unless it comes within some of the exceptions to the general rule regarding hearsay. (In this connection see C. M. O. No. 1, 1922, 12.) It is apparent, therefore, that the action of the court in overruling counsel's objections to the testimony in question and the comment of the court with reference to this character of evidence, was erroneous (File 26251–29969A, J. A. G., Nov. 6, 1922; G. C. M. Rec. No. 56668).

UNDESIRABLE DISCHARGE: "BY WAY OF PUNISHMENT FOR AN OFFENSE."

The words "punishment for an offense" refer to discharges issued pursuant to court-martial sentences. An undesirable discharge as now issued cannot be construed to be "by way of punishment for an offense."

An undersirable discharge issued to a minor who fraudulently enlisted in the Navy and who is discharged at his own request if such discharge is issued on the specific ground that his enlistment was fraudulent is not a discharge "by way of punishment for an offense" (File 9209–125: 1, J. A. G., November 22, 1922).

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[P. 5] EVIDENCE: EX PARTE STATEMENT IMPROPERLY ADMITTED.

An accused in a recent case was convicted of "Stealing property of the United States intended for the naval service thereof," the specification alleging the theft of a ham. The prosecution attempted to prove that the ham was stolen from the U. S. S. ------ by producing a letter written by the chief commissary steward of that vessel, reporting the loss of a ham which disappeared from the general mess ice box sometime between 1 p. m., July 28, 1922, and 8 a. m., July 29, 1922. The judge advocate stated that he had been informed that the signer of the report in question was on board the U. S. S. ------ which at the time of this trial was en route from New York, N. Y., for the west coast. It was apparent, therefore, that the signer of the letter was not available as a witness. With reference to this character of evidence Naval Courts and Boards, section 199, states:

> "It is a general rule that private documents of an ex parte nature, such as affidavits (see sec. 185), are not admissible as evidence of the subject matter therein contained. But the original entries and writings of a person who was in a position to know the facts therein stated, made at about the time the facts occurred, are admissible as evidence of such facts under the following circumstances, provided the entrant is unavailable as a [P. 6] witness as in a case of subsequent death or insanity; (1) When the entry or writing is against the interest of the maker; and (2) *when it was made in due course of business, professional capacity, or in the course of the person's ordinary and regular duties.* As to the admissibility of a memorandum, the authenticity of which is vouched for by a witness on the stand, see section 145."

The writer of the report in this case was neither dead nor insane, therefore no foundation existed which would have warranted this report being introduced in evidence. It further appears that it was not positively established that the report in question was made in the usual routine course of business but might have been called for upon the discovery of the ham in question in the possession of the accused. Neither was it shown that it was the duty of the party signing such report to make it. This report, therefore, would seem to be in the nature of an ex parte statement and as such would be inadmissible. In view of the foregoing it is evident that no legally admissible evidence appears in the record to the effect that the ham found in the possession of the accused was stolen from the U. S. S. ------ as alleged in the specification. The finding on this charge were therefore set aside (File 26251–29927, J. A. G., Dec. 12, 1922; G. C. M. Rec. No. 56569).

FINDINGS: EXCEPTIONS AND SUBSTITUTIONS.

Care should always be taken in making exceptions and substitutions to see that the specification as charged supports the charge found proved and reads smoothly (File 26251–30084, J. A. G., Dec. 4, 1922; G. C. M. Rec. No. 56808).

FINDINGS: TRIAL IN JOINDER WHERE ONE OF ACCUSED IS ACQUITTED.

In a recent case two men were tried in joinder on the charge of "Theft." The court found one of the accused guilty and acquitted the other. In its findings on the specification the court did not make the necessary exceptions and substitutions to cause the wording of the specification to be consistent with the commission of the offense charged by a single person only. One of the accused having been acquitted, the allegations in the specification to the effect that the accused did "each and together, in concert of action and intent" commit the offense in question should have been excepted by the court in its findings. In this connection attention is invited to the following section which is to be incorporated in a new edition of "Naval Courts and Boards" shortly to be published:

> "When two or more persons are tried in joinder, the findings and sentence (or acquittal) in the case of each person arraigned and tried shall

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be separately recorded. If one (or more) of the accused persons is acquitted and one (or more) is convicted, [P. 7] the findings in the case of conviction must by proper exceptions eliminate the words showing that the acquitted person was a joint participant in the offense."

This irregularity, however, being in matter of form only, is not of sufficient gravity to affect the validity of the proceedings in this case (File 26262–9819, J. A. G., Nov. 15, 1922; G. C. M. Rec. No. 56455).

JUDGE ADVOCATE: FAILURE TO PROPERLY PERFORM DUTY.

COUNSEL: FAILURE TO PROPERLY DEFEND ACCUSED.

In a recent case an accused was tried for "Desertion" but convicted of "Absence from station and duty after leave had expired." The judge advocate, the only witness for the prosecution, first took the stand and attempted to establish the guilt of the accused on the charge of "Desertion" by reading the following exerpts from his service record book:

"While serving with barracks detachment, Marine Barracks, Navy Yard, Puget Sound, Wash., from Mar. 2, 1922, to May 7, 1922. Dropped as a deserter, May 17, 1922, to date, from 8 a. m., May 7, 1922. Nothing is known of any intention to desert. Deserters reward of $50 offered for apprehension and delivery. Signed Julius T. Wright, 1st Lt. Comdg."

The prosecution then rested without introducing any further evidence. It is apparent that the prosecution up to this point had not established even a prima facie case of desertion since it did not introduce, as it should have done, any evidence tending to prove the date the accused returned to naval jurisdiction after his alleged desertion on May 7, 1922. The burden of proceeding was not shifted at this point to the defense and had the defense introduced no evidence the accused must necessarily have been acquitted because of lack of sufficient evidence to sustain conviction of either desertion or absence overleave. However, the first witness for the defense, who should have been and was in effect, a witness for the prosecution, established the fact, upon examination by counsel for the accused, that Abbot was received within naval jurisdiction on October 12, 1922. The evidence produced thus far by both prosecution and defense, therefore, set up a prima facie case of "desertion." However, the manner of establishing this prima facie case was very irregular and points toward a careless performance of duty on the part of both the judge advocate and the counsel for the accused. When the accused pleads not guilty, as was the case here, he calls upon the prosecution to prove all the averments of the charge and specification upon which tried and is not required to produce any evidence whatsoever until sufficient evidence has been presented by the prosecution to establish the allegations in the specification supporting the charge. If the prosecution fails to prove sufficient allegations in the specification to support the charge or a lesser [P. 8] included one, the accused cannot be convicted. At no time should counsel attempt to establish elements of the offense which the prosecution is required to prove in order to support its case, unless the accused desires to make admissions. In this case it appears that no admission was intended by the accused for if he desired to admit his return to naval jurisdiction it is believed he would have done so in the manner provided for in section 310, Naval Courts and Boards (File 26251–30084, J. A. G., Dec. 4, 1922; G. C. M. Rec. No. 56808).

JUDGE ADVOCATE: IMPROPER ARGUMENT.

In a recent case an accused was convicted of "Desertion" and "Fraudulent enlistment." In his closing argument the judge advocate improperly brought before the court facts which had not been introduced in evidence during the trial. The improper remarks follow:

"His identity as M, private first class, U. S. Marine Corps, seems to be reasonably established due to the simple fact that his service record book under that name was sent to the judge advocate of this court by the

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Department for use in his trial. It was offered in evidence and received as such. In it I find a picture with M's name on it, and, although he is in a different uniform and it was taken quite a little while ago, to me the resemblance is reasonably marked. Under 'marks and scars' in the book, I find noted there, 'American Flag,' 'Eagle,' on the front of his right forearm, which are there. I know that, because I looked at them. Likewise on the left forearm, it shows that he has an 'Eagle,' 'Wreath,' 'Rising Sun,' 'Friendship,' on one side, and 'Dove' on the other. All those marks are there. It is true that has not been introduced in the regular way as a matter of evidence, but the facts exist. The marks are there if any one cares to look at them."

The photograph of M and the entries relative to the "marks and scars" were not introduced in evidence.

The judge advocate, in making the above-quoted remarks, clearly exceeded the limits of legitimate argument and brought before the court matters of material evidence which had not been introduced in the form of evidence during the trial of the case. Upon these remarks being made it was the duty of the court to halt the argument of the judge advocate along these lines. By permitting this improper argument to be made the court allowed the judge advocate to bring before it facts having a direct bearing on the case at issue in a manner which prevented the accused from exercising his legal right of cross-examination. If the judge advocate desired to bring the facts in question before the court it was his duty to introduce them in evidence in the regular manner and to allow the court to form its own conclusions as to their effect (File 26251–30097, J. A. G., Nov. 22, 1922; G. C. M. Rec. No. 56797).

[P. 9] MISSING SHIP: ELEMENT OF PROOF.

FINDINGS: GRAVAMEN OF OFFENSE ELIMINATED BY EXCEPTION.

An accused was convicted, among other things, of "Conduct to the predjudice of good order and discipline," the specification alleging:

"In that _____, now a fireman first class, U. S. Navy, while so serving on board the U. S. S. _____, at Gibraltar, Spain, well knowing that said ship was to sail on or about August 22, 1922, did, on or about August 21, 1922, without authority, deliberately and willfully, in order to avoid duty thereon, miss said ship when she sailed as aforesaid."

In its finding on the foregoing specification the court found the specification proved except the words "deliberately and willfully, in order to avoid duty thereon" which words were found not proved.

By findings the words referred to above not proved the court eliminated from the specification the words constituting the gravamen of the offense originally charged and the specification as found proved alleges no offense. (In this connection see C. M. O. 141, 1918, 16.) In this connection it is desired to point out that, while the court's findings on the specification under consideration are not inconsistent with possible constructions of the evidence on record, yet the proof of general knowledge of the prospective sailing of a ship, under the circumstances brought out in evidence in the present case would ordinarily justify the assumption by a court, in the absence of satisfactory proof to the contrary, of the specific knowledge and intention on the part of an accused, necessary to constitute the offense of missing ship (File 26251–30030, J. A. G., Nov. 22, 1922; G. M. C. Rec. No. 56710).

SENTENCE: REDUCTION IN RATING.

A chief machinist's mate was tried by general court martial, convicted of "Drunkenness on duty," and sentenced to be confined for three months and loss of three months' pay.

The convening authority in commenting on this case stated that the court awarded an irregular sentence in failing to reduce the accused to a nonrated grade when including confinement in its sentence. This opinion of the convening authority is erroneous. It was not the intention of the Department's Circular

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Letter No. 1–22 of January 17, 1922, covering reductions in rating in court-martial sentences, that sentences not involving accessories together with confinement and discharge should not be included in its provisions. The sentence in this case, therefore, did not fall within the provisions of the circular letter in question and the court's action in reducing the accused only to machinist's mate first class was proper. Had the convening authority so desired he could have directed that the execution of the confinement adjudged in this case take effect on board ship and not [P. 10] necessarily at a naval prison as would be the case in a sentence involving confinement, accessories, and discharge (File 26260–9932, J. A. G., Nov. 29, 1922; G. C. M. Rec. No. 56712).

SPECIFICATIONS: THEFT: APPROXIMATE VALUE OF PROPERTY STOLEN SHOULD BE ALLEGED.

In a recent case the accused was charged with theft, the specification alleging that the accused did feloniously take, steal, and carry away a quantity of intoxicating liquor and candy, "exact amount and value unknown." It will be noted from the specification of the charge in this case that the value of the articles stolen was not alleged, the words "exact amount and value unknown" being used in lieu thereof. Value under a charge of theft should, if possible, always be alleged for two reasons, the first being in order that it may appear specifically that the property is of some value for property of no value is not the subject of larceny (Clark and Marshall on The Law of Crimes, section 312), and secondly in order that the degree of the offense may be determined as the punishment for the crime of theft varies according to the value of the property stolen. It is not necessary that the exact value of the property stolen be set-out, the approximate value thereof being sufficient. While the Department does not know that even the approximate value of the stolen property in this case could have been ascertained when the specification was drawn, yet from the evidence adduced at the trial, it appears that this information could have been secured and the court, instead of finding the charge and specification to have been in due form and technically correct, should have returned the charge and specification to the convening authority in order that the missing information might be supplied.

However, as no doubt can exist but that the property set out in the specification of the charge in this case was of some value and as it is only necessary that property be of some value in order to be the subject of theft it is the opinion of this office that the failure to allege actual or approximate value in the specification in question does not affect the sufficiency of the specification and that it fully supports the charge of "Theft." As to the element of punishment, it has already been stated that the degree of punishment in a case of theft depends upon the value of the property stolen. However, since the court in this case adjudged a sentence which is within the limitation of punishment for the offense of theft of property of minimum value, it is apparent that the accused was not prejudiced in this respect by reason of the omission under discussion (File 26262–9819, J. A. G., Nov. 15, 1922; G. C. M. Rec. No. 56453).

[P. 11] COMMISSIONED WARRANT OFFICERS: COMMISSIONED SERVICE TO BE COUNTED UNDER PROVISIONS OF THE ACT OF JUNE 10, 1922, FOR ADVANCEMENT IN PAY.

The Department held that the term "commissioned service" in the above act contemplates all commissioned service whether permanent or temporary either in the grades of commissioned warrant officer or in a higher grade (File 17789–102:4, J. A. G., Oct. 17, 1922).

LINE OF DUTY AND MISCONDUCT: ENTRIES TO SICK LIST.

The Department held that the following entries made in a medical record under the circumstances set forth are proper:

(*a*) That an entry to the sick list for a disease acquired by misconduct prior to entry into the naval service, or a disease the result of a disease

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acquired through misconduct prior to entry into the naval service should be held to have originated "not in the line of duty, but not due to his own misconduct."

(*b*) That an entry to the sick list for a disease or injury the result of the use of drugs, alcoholic liquors, or other misconduct prior to entry into the naval service should be held to have originated "not in the line of duty, but not due to his own misconduct."

(*c*) That an entry to the sick list subsequent to August 29, 1916, for a disease due to the use of drugs, alcoholic liquors, or other misconduct in the naval service prior to August 29, 1916, should be held to have originated "not in the line of duty, but not due to his own misconduct" (File 29372–122, J. A. G., Oct. 17, 1922).

MEDICAL TREATMENT: WHILE ON LEAVE OF ABSENCE, PAYMENT FOR.

An enlisted man while enroute from Brest, France, to Paris on authorized leave was wounded by a bullet fired by a fellow passenger, on the train, as the result of an accident. The Department held that in view of the fact that the disability complained of had its origin in line of duty (32 Op. Atty. Gen. 193) and that the injury created an emergency requiring immediate care, the expenses are a proper charge against the Government (File 9348–112, J. A. G., September 1, 1922).

[P. 12] NAVAL APPARATUS FOR COALING, ETC.: USE OF IN ASSISTANCE OF MUNICIPALITIES.

Held: Under the act of September 22, 1922 (42 Stat. 1023), the Navy Department has no authority to allow the use of its apparatus for discharging, storing, and distributing coal purchased by the city of Boston, unless the proposal by the mayor to that effect should be acted upon and approved by the Interstate Commerce Commission and the Federal Fuel Distributor in accordance with the above-mentioned statute (File 29431–15:1, J. A. G., Oct. 7, 1922).

PATENT RIGHTS: OF EMPLOYEE OF GOVERNMENT.

In the event an employee of the Government is employed for the purpose of devising or perfecting an instrument, that which he has been employed and paid to accomplish becomes the property of the Government when accomplished, but if he is employed by the Government in a certain line of work but not specifically for the purpose of perfecting an invention, and devises an improved method for doing the work, the Government merely obtains an irrevocable license to use such invention but the inventor retains all foreign rights and can dispose of them as he so desires (File 8247–676, J. A. G., Nov. 10, 1922).

PAY: CHECKAGE OF, IN INSTALLMENTS.

Section 1766, Revised Statutes, prohibiting payment of compensation to persons in arrears to the United States, applies only to disbursing officers in arrears and does not require that the pay of other persons in the Government service be withheld, even when such persons are judgment debtors of the United States (citing 26 Op. Atty. Gen. 77; 1 Op. Atty. Gen. 676; 3 Op. Atty. Gen. 52). The statute was intended to provide a remedy for the benefit of the Government and not for the benefit of disbursing officers wrongfully disbursing the public funds.

Accordingly, *held* that the order of a Force Commander to a Supply Officer, based on a dispatch from the Secretary of the Navy, that Lieut. Comdr. J. be paid balance of his monthly pay after a checkage at the rate of $100 per month on account of prior overpayments amounting to approximately $1,600, did not require the making of any illegal payment; and that the refusal of the supply officer to make monthly payments to Lieut. Comdr. J. as ordered was on the facts shown by the papers in the case, an apparent disobedience of the lawful order of his superior officer and violation of article 1748, Navy Regulations, 1920 (File 22465–98:2, J. A. G. and Sec. Navy, Dec. 6, 1922).

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[P. 13] TRAVEL ALLOWANCE: MEN DISCHARGED AS A RESULT OF MEDICAL SURVEY.

An enlisted man discharged as a result of a medical survey may be furnished transportation in kind including subsistence and transfers en route from the place of his discharge to his actual bona fide home or residence, under the act of July 1, 1922. Or he may be furnished with the necessary funds at the rate of five (5) cents a mile for transportation from the place of discharge to the place of enrollment or enlistment (act of September 22, 1922). But he may not be furnished with funds for transportation at the rate of five (5) cents a mile from the place of discharge to his actual bona fide home or residence, under either of the above mentioned acts (File 9209–125–O, J. A. G., Oct. 26, 1922).

WARRANT OFFICERS: PRECEDENCE OF, HAVING SAME DATE OF WARRANT.

Warrant officers whose warrants are of the same date take precedence according to the order in which their names are borne upon the Official Navy Register as kept in the Navy Department (File 1130–86, J. A. G., Oct. 7, 1922).

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[P. 8] DRUNKENNESS ON DUTY: FINDINGS NOT IN ACCORD WITH EVIDENCE.

The accused in a recent case was tried on the charges of "Drunkenness on duty" and "Conduct to the prejudice of good order and discipline." He was convicted of the former and acquitted of the latter charge.

The specification under the charge of "Drunkenness on duty," of which the accused was convicted, alleged that he was, on or about September 1, 1922, while on duty as boatkeeper on board the coastal motorboat of the Navy torpedo-testing barge, under the influence of liquor and incapacitated for duty. In support of this specification it was brought out in evidence that the accused had, at 7 p. m. on the day in question, gone on duty as keeper of the motorboat of the torpedo-testing barge, and the commanding officer of the barge testified that he had boarded the motorboat about 9:30 p. m. and talked with the accused. The testimony of the commanding officer in regard to the condition of the accused at this time was vague and somewhat contradictory. He stated, on the one hand, that the accused was under the influence of intoxicating liquor, but upon being required to detail the physical manifestations of the accused's condition, he was able to substantiate his conclusion in regard thereto only by the fact that he had detected the odor of liquor on the breath of the accused. In fact, the witness specifically stated that the accused appeared rational, answered questions intelligently, was able to perform satisfactorily his duty as boatkeeper, and gave no evidence of being under the influence of intoxicating liquor other than the odor of liquor on his breath.

The only evidence on record other than the above in support of the court's findings under the charge of "Drunkenness on duty" in this case is that of the officer of the deck of the barge, who testified that at about 4 p. m. on the day in question he refused to allow the accused to go ashore because he thought the accused was under the influence of intoxicating liquor. The testimony of this witness was sufficiently specific to support a finding that the accused was under the influence of intoxicating liquor at 4 p. m., at which time, however, the accused was not on duty as set forth in the specification. As above stated, such status did not commence until 7 p. m. Accordingly, the condition of the accused at 4 p. m. on the day in question is relevant to the matter at issue in the present case only insofar as it reflects upon the later condition of the accused at 9:30 p. m., when he was examined by his commanding officer. The testimony of the officer of the deck in this case, therefore, carries but little weight as compared with the testimony of the commanding officer, who noted the condition of the accused at the time laid in the specification.

In view of the above, and for the reasons set forth in detail in C. M. O. 1, 1922, pages 14 to 16, the Department is of the opinion that the [P. 9] finding of the court on the charge of "Drunkenness on duty" in this case is not supported by the evidence on record. The finding on this charge, and inasmuch

as this is the only charge found proved by the court, the sentence in this case were disapproved (File 26251–30011, J. A. G., Dec. 27, 1922; G. C. M. Rec. No. 56872).

FRAUD: NECESSARY ALLEGATIONS IN SPECIFICATION TO SUPPORT THE CHARGE.

In a recent case an accused was tried on the charge of "Attempting a fraud against the United States" and acquitted. The specification of the charge was as follows:

> "In that B, commissary steward, U. S. Navy, now serving on board the U. S. S. _____, at Chefoo, China, did, on or about February 27, 1922, while serving on board the U. S. S. _____, at Olongapo, P. I., as commissary steward of said vessel, procure and receive into his charge, possession, and custody, in the execution and under color of his office as aforesaid, from the All Star Department Store, at Olongapo, P. I., forty-three pounds of bacon, valued at thirty dollars and ten cents ($30.10), for use and to be charged to the naval service of the United States, to wit, for issue to and consumption by the general mess on board the said ship _____, but he, the said B, Commissary Steward, U. S. Navy, did willfully and with corrupt intent neglect and fail to deliver same on board said ship, and did unlawfully convert to his own use the said bacon."

In the opinion of the Department the above specification does not support a charge of attempted fraud. In the first place if the acts alleged in the specification were in the nature of acts of fraud they would allege completed and not attempted fraud because the specification states that the accused actually converted the bacon in question to his own use. However, it is believed that the above specification alleges an offense of embezzlement and not fraud or attempted fraud. According to its wording the accused received into his "charge, possession, and custody, in the execution and under color of his office," property for the use of and to be charged to the naval service of the United States and converted this property to his own use. These are the elements of an offense which go to make up embezzlement. For a specification to allege fraud it must show that the accused had (1) made a false representation of some existing or past fact to the person concerned with intent to defraud; (2) that the accused knew such representation to be false; (3) that the person concerned had believed, and relied upon such false representation; and (4) that said person concerned had actually been defrauded by, and parted with something of value in consequence of such false representation (C. M. O. 6, 1922 12). In this case it appears that the United States was the party defrauded and the specification fails to show that any false representation had been made to an agent of the United States which resulted in its being defrauded, or to include any of the other essentials of fraud. [P. 10] In view of the above the proceedings and findings in this case were set aside (File 26262–9928, J. A. G., Dec. 5, 1922; G. C. M. Rec. No. 56716).

IMPEACHMENT OF WITNESS: IMPROPER METHOD.

In a recent trial during the cross-examination of a material witness for the defense the judge advocate attempted to impeach the witness by showing that he had given testimony before a previous board of investigation to an effect contrary to his testimony before the present court. In attempting to thus impeach the witness on the stand the judge advocate was well within his rights but it so happened that he was permitted, over objection, to bring before the court in an improper manner an unverified version of what had been the witness's testimony before the above-mentioned board of investigation. The following excerpt from the record of the testimony of the witness illustrates what is meant:

> "87. Q. Now, can you explain why you failed to tell the Board of Investigation or give the Board of Investigation that (bad table manners) as a reason for 'bawling out' Mr. A. instead of Seamanship questions? They created quite an impression on your mind and you have no difficulty at all in stating that it was for that reason and no other he was 'bawled out';

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and yet before the Board of Investigation you said nothing whatever about it and assigned as the reason for his 'bawling out,' failure to answer Seamanship questions. Can you explain that discrepancy?

"A. I do not know that I said Seamanship questions. I said 'bawling out' because I thought it was misconduct. It was the same as ill table manners.

"88. Q. But why did you say before the Board of Investigation that he was 'bawled out' for failure to answer Seamanship questions and you did not mention his table manners. Now, how can you explain the discrepancy or do you explain it?

"A. If I remember rightly I never mentioned his 'bawling out' at the table in my former testimony.

"89. Q. You didn't mention table manners before the Board of Investigation?

"Objected to by the counsel for the accused on the ground of the line of questioning by the judge advocate. He is making a supposition and is not quoting exactly from the record of the Board of Investigation. He has improper reasons to suspect this and is bringing out the evidence without quoting anything from the Board of Investigation.

"The judge advocate replied that he can impeach this witness in any way he pleases, whether by contradictory statements in answer to oral statements, or by referring to the Board of Investigation without bringing it into the record.

"The court was cleared.

[P. 11] "The court was opened. All parties to the trial entered and the president announced that the objection by the counsel for the accused is not sustained. It is the understanding of the court that the judge advocate is proceeding along the line of questioning for the purpose that the witness has made contradictory statements before a properly constituted Board of Investigation and that such questioning is permitted by rules of evidence, page 164, paragraph 167."

In connection with the foregoing it is important to note that at no time during the trial was the record of the board of investigation brought into evidence for the purpose of showing by reading therefrom, which is the only way in which it could properly have been shown, what testimony the witness M did actually give before said board.

An examination of the context of Section 167 Naval Courts and Boards shows that it in no way supports the above ruling which the court attempted to base upon it. On the contrary, the section in question distinctly requires that the contradictory statements of a witness be proved. It is true that reference is made to certain preliminary questioning in regard to contradictory statements but such questioning is permitted only for the purpose of laying the foundation for future impeaching evidence. It in no way takes the place of such evidence. As stated above no proper impeaching evidence was later introduced in this case, and the impression is created, from the reading of the above-quoted excerpt from the record that the judge advocate's unsworn version of what the record of the board of investigation contained was accepted by the court as evidencing what such record did actually contain. From this it would appear that the judge advocate was permitted to testify without being placed under oath and was permitted to testify in regard to a matter as to which the record of the board of investigation itself and not the testimony of the judge advocate would have been the best evidence. The proper procedure would have been for the judge advocate to have asked the witness questions in regard to the testimony previously given by him before the board of investigation and thus lay the foundation for later impeachment in the event of inconsistency; but in order to have properly brought before the court the impeaching evidence, the judge advocate should have taken the stand as the custodian of the record of the board of investigation and should have introduced such record into evidence and read therefrom the testimony with which he intended to impeach the witness.

It is not known to what extent the improper procedure commented upon above affected the court in giving or denying credence to the testimony of the witness M, but it is considered that the court's ruling in failing to sustain counsel's objection to such procedure was erroneous. It is necessary, therefore, to determine whether such erroneous ruling prejudiced the interests of the accused [P. 12] to such an extent as to invalidate the proceedings in this case; or, in

other words, whether the interests of the accused were materially affected by such a ruling. On this question it is the opinion of the Department that, for reasons hereinbefore set forth in full, the credibility of the material witnesses as to facts in this case was of the utmost importance in aiding the court to arrive at its findings and that, in view of the fact that the erroneous ruling of the court now under consideration was on a point that involved the credibility of a material witness for the defense, it must be held that such error was fatal to the proceedings in this case (File 26262–10008, J. A. G., Dec. 16, 1922; G. C. M. Rec. No. 56875).

SPECIFICATIONS: IN ALLEGING STATUTORY OFFENSES EXACT WORDS OF STATUTE NEED NOT BE USED, BUT WORDS OF STATUTE SHOULD BE FOLLOWED AS NEARLY AS POSSIBLE.

In a recent trial for hazing, the accused objected to the specifications under the charge on the ground that the exact words of the statute were not followed in setting forth the offenses alleged in these specifications. Particular objection was made to the use of the word "unwarranted" instead of "unauthorized," this latter word being the one used in the statute defining hazing. As the word "unwarranted" is defined in Webster's New International Dictionary, as "being without warrant, authority or guaranty," it is apparent that the word "unwarranted" is a synonym of "unauthorized" and that there is no merit, therefore, to the counsel's objection insofar as the use of this word is concerned. As to the further statement of the offenses the allegations in the specifications substantially follow the wording of the statute and contain all the necessary averments to support a charge of "Hazing." In Joyce on "Indictment," section 330, it is stated that:

> "It is undoubtedly safer to follow the language of the statute in describing the offenses charged in the indictment. But it has been repeatedly held that words equivalent in meaning to those in the statute may be used."

Accordingly the Department was of the opinion that the court properly overruled counsel's objection to the wording of the specifications (File 26262–9999, J. A. G., Dec. 22, 1922; G. C. M. Rec. No. 6991, 26262–10009; J. A. G., Dec. 16, 1922; G. C. M. Rec. No. 56874).

[P. 13] DISCHARGES: REISSUANCE OF.

The service record of an enlisted man contains the following notation:

> "Navy Department, Bureau of Navigation, September 11, 1920.
> "The discharge, dated November 20, 1919, is hereby changed from 'Good,' to 'Honorable,' in accordance with the act of Congress approved July 11, 1919. Signed _____ Lt. Comdr. U. S. N."

The question was presented whether this entry changing the character of his discharge from "Good," to "Honorable," satisfies the provision of the act of July 11, 1919, which requires that he shall receive an honorable discharge. *Held:* The man in question is entitled to receive a certificate of honorable discharge in lieu of the certificate of good discharge and the entry made on his service record changing his discharge from "Good," to "Honorable," does not satisfy the requirements of the statute (File 7657–1435, Jan. 6, 1923).

FLEET NAVAL RESERVE: REVISION OF RATINGS IN.

Held: That all enlisted men in the Regular Navy, who are transferred to the Fleet Naval Reserve while serving in the grade of "chief special mechanic" or "special mechanic first class," must be transferred thereto in said rating and having been transferred to the Fleet Naval Reserve in the rating of "chief special mechanic" or "special mechanic first class," said enlisted men are entitled to serve in the said ratings, respectively, until advanced to higher ratings as provided in the act of August 29, 1916, (39 Stat. 589) or until discharged by sentence of a court martial (File 28550–1469: 1, J. A. G., November 24, 1922).

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LOSS OF NUMBERS: RESTORATION OF, AFTER PROMOTION TO HIGHER GRADE.

The question was presented as to the legality of the restoration of numbers lost by sentence of a general court martial in the case of an officer who has since been promoted to a higher grade than that in which serving when the penalty was imposed. It appears that since the date of his trial he has been promoted three times. *Held:* The sentence having been fully executed there is no action which the President can now take whereby the numbers lost may be legally restored (File 26282–403; 2 J. A. G., Jan. 6, 1923).

[P. 14] NAVAL MILITIA: PROVISION OF THE ACT OF JULY 1, 1922.

Held: There is no provision of law authorizing the Secretary of the Navy to approve or prescribe for the organization of Naval Militia sections, divisions, battalions, regiments, or brigades, which were not in existence at the time of the passage of the above act.

The Naval Militia units in existence on July 1, 1922, organized under authority of the act of February 16, 1914, should be a part of the Naval Reserve Force only in the event that the individual members thereof enrolled in said force.

Members of the Naval Militia who are members of the Naval Reserve Force may hold the rank or rating therein different from the rank or rating which they hold in the Naval Militia. The provisions of the above-mentioned act do not require that these individuals shall have the same rank and rating in both the Naval Reserve Force and the Naval Militia. Members of the Naval Militia who are not enrolled in the Naval Reserve Force may not be called to active duty for training with pay (File 39773–225, J. A. G., November 17, 1922).

REDUCTION IN RATING: LEGALITY OF, AS PUNISHMENT BY COMMANDING OFFICER.

"A" upon reenlistment was issued an appointment as yeoman second class, the rating he had held in a prior enlistment. After his transfer to the Receiving Ship he was disrated by the commanding officer to yeoman third class, his service record showing that he was disrated for "deliberate neglect." *Held:* That such disrating was in conflict with article 24 of the Articles for the Government of the Navy, that it was without legal authority and that the record should be corrected and "A" should be treated as though such attempted reduction of his rating had not occurred (File 7657–745: 23, J. A. G., Jan 6, 1923).

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[P. 9] DEATH GRATUITY: DEATH NOT DUE TO HIS OWN MISCONDUCT.

The act of June 4, 1920 (41 Stat. 827), provides that the death gratuity therein referred to shall be paid by the Paymaster General of the Navy to the widow of the deceased who dies while in the naval service on active duty, except where death is due to the deceased's own misconduct. While the death or disease may be held to be incurred not in the line of duty, it does not follow that it is due to his own misconduct. In the absence of specific facts showing that the death of the deceased was actually due to his own misconduct, the Department held that the widow was entitled to receive the death gratuity provided (File 26245–346, J. A. G., Feb. 13, 1923).

FORMER TEMPORARY OFFICERS: RETIREMENT OF.

An individual must be in the naval service at the time of his retirement. Since, therefore, a former temporary officer is no longer a member of the naval service but a civilian, the Department is without authority to send him before a retiring board or to reconsider the approved findings of the retiring boards which have heretofore examined and passed upon his eligibility for retirement (File 26256–578: 2, J. A. G., Feb. 17, 1923).

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FRAUDULENT ENLISTMENT: IS CONSIDERED AN ENLISTMENT WITHIN THE MEANING OF SECTION 459, NAVAL COURTS AND BOARDS, 1917.

W was discharged in 1916 as undesirable, having fraudulently enlisted by concealing the fact that he was under age. He enlisted in the Marine Corps in 1922, was tried by summary court martial in January 1923 for absence over leave, convicted and sentenced to be discharged from the Marine Corps and the naval service with a bad-conduct discharge.

Held: A fraudulent enlistment is an enlistment (*U. S.* v. *Reaves*, 123 Fed. 127: *Ex parte Rock*; 177 Fed. 240.) The fraudulent enlistment [P. 10] in this case constituted a first enlistment within the meaning of section 459, Naval Courts and Boards and the discharge pursuant to the sentence of the summary court martial should not be effected until an order for his discharge is received from the Commandant of the Marine Corps (File 26287–9302, J. A. G., Feb. 20, 1923).

MIDSHIPMEN: LEAVE WITHOUT PAY.

Held: That while the Bureau of Navigation has the authority to grant a leave of absence to midshipmen for the good of the service, there is no authority of law which will permit the granting of such leave without pay (File 5352–242, J. A. G., Feb. 6, 1923).

NAVAL RESERVE FORCE: PHYSICAL REQUIREMENTS FOR ENROLLMENT.

Held: That individuals enrolling in the Naval Reserve Force, or reenrolling within four months from the date of their prior enrollment, or again enrolling after the expiration of the said four months, are required by law and regulations issued pursuant to law, to pass the physical examinations prescribed for first enlistment in the Regular Navy. Waivers of certain physical defects may be granted only in the cases of especially desirable recruits where the variations from the physical standards are slight.

That the reenrollment of any person whose physical condition does not meet the above requirement, is illegal and void (File 26253–1465, J. A. G., Feb. 14, 1923).

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[P. 9] SENTENCE: ILLEGAL.

In a recent case the sentence adjudged by the court was as follows:

> "The court, therefore, sentences him, J F, baker third class, U. S. Navy, to be reduced to the rating of landsman, to be confined for a period of three (3) months, then to be discharged from the United States naval service with a bad-conduct discharge, and to suffer all the other accessories of said sentence, as prescribed by section 349, Naval Courts and Boards."

The rating table, in effect at the time the sentence was adjudged, contained in Navy Department Circular Letter No. 1–22 dated January 17, 1922, shows that the lowest rating in the commissary branch is apprentice seaman. Paragraph D–4000, Bureau of Navigation Manual, does not include the rating of landsman among the authorized ratings in the Navy. So much of the sentence of the court as relates to reduction in rating, being, in the opinion of the Department, illegal, was set aside (File 26262–10073; J. A. G., Feb. 15, 1923; G. C. M. Rec. No. 57029).

VIOLATION OF A LAWFUL REGULATION ISSUED BY THE SECRETARY OF THE NAVY: NECESSARY ALLEGATIONS IN SPECIFICATION TO SUPPORT CHARGE OF.

An accused was recently tried on the charge of "Violation of a Lawful Regulation issued by the Secretary of the Navy, the specification reading as follows:

> "In that M. H., now a private, U. S. Marine Corps, while so serving at the United States Marine Barracks, * * * did, on or about January 4,

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1923, knowingly, willfully, and without permission from proper authority, sell to one H. G. private, U. S. Marine Corps, serving at said barracks, alcoholic liquor."

The regulation apparently alleged to have been violated must have been article 118, Navy Regulations, 1920, which reads as follows:

(1) "No person in the naval service shall take or keep any alcoholic liquors or any intoxicating or narcotic substances on board ships of the Navy or within the limits of naval stations, marine barracks, or any other place under the exclusive jurisdiction of the Navy Department except as authorized for medical purposes, nor shall any such liquors, intoxicants, or substances be sold or given to said persons or issued to them except for medical purposes, within such places."

In order to allege the violation of this regulation by the sale of liquor it is necessary to aver that the sale was executed on board a ship of the Navy, within the limits of naval stations, marine barracks, or any other place under the exclusive jurisdiction of the Navy Department. Inasmuch as this specification does not allege that the sale took place at one of the above-named places, the Department held that it did not support the charge. The proceedings and finding on this specification were therefore set aside (File 26251–30255, J. A. G., Feb. 26, 1923; G. C. M. Rec. No. 57112).

[P. 10] CHIEF WARRANT OFFICER: ISSUE OF CERTIFICATE OF CREDIBILITY OF RECORD SUBSEQUENT TO RETIREMENT.

A chief warrant officer, completed twelve years of active service as a commissioned warrant officer, on July 30, 1922, and was placed on the retired list on October 15, 1922. The question was presented as to whether a certificate of credibility of record as provided in the Act of June 10, 1922 (42 Stat. 627), may now be issued. *Held:* The right to receive a certificate of credibility accrued on July 30, 1922, and the officer is entitled to it, regardless of the fact that he has been subsequently transferred to the retired list of the Navy (File 17789–27: 29, J. A. G., March 5, 1922).

FLEET NAVAL RESERVE: MEMBERS OF, ENTERING INTO CONTRACT WITH NAVY.

Held: There are no provisions of law prohibiting an enlisted man of the Fleet Naval Reserve, whether on active or inactive duty, entering into contracts with the Navy (File 3973–215: 15, J. A. G., March 26, 1923).

LINE OF DUTY AND MISCONDUCT.

Where the disability complained of existed prior to enlistment, the proper entry is "Not misconduct, and not in line of duty" (File 29372–149, J. A. G., March 2, 1923).

MARINE CORPS RESERVE: EMPLOYMENT ON ACTIVE DUTY.

Held: During the fiscal years ending June 30, 1923, and June 30, 1924, respectively, the Secretary of the Navy is authorized to order members of the Marine Corps Reserve Force, with their consent, who have been confirmed in their rank, grade, or rating, to perform any duty afloat for which their services may be required, and further, that during said fiscal years the Secretary of the Navy may assign members of the Marine Corps Reserve Force, upon application, who have not been confirmed in their rank, grade, or rating, to active service for such periods of instruction and training as may enable them to qualify for and be confirmed in such grade, rank, or rating, and that he may assign members of the Marine Corps Reserve Force, who have been confirmed in their rank, grade, or rating, to duty for performing the service required for maintaining their efficiency and further, that such instruction, training, and drilling [P. 1] as may be required either to qualify them for confirmation or to enable them to maintain their efficiency may be performed ashore or afloat as the nature of said training may require (File 28553–508, J. A. G., March 26, 1923).

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NAVAL STATIONS AND NAVY YARDS: RIGHT OF CIVIL AUTHORITIES TO SERVE PROCESS IN.

The following decision of the Department was made in answer to a request by the Commandant, Navy Yard, Norfolk, Va.:

Query: Has a police officer of the State of Virginia the right to enter the navy yard for the purpose of making investigations of any kind?

Answer: As stated in reference (*a*), the jurisdiction of the Federal authorities within the limits of the navy yard under your command is exclusive. It follows, therefore, that a police or other State officer has no right whatever to conduct investigations of any kind within the limits of said navy yard. However, in cases where there are reasonable grounds for believing that an offender against the State laws has sought refuge inside the navy yard, a duly authorized police officer or agent of the State of Virginia should be permitted to enter the yard for the purpose of identifying, if possible, the guilty party. If the offender is a person in the naval service, the civil authorities should not be permitted to arrest him, but should be informed that his delivery to them for trial may be effected in accordance with the provisions of section 29, paragraphs (9) and (12). Naval Courts and Boards, 1917; if a civilian, he should be required to leave the yard and the police officer notified accordingly, in order that he may be enabled to take the offender into custody upon departure from the yard.

Investigations should not be allowed under any circumstances without permission duly obtained in advance from the commandant or other administrative officer of the yard and may be subject to any reasonable restrictions which the commandant, in his discretion, may deem it advisable to impose.

Query: Should not police officers who come into the yard on business connected with warrants or processes leave their arms behind them or at the gate?

Answer: In ceding the land occupied by the navy yard, Norfolk, Va., to the Government, the Virginia Assembly, in its various acts of cession, quoted in reference (*a*), reserved to the State of Virginia the right to serve within the limits of the navy yard all civil and criminal processes duly issued within said limits, under the same conditions as govern service of processes elsewhere within said State. In view of this reservation, I am of the opinion that an authorized officer of the State of Virginia should not be required to serve process inside the yard without his arms, but, on the contrary, should be permitted to retain them. The retention of such arms by the officer also appears to be essential to his self-protection in the event the offender [P. 12] forcibly resists service of process and endeavors to inflict personal physical injury upon the officer. It must be presumed in this connection that the officer serving process will not resort to the use of arms except as a means of self-defense or other emergency clearly warranting such action. This conclusion appears to be in accord with the letter and spirit of the reservation above mentioned.

Query: Should a police officer of the State or city be allowed to make an arrest in the navy yard?

Answer: The question is answered in the negative. The civil authorities of the State of Virginia have a right to serve legal process upon any person within the limits of the yard under your command, whether in the naval or civil service, but in all such cases the commandant or other administrative officer of the yard must first be consulted to the end that service may be accomplished in an orderly manner. This right to execute legal process, however, does not include the power of arrest.

Where a person in the naval service commits an offense outside the limits of the navy yard in violation of the laws of the State of Virginia, and thereafter returns to said yard, warrant for his arrest should be served upon him through the commandant or the man's commanding officer. His delivery to the civil authorities for trial will then be effected pursuant to the provisions of section 29, Naval Courts and Boards, 1917.

A civilian employee of the yard committing an offense under like circumstances should be taken to the main gate of the yard and there turned over to the proper civil authorities.

Likewise a civilian unconnected with the naval service, who happens to be inside the yard, should be taken to the navy yard gate and delivered into the custody of the civil authorities.

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Query: Suppose a police officer sees an enlisted man of the Navy or the Marine Corps, or even a civilian, commit a serious offense in the city not far from the navy yard gate; the man flees and runs through the navy yard gate. I would assume that the police officer had no right to pursue him into the navy yard and attempt to capture him. Is this interpretation correct?

Answer: Your assumption is correct. (See answer to paragraph 2 above, to the effect that the officer concerned should obtain permission from the commandant or other administrative officer to enter the yard for the purpose of identifying the offender, etc.)

If the person concerned is a member of the naval service, his delivery to the civil authorities after identification is governed by the provisions of section 29, Naval Courts and Boards above referred to; if a civilian, the procedure outlined with regard to civilians in answer to query 4 above should be followed.

Query: Suppose a civilian is visiting some officer in the yard and is wanted by the State police on a warrant; he is neither of the civilian nor enlisted force of the yard. Should the police be allowed to enter the yard and arrest him?

[P. 13] *Answer:* No. The procedure outlined in the answer to query 4 above should be followed in all such cases, namely, take the individual to the navy yard gate, where the civil authorities may, if they desire, take him into custody.

Inasmuch as the answers to the foregoing questions are necessarily general, the facts in any specific case arising in the future, which may not appear to be clearly covered by File 5267–116, J. A. G. Oct. 19, 1921, or by this opinion, should be promptly forwarded to the Department for consideration (File 5267–116:2, J. A. G., Jan. 24, 1923).

MEDICAL TREATMENT: CIVILIAN SPECIALIST, PAYMENT FOR.

An officer on duty at a naval station incurred a disability which required an immediate operation. There being no medical officers at that station qualified to perform this operation, the services of a civilian surgeon were obtained. Several months later a further operation became necessary which was performed and treatment given by the same civilian surgeon. The second operation while necessary was not urgent. Prior authority from the Chief of the Bureau of Medicine and Surgery was not obtained for either operation. The question was presented whether, in view of paragraph 4, article 1189, Navy Regulations, 1920, payment for the services of the civilian surgeon, is a legitimate charge against the Government.

Held: In view of the extenuating circumstances existing in connection with the first operation performed, the Department is of the opinion that said operation together with subsequent treatment in connection therewith raises a legitimate charge against the Government but that the second operation performed together with subsequent treatment in connection therewith does not raise a legitimate charge against the Government for the reason that although this officer had sufficient opportunity, he apparently made no effort to comply with Paragraph four of article 1189, Navy Regulations, 1920, after his attention had been called thereto (File 9438–128, J. A. G., March 24, 1923).

PAY: RETIRED OFFICERS HOLDING CIVIL SERVICE APPOINTMENTS.

The question was presented as to whether in view of the act of July 31, 1894 (28 Stat. 205), the pay, under a civil service appointment of a retired officer, could be increased to $5.20 per diem, his retired pay being, $1,020 per annum.

In view of the Comptroller General's decision of April 15, 1922, which stated that the above act as amended by the act of May 10, 1916 (39 Stat. 120, 582), does not prohibit retired officers from holding a Government position or office, provided neither the retired pay nor the salary attached to the position or office amounts to $2,500, the aggregate of the two being immaterial, the Department held that the proposed increase is legal (File 26254–367:4, J. A. G., Feb. 28, 1923).

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[P. 14] PUBLIC QUARTERS: DEFINITION OF.

The term "public quarters" has never been legally defined. However, under the provisions of the act of July 1, 1918 (40 Stat. 718), the Secretary of the Navy is empowered to determine where and when public quarters exist and are available. When any question as to the availability of public quarters or their fitness for habitation arises, the question should be submitted to the Department for the determination of the Secretary of the Navy (File 9886:123, J. A. G., March 3, 1923).

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[P. 8] LINE OF DUTY AND MISCONDUCT.

W enlisted in the Marine Corps in June 1920, and in February 1921, he was discharged in accordance with the findings of a board of medical survey, his disability being trachoma, not in line of duty, not due to his own misconduct. In September 1922, he again enlisted in the Marine Corps and was surveyed on March 6, 1923, his diagnosis trachoma, origin not in line of duty, disability not the result of his own misconduct.

Held: In view of the fact that the disability complained of is chronic in nature and existed during a prior enlistment from which he was discharged on account of said disability, the Department is of the opinion that his present disability must be held to have been incurred in a prior enlistment, not in line of duty, not due to his own misconduct (File 29372–154, J. A. G., March 31, 1923).

NATURALIZATION: NATIVE OF GUAM.

Held: While a native of the Island of Guam owes perpetual allegiance to the United States he is not a citizen thereof nor is he an alien and there are no provisions of law under which he may become a citizen of the United States by naturalization (26252–165, J. A. G., March 31, 1923).

NATURALIZATION: NATIVE OF ST. THOMAS, V. I.

Under the provisions of section 6 of the treaty under which the Danish West Indies were ceded to the United States, proclaimed by the President January 25, 1917, Danish citizens who remained in the islands became citizens of the United States, unless they made a declaration before a court of record within one year from the date of exchange of ratification of their decision to retain their citizenship in Denmark.

In view of the foregoing the Department held that a native of the Virgin Islands who failed to make said declaration within one year from the date of exchange of ratifications, i. e., prior to January 25, 1918, became a citizen of the United States by operation of the treaty which has the force of law. If he filed such a declaration he is a citizen of Denmark and may become a naturalized citizen of the United States under the provisions of the act of May 9, 1918 (40 Stat. 542; File 26252–143:8, J. A. G., April 2, 1923).

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[P. 9] CONFESSIONS AND ADMISSIONS: UNCORROBORATED EXTRAJUDICIAL. INSUFFICIENT TO CONVICT.

An accused was convicted of the charge, supported by one specification. The only evidence introduced to prove the specification of the charge was the testimony of a witness to the effect that the accused had made a statement to him admitting that he had committed the alleged offense. There was no corroborative testimony whatsoever. It is a well-established principle of law that an uncorroborated extrajudicial admission or confession of an accused will not in itself sustain a conviction. (C. M. O. 4, 1922, p. 8.) The prosecution therefore failed legally to prove the offense alleged in the charge. The proceedings, findings, and sentence were accordingly disapproved (File 26251–30331, J. A. G., May 17, 1923; G. C. M. Rec. No. 57498).

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SENTENCE: NOT IN ACCORD WITH DEPARTMENT'S POLICY.

An accused was sentenced "to be confined for a period of six (6) months, and to suffer all the accessories of the sentence." No discharge was adjudged in the sentence in this case and as it is contrary to the Department's policy to have men serving sentence in a naval prison who are not to be discharged at the expiration thereof in other than an honorable status, it was directed by the Department that, upon the expiration of the period of confinement adjudged in this case as a separate and distinct action, the accused be discharged as undesirable (File 26251–30456, J. A. G., April 25, 1923; G. C. M. Rec. No. 57478).

STENOGRAPHER: RECORD OF CASE SHOULD CONTAIN STATEMENT THAT EACH REPORTER AND STENOGRAPHER WAS SWORN.

In a recent case it was noted that an additional stenographer was introduced, but the record fails to show that he was sworn. The rules governing naval court-martial procedure require that each stenographer officiating at a trial shall be sworn, and that the record shall contain a statement to this effect. This requirement, however, is a regulation only, and not a provision of statutory law, for by law the judge advocate is charged with the correct preparation of the record, the authenticity of which is further attested by the signatures of the members of the court, as well as of the judge advocate. However, the absence of a statement in the record to the effect that the stenographer upon being introduced was sworn, while an irregularity, is not sufficient to invalidate the record (File 26251–30221y. J. A. G. April 27, 1923; G. C. M. Rec. No. 57246).

[P. 10] LINE OF DUTY: RETIRED OFFICERS.

Held: That it has been fully established that it is not necessary that an individual in the naval service be on active duty at the time his death occurred, in order to warrant the holding of line of duty (7 Op. Atty. Gen. 149, 160; 32 Op. Atty. Gen. 193, 196, 198; *Moore* v. *U. S.*, 48 St. Cls. 110). But when his death has occurred after he has been placed on the retired list of the Navy, and while he is on active duty, it is necessary that the records show that his death was caused by some incident originating while on active duty, before a holding of line of duty is warranted. For example, if a retired officer, while going about his private affairs, had been struck by lightning or killed in some other manner wholly disconnected with the naval service or had died as a result of some disease not due to prior service conditions, his death should not be held to have occurred in the line of duty. Where, however, it is shown by the records of the Department that his death was due to a disability, not the result of his own misconduct, originating while in active service, the Department is of the opinion that is should be held that his death is the result of an incident of the service and therefore in the line of duty (File 26250–3145:1, J. A. G., May 23, 1923).

NAVAL RESERVISTS: MEDICAL TREATMENT OF.

Held: That members of the Naval Reserve Force on duty under competent orders on board naval reserve vessels in any capacity other than at drills, are in the "active service," and that while performing said service they are entitled to be furnished with medical care and treatment by the Government and that when such care and treatment cannot be furnished in kind by the Navy the law authorizes its procurement from outside sources, the Government being responsible for the expense thereof if properly authorized and incurred.

That when it becomes necessary to incur expenses for medical and hospital services for members of the Naval Reserve Force procured from sources outside the Government where medical and hospital treatment cannot be furnished in kind by the Navy, that the Government is responsible for the total expense of the medical treatment and hospital service thus rendered regardless of whether or not their period of service would have terminated except for the disability arising, prior to the termination of said treatment (File 28550–1399; 5, J. A. G., April 25, 1923).

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[P. 11] NURSE CORPS: ISSUE OF CLOTHING AND EQUIPMENT TO MEMBERS OF.

Held: That each member of the Navy Nurse Corps in the service on July 1, 1923, who has not received an outfit of clothing on first appointment similar to that authorized for members of the Army Nurse Corps on first appointment, is entitled to receive said outfit on July 1, 1923, or as soon thereafter as practicable, and each nurse thereafter entering the naval service shall receive said outfit on first appointment (File 26477–111, J. A. G., May 11, 1923).

TRAVEL ALLOWANCE: WAIVER OF BY ENLISTED MEN ON EXPIRATION OF ENLISTMENT.

The question was presented as to whether or not the Government may be considered as having fulfilled its obligation to a man to return him to the place of acceptance for enlistment as provided in the act of September 22, 1922 (42 Stat. 1021), when it has tendered him the opportunity of Government transportation to the port nearest the place of acceptance, plus five cents per mile by rail, thence to the place of acceptance for enlistment, and whether or not the man under the above circumstances may decline this offer for his own convenience and may legally waive all right to transportation upon discharge of the expiration of his enlistment, (*a*) In order that he may be permitted to remain on his present ship or at his present station and be given the opportunity to reenlist or extend his enlistment under continued service, or (*b*) In order that he may be discharged from the ship or at the station on which then serving.

Held: Where the Government, for the convenience of the enlisted man, permits him to remain until the expiration of his enlistment at the place selected and designated by him, and in its turn waives the right to furnish transportation in kind to said enlisted man to the place of his enlistment, it appears that the purpose and intent of the law has been complied with. In the case where by mutual voluntary agreement proposed by the enlisted man for his own convenience, he is discharged at the place selected by him, the Government's obligation in the matter is fulfilled.

If, however, the Government chooses to transfer him to the port nearest to the place of acceptance for enlistment for the purpose of discharging him at said port, it may do so. In this event he will be entitled to receive five cents per mile for transportation thence to the place of acceptance for enlistment, even though said enlisted man may have offered to waive all right to transportation upon discharge at the expiration of his enlistment (File 9209–114; 126, J. A. G., May 22, 1923).

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[P. 8] CHIEFS OF BUREAU, NAVY DEPARTMENT: ELIGIBILITY FOR DUTY AS MEMBERS OF NAVAL EXAMINING BOARDS.

The question was presented as to whether a Chief of Bureau may be legally assigned to duty as a member of the naval examining board to examine for promotion to the rank of rear admiral an officer with the rank of captain who is senior on the regular Navy list to the Chief of Bureau.

Held: That while in the performance of those duties that may be assigned him by the Secretary of the Navy as Chief of Bureau in the Navy Department he has as incident to such office the rank, authority, and emoluments of a rear admiral; but nevertheless during his incumbency he retains his regular rank and grade in the Navy by virtue of which he may perform the duties incident thereto and while in the performance of such duties, not incident to this office of Chief of Bureau, he must act in the only capacity by virtue of which those duties may be assigned him, that of captain. If in this latter capacity he is junior to the officers to be examined, under the provisions of section 1498, Revised Statutes, he is not eligible to serve as a member of the naval examining board for the examination of an officer regularly his senior preliminary to promotion (File 26251–527, J. A. G., June 20, 1923).

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[P. 7] ENLISTMENT: WHEN CONSUMMATED.

The accused in this case, C ------ H. H. ------, musician second class, U. S. Navy, alias C ------ H. H. ------, seaman second class, U. S. Navy, alias F ------ E. M. ------, musician second class, U. S. Navy, was tried by general court martial and acquitted of the charges of I "Fraudulent enlistment," II "Desertion," and an additional charge of "Breaking arrest."

The evidence adduced before the court indicates that H ------, on April 22, 1921, at Des Moines, Iowa, enlisted as an apprentice seaman and thereafter served as an enlisted man in the Navy until November 2, 1921, on which date he was discharged with a bad-conduct discharge. On November 7, 1922, H ------, presented himself at the Navy recruiting station at St. Louis, Mo., for enlistment. He gave his name as F ------ E. M ------, and under that name signed shipping articles evidencing his enlistment as a musician second class. He took the usual oath, and his acceptance by the Government is evidenced by the signature of the recruiting officer.

The facts as above set forth as evidencing the enlistment of the accused in the Navy were in no way contested. The accused, however, testified that subsequent to the completion of the formalities above described he was informed by some person or persons at the recruiting station, the personality of whom he did not make clear, that it was necessary for him to produce a birth certificate in order to complete his enlistment, and that until such birth certificate was produced his status would not be that of an enlisted man in the Navy. The accused further stated that he realized his inability to obtain a birth certificate under the assumed name of M ------ and accordingly decided to let the matter drop, and that on November 9, 1922, he left the vicinity of St. Louis under the impression, as he stated, that his enlistment in the Navy had not been completed, and he was free to go where he wished.

It further appears that about a month after the above incident took place the accused wrote to the Bureau of Navigation, apparently under his true name, and requested that the disability arising from his previous bad-conduct discharge be waived and that he be permitted to reenlist. The accused was thereupon informed by the Bureau that he had already fraudulently enlisted and was [P. 8] directed to report at once to the nearest recruiting station. The accused then surrendered himself at the recruiting station at Dallas, Tex., and was transferred to Pensacola. It was while there awaiting trial on charges covering the alleged fraudulent enlistment and desertion above described that the offense alleged in the additional charge was committed.

As the accused was acquitted of all three charges preferred against him, it would seem that the court reached its findings on the theory that the accused's purported enlistment on November 7, 1922, at the recruiting station at St. Louis was invalid. In fact, an examination of the course which the trial took leaves no doubt in regard to the conclusion that the above was the underlying theory of the acquittal of the accused. We have before us, therefore, the case of a man who has gone through all required formalities incidental to enlistment in the Navy, has been duly accepted by a proper officer, and who, subsequent to such performance and acceptance, conceives a mistaken idea in regard to the completion of his enlistment. The court apparently decided in this case that the enlistment of the accused, which, as explained above, had in fact been fully completed, was invalidated by reason of the fact that the accused, as the result of a conversation in which he engaged subsequent to his enlistment with some unknown person or persons at the recruiting office, gained the erroneous impression that his enlistment would not be complete until after he had presented a birth certificate. With such a conclusion this office cannot agree.

The case of *In re Grimley*, reported in 137 U. S., p. 147, presents a situation somewhat similar to the present one. Grimley entered a recruiting station at Boston and expressed a desire to enlist. He underwent the physical examination, took the oath of allegiance before the recruiting officer, signed the clothing rolls, and was placed in charge of a sergeant. The latter took him to the clothing room and selected his outfit of clothing. Grimley then asked permission to go away and see his friends, and the sergeant permitted him to go, but told him to be back on a certain day. Grimley went away in his

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civilian clothing, taking none of his military outfit with him, and returned to his mother's home and told her what he had done. The mother did not approve of her son's enlistment, and after some conversation with him went to the recruiting office, where she found three men. She told them of her son's enlistment and her [P. 9] dissatisfaction therewith, and was advised substantially by these men that Grimley need not come back. The personality of the men in question was not discovered, but on the strength of the alleged conversation Grimley did not return to the recruiting office, but engaged in other work. He was arrested as a deserter, brought to trial before a general court martial, and convicted. The case was taken to the United States Supreme Court on habeas corpus proceedings. The court held that Grimley, who was over the statutory age for enlistment, had performed every act necessary to enlist himself in the Army, that the enlistment was a deliberate act on his part, and that he could not be permitted to ignore his own voluntary act.

After a careful review of the subject the Department is of the opinion that it may be stated as a rule that, after a contract of enlistment which is otherwise valid has been consummated by the applicant on the one hand and the recruiting officer on the other and the oath of allegiance has been taken, no subsequent belief or act by the party thus enlisting can invalidate such contract. Accordingly, it is the opinion of this office that the findings in effect contrary to the above by the court martial in the present case are erroneous.

The issue in the present case was somewhat confused by reason of the fact that great stress was laid on an extract from Court-Martial Order No. 48, 1920 (28), which was read to the court. The court-martial order in question dealt with a case in which an applicant for enlistment had failed to take the oath of allegiance after signing the shipping articles, and stated that the mere signing of the shipping articles did not make the applicant an enlisted man in the Navy. The order went on to explain, however, that the applicant had by his subsequent conduct voluntarily placed himself under naval jurisdiction and accepted transportation, subsistence and other emoluments, and that such conduct considered in connection with the fact that he had signed the shipping articles amounted to a constructive enlistment.

As can be readily seen, the case cited in the above-mentioned court-martial order has no bearing on the present case for the reason that the steps preliminary to enlistment in the Navy which were omitted from the former were admittedly taken in the latter. The stress laid upon the court-martial order in question during the trial of the present case was therefore unwarranted and not only [P. 10] served to unnecessarily take up the time of the court, but, more unfortunately, appears to have confused the issue in the minds of its members.

For the reasons set forth in the foregoing remarks it is the opinion of the Department that the court erred in finding, as it substantially did, that the accused in this case was not under naval jurisdiction at the time he committed the acts described in the specifications and which were clearly proved and that he was therefore not guilty of any offenses against naval law. Accordingly, the findings and acquittal on charge II and the additional charge in the case of the accused were disapproved. For the reason that, apart from any jurisdictional question, the receipt of pay and allowances, which was not proved, was one of the allegations contained in the specification under charge I, the findings and acquittal on charge I were approved (File 26251–30562, J. A. G., June 27, 1913; G. C. M. Rec. No. 57739).

SUICIDE: IN CASES OF, BOARDS OF INQUEST SHOULD GET ON RECORD ALL POSSIBLE EVIDENCE CONCERNING MENTAL CONDITION OF DECEASED.

On June 3, 1923, F_____, late private, U. S. Marine Corps., went on board the wreck of the U. S. S. *Memphis*, at San Domingo City, Dominican Republic, and carried with him an automatic pistol which had been in the custody of another marine. Later Private K_____ went on board the *Memphis* to obtain the pistol. When Private F_____ saw him coming he turned the pistol on himself and fired. He died a few minutes later. No evidence was adduced reflecting on the mental condition of Private F_____ at the time he took his life. A letter was found on his body showing that he intended to take his life.

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Board of Inquest convened by Commanding General, Second Brigade, held not line of duty, own misconduct.

[P. 11] In connection with this case the following letter was sent by the Department to the officer who convened the board of inquest:

"You will direct the Board of Inquest in this case to reconvene for the purpose of obtaining all the information available reflecting upon the mental condition of the late Private F_____, U. S. Marine Corps, prior to the commission of the act whereby he took his own life, with a view to finding whether or not he was sane at the time he committed suicide. This information is necessary in all cases of suicide in order that the Department may reach a decision as to whether or not death occurred in line of duty.

"If it should be found that F_____ was permanently or temporarily insane at the moment of taking his own life and that such insanity was incurred in line of duty, then his death should be held to have occurred in the line of duty and not as a result of his own misconduct.

"On the other hand if it should be found that F_____ was insane and that this insanity was a result of his own unauthorized and wrongful acts in no way connected with his service and duty, his death should be held as due to his own misconduct and not incurred in the line of duty. The same holding should be reached in case the evidence indicates that the deceased was sane at the time of taking his life.

"In order that the holdings in cases of this kind may be passed upon intelligently, Boards should make every effort to get upon record all possible information reflecting upon the mental condition of a person prior to his act of taking his own life."

[P. 12] BREAD AND WATER: DEPARTMENT'S POLICY RELATIVE TO PUNISHMENT BY MEANS OF SENTENCES INVOLVING.

The provision in section 702, Naval Courts and Boards, that "a sentence on bread and water or on diminished rations is not, in the usual case, looked on with favor" is based upon the reference given in the footnote, which is a holding setting forth the Department's policy in 1882. The quotation in question is not a correct statement of the present policy of the Department and should not have been incorporated in Naval Courts and Boards. It will be stricken out at the time that the first correction to that publication is promulgated.

ENLISTED MAN: RETENTION OF, AFTER EXPIRATION OF ENLISTMENT AS A WITNESS IN HOMICIDE CASE PENDING BEFORE CIVIL COURT.

An enlisted man of the marine corps, whose enlistment expires July 1923, is a necessary witness in a murder case to be heard in the civil court of Puerto Rico in October. The question was presented whether he might be lawfully retained in the service until his presence as a witness is no longer required.

Held: The retention of this man in the service after the expiration of his enlistment without his consent is not authorized by any law regulation, but if he is willing to continue serving in his present status, he may be continued in the service after his enlistment has expired for a sufficient length of time to accomplish the purpose sought (File 26250–3057: 2, J. A. G., July 5, 1923).

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[P. 5] ARREST AND DETENTION BY CIVIL AUTHORITIES: EFFECT OF, ON ABSENCE OVER LEAVE.

An accused who was tried for desertion, was convicted by the court of "Absence from station and duty after leave had expired." The specification alleged that he had deserted on December 28, 1922, and remained in desertion until delivered on May 28, 1923.

The accused admitted his unauthorized absence for the period set out in the specification, but stated that he had no intention of deserting. He further testified that he had been granted leave from the U. S. S. *Delaware* which was to expire on the 28th of December 1922, but on that date he was in New York and

the *Delaware* was in Boston and he had insufficient funds to pay his way to the ship. He decided to await the return of the ship, which, it appears, was about to proceed south on a cruise and on March 23, 1923, was arrested by the civil authorities on a charge of robbery. He was tried by the civil authorities on May 28, 1923, after having been detailed for more than two months and was acquitted. He was then turned over to the naval authorities.

The court found the accused guilty of "Absence from station and duty after leave had expired" for a period of about eighty-five days, eliminating from the period set out in the specification the time he was detained by the civil authorities, viz, from March 23 to May 28, 1923. It will be noted that at the time of arrest by the civil authorities the accused was already absent overleave for a period of nearly three months.

[P. 6] The Department has held in numerous cases that arrest and acquittal by the civil authorities is a good defense to unauthorized absence when the accused is arrested while on authorized leave but in a case where the accused, at the time of his arrest, is absent without authority, his arrest and acquittal is no defense to the absence caused by his detention by the civil authorities as such absence is the result of his own misconduct in being absent from the naval service without authority. (See Naval Digest, 1921, p. 4.) It is apparent in this case, therefore, that the court erred in failing to find the accused guilty of absence overleave for the entire period of his unauthorized absence from the naval service (File 26251–30720, J. A. G., July 10, 1923, G. C. M. Rec. No. 57860).

IMPROPER CROSS-EXAMINATION: EXAMPLE OF.

During the course of a recent trial a witness for the prosecution, who had during his direct examination testified to the effect that on the occasion in question the accused was under the influence of intoxicating liquor as alleged in the specifications, was cross-examined at length by the counsel for the accused. During the course of this cross-examination, and after a wide latitude had already been allowed in the conduct thereof, counsel asked the witness the following question:

> "Q. Now, is it not a fact ——, that you have on various occasions, at whose houses you visited, occasionally partook of alcoholic liquors?"

The above question, insofar as its faulty grammatical construction permits of an interpretation, is a good example of one which transcends the legitimate ends of cross-examination and the wide latitude allowable therein, and was apparently designed, not for the legitimate purpose of throwing light upon the weight to be given to the witness' testimony in direct examination—since it had no bearing thereon, but for the improper purpose of pointlessly and unwarrantedly annoying and harassing a witness who had given adverse testimony.

As above stated, the examination in chief of the witness in question touched merely upon his observations in regard to the sobriety of the accused at the time under consideration. The counsel should not, therefore, have been allowed to proceed along the lines suggested by the above-quoted question beyond the point of inquiring as to whether the witness had, within a reasonable period before the time of his observations, partaken of intoxicating liquor. Such an inquiry would have had some relevance to the matter brought out during the witness' direct testimony for the reason that his powers of observation at the time in question might have been affected in the event that he himself had partaken of liquor shortly before making his observations of the accused. But the inquiry made by [P. 7] counsel in the above-quoted question was totally irrelevant to the matter brought out during the witness' direct examination or to anything connected with the present trial.

It follows from the above that the court should have on its own initiative ruled out the above question and should have cautioned counsel to restrict himself during his further cross-examination to the proper bounds of such examination. The court, however, took no such action. Upon the failure of the court thus to act it would seem reasonably clear that it became the duty of the judge advocate to protect his witness from improper cross-examination

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and to object to the line pursued by counsel in asking the above question. The judge advocate, however, appears to have regarded the matter as one between the counsel and the witness only and in which he had no interest. The result was that after a somewhat lengthy and unnecessary discussion, during which the witness was left to protect himself as best he could and denied, or at least not offered, protection to which he was properly entitled from the judge advocate and the court, the witness was forced to ask to be excused from answering the question on the ground that it was privileged. No such request on the part of the witness should have been necessary. As previously pointed out, the question under consideration was totally irrelevant on its face and should have been immediately excluded by the court on the ground of irrelevancy and no point as to whether or not it was privileged should properly have arisen (File 26251–30595, J. A. G., July 27, 1923; G. C. M. Rec. No. 57855).

CIVILIAN CHINESE SERVANTS: EMPLOYMENT OF, ON BOARD GUN BOATS IN CHINESE WATERS.

Held: There is no authority of law for employing civilian Chinese servants on board any vessel of the Navy and they can be so employed only when specifically authorized by Congress. However there is no law prohibiting the enlistment of Chinese for service on board vessels of the Yangtze Patrol Force (File 13157–77, J. A. G., July 21, 1923).

ENLISTED MEN: COMPUTATION OF SERVICE FOR RETIREMENT AFTER THIRTY YEARS' SERVICE.

The question was presented whether enlisted men discharged at any time within three months before the expiration of term of [P. 8] enlistment, or extended enlistment, are entitled to credit for full term of enlistment or extended enlistment in computing time for retirement from the Navy after thirty years' service.

Held: That where a man has been discharged at any time within three months prior to the expiration of his term of enlistment or extended enlistment at the direction of the Secretary of the Navy, he shall be entitled to credit for the full term of enlistment or extended enlistment in computing the necessary time required for retirement from the Navy (File 27231–243, J. A. G., July 19, 1923).

FLEET NAVAL RESERVE: PURCHASE OF SUBSISTENCE STORES FROM QUARTERMASTER CORPS, U. S. ARMY.

Held: Members of the Fleet Naval Reserve, on inactive duty are not entitled to purchase subsistence stores from the U. S. Army, under the provision of Army Regulation 1239 (File 28550–1674, J. A. G., July 22, 1923).

FLEET NAVAL RESERVE: RESIGNATION FROM.

Held: The Department may legally accept the resignation of a man from the Fleet Naval Reserve for the purpose of rendering him eligible to receive compensation through the Veteran's Bureau, for total disability incurred during his period of active service in the Navy (File 28550–1427:4, J. A. G., July 22, 1923).

NAVAL HOME: SALE OF MEALS TO CERTAIN CIVIL SERVICE EMPLOYEES.

Held: The Secretary of the Navy may authorize the Governor of the Naval Home to sell meals upon request approved by him to certain classified civil service employees of the naval home who do not receive subsistence of any kind as part of their compensation. The proceeds from such sale must be turned into the Treasury of the United States to the credit of the naval pension fund (File 21138–70, J. A. G., July 22, 1923).

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TYPHOID PROPHYLAXIS: GENERAL COURT-MARTIAL PRISONERS WHOSE ENLISTMENT HAS EXPIRED.

Held: The commanding officer of a naval prison is authorized to cause prisoners, whose enlistments have expired, to submit to typhoid prophylaxis, smallpox vaccination, etc., for their own protection, for that of other G. C. M. prisoners whose enlistments have not expired, as well as for the protection of the naval personnel with whom they come into contact (File 26267–417, J. A. G., July 19, 1923).

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[P. 7] CHARGES: INCONSISTENT.

An accused was tried by general court martial and convicted of: (I) "Leaving his station before being regularly relieved," and (II) "Sleeping upon his watch." He was sentenced to be confined for a period of twenty-four (24) months, bad-conduct discharge, and accessories.

The specification of the first charge alleges that the accused, while stationed as a sentinel, left his station at 5 a. m., on July 15, 1923, without authority and without being regularly relieved. The specification of the second charge alleges that the accused while posted as a sentinel on watch, at 5:10 a. m., July 15, 1923, slept on said watch.

[P. 8] The accused pleaded guilty to both of the above specifications and the prosecution then introduced evidence to show the circumstances surrounding the commission of these offenses. The substance of this evidence was that the corporal of the guard was unable to locate the accused at about 5:10 a. m., on July 15, 1923, when the accused was supposed to have been on duty as sentinel on post Number 3. Upon investigation the accused was found off his post and asleep in a hospital boat.

In the opinion of the department the charge of "Sleeping upon his watch" should not have been preferred against the accused in this case. The first charge of "Leaving his station and duty before being regularly relieved" covered fully the offense committed by the accused, and what he did after leaving his post should make no difference under the circumstances in this case. Furthermore, the conviction of the accused of both offenses is somewhat inconsistent; for if the accused left his post and fell asleep while away from his post, he clearly did not sleep on his watch as the specification of the second charge alleges. Consequently the proceedings and findings on charge II and its supporting specification were set aside (File 26262–10508, J. A. G., Sept. 17, 1923; G. C. M. Rec. No. 58116).

DYING DECLARATION: NECESSARY ELEMENTS TO CONSTITUTE.

An inhabitant of the Dominican Republic who was recently tried by a Military Commission on the charge of "Murder" was found guilty of "Manslaughter."

The only evidence presented by the prosecution to describe the events which transpired at the home of the accused at the time the deceased was stabbed was: (1) a written statement which had been sworn to by the deceased several days before his death, and which was admitted in evidence as a dying declaration, and (2) certain admissions of the accused wherein she stated that she stabbed the deceased with a bottle because he was abusing her. The statement of the deceased concluded with the following:

> "I, ------, having been informed by the Commanding Officer of the Base Hospital that I am in danger of death make this statement freely and voluntarily under oath."

Greenleaf in his work on Evidence, 16th Edition, volume 1, page 248, states that,

> "It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated, at the time, to be so made. It is enough, if it satisfactorily appears, in any mode that they were made under that sanction; whether to be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical

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or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's [P. 9] mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence; though, in the absence of better testimony, it may serve as one of the exponents of the deceased's belief, that his dissolution was or was not impending. It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible. *Therefore, when it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterward, the declaration is inadmissible.* On the other hand, a belief that he will not recover is not in itself sufficient. unless there be also the prospect of 'almost immediate dissolution.' "

And in a United States case (*Mattox* v. *U. S.*, 146 U. S. 140), the court said:

"It must be shown by the party offering them (dying declarations) in evidence that they were made under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. The length of time elapsing between the making of the declaration and the death is one of the elements to be considered, although as stated by Mr. Greenleaf, 'it is the impression of almost immediate dissolution and not the rapid succession of death, in point of fact, that renders the testimony admissible.'

* * * * * * *

"The point is to ascertain the state of mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected."

And again in the case of *Carver* v. *United States*, 160 U. S. 554, Chief Justice Fuller stated that "in the admission of the declarations of the victim as to the facts of a homicide the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution."

In this case four witnesses testified at the trial as to the circumstances surrounding the making of the declaration by him. Major [P. 10] N_____ testified that the deceased was advised by Commander S_____ (M. C.), U. S. N., just prior to making the statement admitted in evidence as a dying declaration, that his recovery was very doubtful. The deceased did not show by his manner that he realized that he was going to die, according to the testimony of this witness, but he was very weak and was not resting easy. Lieutenant P_____ (Chaplain Corps), U. S. N., testified that he took down in longhand the statement of the deceased now under consideration and immediately after reduced the statement to typewriting and it was subsequently acknowledged by the deceased, who made his mark in place of his signature, and witnessed by two other persons. Chaplain P_____ stated he informed the deceased "as delicately as possible" that his condition was quite serious and that in all probability he would not recover. The deceased said he felt very weak and requested Chaplain P_____, if he should die, to write to his mother. Chaplain P_____ stated that he thought the deceased realized how serious his condition was, basing his belief upon the deceased's condition and what the deceased said to him with reference to writing to his mother in case of his death. This witness further testified that at the time the deceased made the declaration in question he had his "Maker in mind," for Chaplain P_____ had him repeat the form of the "Act of Contrition," and other prayers, and he stated that when he left the deceased he knew full well the accused realized the seriousness of his condition

for he was saying mental prayers and calling upon God for forgiveness and mercy. Lieutenant C _____, U. S. C. M., testified that the brigade surgeon informed the deceased, in his presence, that he was in danger of death. Doctor S _____, the brigade surgeon, testified that immediately before making the declaration the deceased was gravely ill and this officer informed him that he was in danger of death though he stated that at that time the deceased had hope of recovery. Doctor S _____ stated that he could not take away his hope of life in such a critical state, and in fact the doctor himself had hope of the deceased's recovery on this date, though his condition was not good. After the deceased made the statement, and before his death, which occurred six days later, he showed signs of improvement and every encouragement was given him to aid his improvement. At the time of making the declaration the deceased was suffering pain from the wound inflicted upon him, and was very uncomfortable; he was breathing with difficulty and he was very weak.

After a careful consideration of the testimony referred to above in regard to the circumstances surrounding the making of the statement of the deceased, which was admitted in evidence as a dying declaration, the Department is of the opinion that it was not shown that the deceased had given up all hope of life at the time of making the statement, which, as we have seen, is necessary to be proved by satisfactory evidence before such a statement can legally be admitted in evidence. To take the testimony of each witness [P. 11] we find that Major N _____ testified that Doctor S _____ told the deceased his recovery was doubtful but he was not informed that he could not recover and was surely going to die. This witness further stated that the deceased did not show by his manner or indicate in any way before him that he realized that he was going to die. There is nothing, therefore, in the testimony of this witness to lead to the conclusion that the deceased had given up all hope of life.

Chaplain P _____ testified that he informed the deceased "as delicately as possible," that his condition was quite serious and that in all probability he could not recover. Here again it would seem that all hope of recovery was not taken from the deceased by Chaplain P _____'s statements, and furthermore this officer apparently did not tell the deceased in so many words that he might not recover, as he testified before the commission that he "informed the deceased as delicately as possible." The deceased's own statements to the chaplain would indicate that he had not given up hope of life because he told the chaplain that he felt very weak and that if he should die would the chaplain please write his mother. The contingency which the deceased himself expressed by the use of these words seems conclusively to show that he had hope of recovery. From the testimony of this witness it appears that the deceased devoutly repeated prayers after the chaplain, but it seems that the desire to perform these acts did not spring spontaneously from the deceased, but were prompted by the chaplain, and in this connection it might be remarked that even though the deceased had not given up all hope of life, if he felt that he were in danger of death, it would seem that nothing would be more natural than that he should desire to pray.

Lieutenant C _____ testified only that he witnessed the signing of the declaration and heard the brigade surgeon inform the deceased that he was in danger of death.

Doctor S _____, the remaining witness as to the declaration of the deceased, stated that he informed the deceased that he was in danger of death. He stated, however, that at the time, the deceased had hope of recovery and he could not take away his hope of life at such a critical stage. Doctor S _____ stated that he himself had hope of the deceased's recovery at this time. Furthermore, according to Doctor S _____, the deceased showed signs of improvement between the time of making the declaration and his death, and his death did not occur until six days after the making of this declaration. The testimony of this witness, therefore, does not indicate that the deceased had given up all hope of recovery at the time of making the declaration; in fact this witness specifically stated that the deceased had hope of recovery.

From a consideration of the foregoing taken as a whole it would seem to the department that it would be fair to state that the deceased at the time of making the dying declaration in question knew that he was in danger of death but it is not believed that the circumstances under which this declaration was made justify the [P. 12] conclusion that the maker was at the time under an "impression of almost immediate dissolution." It would follow

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therefore that, in the light of the authoritative decisions hereinbefore discussed, and which appear to represent the law in the matter, the declaration of the deceased was not legally admissible into evidence. The court therefore erred in accepting this declaration in evidence and it accordingly becomes necessary to determine whether such error was a fatal one or, in other words, whether the interests of the accused were prejudiced by the erroneous admission of the declaration of the deceased into evidence to such an extent as to necessitate the setting aside of the court's proceedings, and consequently of the findings and sentence.

From an examination of the record it appears that the only evidence before the court, other than the declaration of the deceased, descriptive of the acts resulting in his death was the testimony of the accused, and certain admissions on the part of the accused which were given in testimony by the persons who heard them. These admissions consisted of statements by the accused to the effect that she had stabbed the deceased because he had entered her house without permission and struck and abused her.

Bearing in mind the résumé of the evidence presented in this case which has previously been given in this opinion, it is believed that it can be fairly summarized by the statement that the record, with the declaration of the deceased excluded, presents a case of homicide which could unquestionably be characterized as voluntary manslaughter unless the circumstances under which the homicide took place can be held to constitute a case of self-defense. The description of the circumstances as contained in the record, with the declaration of the deceased excluded, must be characterized as setting forth at least a colorable case of self-defense. The extent to which the declaration of the deceased influenced the court in rejecting the plea of self-defense made on behalf of the accused is of course unknown to the department. It is apparent that the court in failing to convict the accused of murder as charged placed itself on record as not accepting at its full face value the declaration of the deceased. However, it does not follow from this that it gave such declaration no weight at all, and it would not appear unreasonable to believe that this declaration influenced the court to some extent at least in rejecting the theory of self-defense. Accordingly, the department is unable to state it as its opinion that the erroneous admission into evidence of the declaration of the deceased did not seriously prejudice the interests of the accused and must therefore reach the conclusion that such error was a fatal one and necessitates setting aside the proceedings and consequently the findings and sentence of the military commission in this case (File 16870–47: 896, J. A. G., Aug. 15, 1923).

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[P. 7] CHARGES AND SPECIFICATIONS: SPECIFICATIONS MUST SUPPORT CHARGE.

In a recent trial a specification of the charge "Scandalous conduct tending to the destruction of good morals" read as follows:

> "In that B_____, chief pharmacist's mate, U. S. Navy, serving on board the U. S. S. *Denebola* at Constantinople, Turkey, having, as duly elected caterer of the chief petty officer's mess on board said ship, been entrusted with the sum of four hundred dollars and twenty-one cents ($400.21), for the safekeeping and disbursement of which sum, he, the said B_____ chief pharmacist's mate, U. S. Navy, was responsible, did, on April 20, 1923, fail to render any accounting for the said sum of four hundred dollars and twenty-one cents ($400.21), which it was his duty to do, and further that the said B_____, chief pharmacist's mate, U. S. Navy, did neglect and fail and has ever since neglected and failed to pay or otherwise properly account to the said mess for the said sum of four hundred dollars and twenty-one cents ($400.21)."

The offense alleged in the foregoing specification constitutes nothing more than neglect of duty and is not properly chargeable under "Scandalous conduct tending to the destruction of good morals." The specification, therefore, does not support the charge and the proceedings and finding of the Court on this specification were set aside (26262–10431, J. A. G. Oct. 12, 1923; G. C. M. Rec. No. 57859).

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[P. 8] CONFESSION: IMPROPERLY INTRODUCED.

A witness for the prosecution in a recent trial testified that the accused had voluntarily made a written statement confessing that he broke into the ship's store. This witness did not produce the written statement or identify one in support of his testimony. After this witness withdrew the judge advocate, without taking the stand as a witness, offered in evidence a written statement which he stated was signed by the accused. The accused (counsel) objected to this document being allowed in evidence on the ground that the accused made the statement as the result of a promise to receive light punishment, and that the accused wished to take the stand to repudiate the alleged confession. The court did not sustain the objection and the document was received in evidence.

The alleged confession was not properly introduced into evidence as it was not identified by a witness on the stand or shown that the person in possession of the document properly had it in his possession. (See sec. 187, Naval Courts and Boards, 1917, and sec. 385, Naval Courts and Boards, 1923.)

When the question of the admissibility of a confession arises the defense as well as the prosecution should be permitted to introduce evidence to show that the confession was not voluntarily made by the accused (sec. 120, Naval Courts and Board, 1917; see also sec. 352, Naval Courts and Board, 1923). If the court, after a consideration of the evidence submitted by the prosecution and defense relative to the circumstances surrounding the making of a confession, is convinced beyond a reasonable doubt that it was voluntarily made, it can then admit such evidence. However, it cannot properly accept testimony offered by the prosecution showing a confession to be a voluntary one without giving the defense an opportunity to show contra. It is apparent, therefore, that the court's action in refusing to permit the accused to offer evidence showing the alleged confession to be involuntary was a fatal irregularity (26262–10507, J. A. G., Oct. 8, 1923; G. C. M. Rec. No. 58085).

FRAUD: SPECIFICATION NOT SUPPORTING CHARGE OF.

The specifications under which an accused was tried read as follows:

I. "In that B_____, ship's cook first class, U. S. Navy, serving on board the U. S. S. *Tracy*, at Cavite, P. I., detailed as, and acting as commissary steward of the U. S. S. *Tracy*, did, during the period from November 1, 1922, and November 10, 1922, procedure and receive into his charge, possession, custody, and control, in the execution and under color of his office as aforesaid, from Armour and Company, Manila, P. I., three cases or thereabout of fresh butter of the total value of ninety-three dollars and sixty cents ($93.60) or thereabouts, furnished and intended for use of and to be charged to the naval service of the United States, to wit, for [P. 9] issue to and consumption by the general mess on board the said ship *Tracy*, but he the said B_____, ship's cook first class, U. S. Navy, wilfully, corruptly, and with intent to defraud did neglect and fail to deliver same on board said ship, and did unlawfully convert and appropriate the said butter to his own use.

II. "In that B_____, ship's cook first class, U. S. Navy, serving on board the U. S. S. *Tracy*, at Cavite, P. I., detailed as, and acting as commissary steward of the U. S. S. *Tracy*, did, during the period from November 1, 1922, and November 10, 1922, procure and receive into his charge, possession, custody, and control, in the execution and under color of his office as aforesaid, from the Pacific Commerical Company, Manila, P. I., six cases or thereabouts of fresh butter of the total value of two hundred and seven dollars ($207) or thereabouts, furnished and intended for the use of and to be charged to the naval service of the United States, to wit, for issue to and consumption by the general mess on board the said ship *Tracy*, but he, the said B_____, ship's cook first class, U. S. Navy, willfully, corruptly, and with intent to defraud, did neglect and fail to deliver same on board said ship, and did unlawfully convert and appropriate the said butter to his own use."

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In the opinion of the Department the above specifications do not support a charge of fraud. According to their wording the accused received into his "charge, possession, and custody, in the execution and under the color of his office," property for the use of and to be charged to the naval service of the United States and converted this property to his own use. These are the elements of an offense which go to make up embezzlement and not fraud. In order to allege fraud a specification must show that the accused had (1) made a false representation of some existing or past fact to the person concerned with intent to defraud; (2) that the accused knew such representation to be false; (3) that the person concerned had believed, and relied upon such representation; and (4) that said person concerned had actually been defrauded by, and parted with something of value in consequence of such false representation (C. M. O. 6, 1922, 12; C. M. O. 1, 1923, 9). In this case the specifications fail to show that any false representations had been made to an agent of the companies from whom the property in question was obtained which resulted in the companies being defrauded, or to include any of the other essentials of fraud set out above (26262–10459, J. A. G., Oct. 2, 1923; G. C. M. Rec. No. 57970).

JUDGE ADVOCATE: STATEMENTS TO COUNT.

In reviewing the record of proceedings in a recent case it is noted that after the prosecution and defense had rested, the court announced that it desired further evidence and directed that certain [P. 10] enlisted men be called to testify. The record then shows the following quoted entry:

> "The judge advocate would like to invite the court's attention to the result of Captain C_____'s trial. Captain C_____ was tried by general court martial, among other things for the striking of native prisoners. The judge advocate did not call the two natives as witnesses. The court after the defense rested insisted that the judge advocate call those two witnesses and also call in the prison officer. The judge advocate general in writing up his decision stated that this procedure on the part of the court indicated that the court did not think that sufficient evidence had been brought by the prosecution and the result was that, although the court convicted Captain C_____, the judge advocate department threw that particular charge out. The judge advocate in this particular case has brought all the witnesses whose names were furnished him by the convening authority. The judge advocate does not know whether he can obtain any of these other witnesses or not and if he does obtain them what their testimony might be."

The judge advocate apparently referred to the case of First Lieutenant C_____, U. S. Marine Corps (Captain Policia Nacional Dominica), and his statement as to the remarks of the office of the Judge Advocate General on the record of proceedings of that case are incorrect. In the case of Lieutenant C_____, the court directed the judge advocate to call an officer as witness and over the objection of both the judge advocate and counsel for the accused allowed the witness to testify as to what he had been told by other persons. This testimony was hearsay and should not have been admitted. Inasmuch as this evidence was material to the issue and was highly prejudicial to the rights of the accused, this office recommended that the proceedings and findings on the related charge be set aside.

As pointed out in section 452, Naval Courts and Boards, 1923, a court may, under certain circumstances, direct the procurement of additional evidence. There is nothing in the remarks of the Judge Advocate General in the case of Lieutenant C_____ contrary to this, and the action of the judge advocate in the case now under consideration in giving the court incorrect information as to the action of this office on a prior case was improper. As pointed out in section 640, Naval Courts and Boards, the judge advocate is the legal adviser of the court and should at all times "exercise great care in regard to the authenticity of any statement he may make to the court" (26262–10568, J. A. G., Oct. 1, 1923; G. C. M. Rec. No. 58278).

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JURISDICTION: PLEA TO, MAY BE INTRODUCED AT ANY TIME.

In a recent case after the prosecution and defense had both closed and the judge advocate had made his opening argument the record shows the following entry:

> "Counsel for the accused: May it please the court, I should like to ask the court to advise the counsel, if I am again prohibited [P. 11] from dwelling upon the subject of jurisdiction, in view of section 646.
>
> The judge advocate: May it please the court, regardless of section 646, or any other section relating to jurisdiction, there has been no evidence offered in this court that the court will not have jurisdiction over this case, and I therefore submit that any section upon the point of jurisdiction is out of place. The time to enter a plea in bar and plea to the jurisdiction of the court to have been made prior to the plea to the general issue (sic).
>
> Counsel for the accused: May it please the court the portion (sic) of the expiration of the enlistment which terminates the contract and the subsequent delivery is a question in my mind which raises the question of jurisdiction. If a man makes a contract between two dates and is subsequently delivered it is a question if he is then a member of the Navy. There is no law that authorizes the Navy to hold anybody after the expiration of his enlistment. Therefore it is a question of jurisdiction, to my mind, and the first sentence of that section states (counsel read the first sentence of section 646, Naval Courts and Boards). The entire evidence is a matter of jurisdiction, to my mind.
>
> The judge advocate: May it please the court, I submit there has been no evidence offered as to jurisdiction. As a matter of fact, a sweeping statement such as the counsel made to this court, whether intentionally made to mislead or due to ignorance of the law, is more or less immaterial. It does mislead. I defy the counsel to show any authority for any such statement that the court has no jurisdiction over a case after the enlistment had expired.
>
> The court was cleared. The court was opened. All parties to the trial entered, and the court announced that the counsel for the accused cannot raise the question of jurisdiction of this court during his argument, as there has been no evidence presented to show any way that the court is lacking jurisdiction, and therefore the counsel is directed to confine his argument to the material facts brought forth by the evidence."

From the above, it appears that counsel for the accused, in his argument, attempted to attack the jurisdiction of the court but, upon objection by the judge advocate, was instructed by the court, in effect, that such an attempt was out of order and to confine his remarks to the material facts brought out by the evidence. In the opinion of this office, the action of the judge advocate and the court in this matter was decidely improper and in violation of the instructions laid down in Naval Courts and Boards. In this connection Section 646, Naval Courts and Boards, states that a plea to the jurisdiction of the court should regularly be made prior to pleading the general issue, but as lack of jurisdiction is a fatal defect, the plea may be made at any time. As pointed out later in the same section, even a waiver of objection by the accused will not avail to confer jurisdiction on a court not otherwise so possessed. Since the question of jurisdiction is one on which is determined the [P. 12] legality of the court's right to act in any case, the court should immediately after having such a question raised, carefully consider any plea so presented and before proceeding further with the trial determine whether or not jurisdiction is lacking (sec 641, Naval Courts and Boards).

The statement of counsel for the accused that "there is no law that authorizes the Navy to hold anybody after the expiration of enlistment" is incorrect. Article 62 of the Articles for the Government of the Navy, provides that—

> "No person shall be tried by court martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States or by reason of some other manifest impediment shall not have been amenable to justice within that period,

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in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was enlisted in the service."

Section 559, Naval Courts and Boards, states that—

"The mere expiration of the period of enlistment of an enlisted man, without the concurrence of any other circumstance whatsoever, does not operate to dissolve his status and does not of itself relieve him of liability to military law for offense committed during the period of enlistment."

The contention, therefore, of counsel that because the accused was not delivered to the naval authorities until after the date on which his three-year enlistment would ordinarily have expired, he had ceased to be a member of the naval service and hence was not amenable to trial by naval general court martial is fallacious. (See also in this connection *Ex parte Clark* 271, Fed. Rep. 533; *In re Cadwalloder*, 127 Fed. Rep. 881.)

It is therefore the opinion of the department that there is no doubt as to the jurisdiction of the court in this case and it is not believed that the court's error of procedure was fatal to the proceedings.

In the course of his remarks in objecting to the plea of counsel for the accused the judge advocate, as shown by the record, stated that "As a matter of fact, a sweeping statement such as the counsel made to this court, whether intentionally made to mislead or due to ignorance of law, is more or less immaterial." Athough as pointed out above the position taken by counsel was not well founded, there appears to be nothing to indicate that counsel deliberately attempted to mislead the court, and the remarks of the judge advocate intimating that counsel was guilty of such irregularities was, in the opinion of the department, unwarranted. (See sec. 591 N. C. & B.) The judge advocate is the legal adviser of the court, and the accused and his counsel have a right to his opinion in or out of court on any question arising out of the proceedings. (sec. 640, N. C. & B; 26251–30958, J. A. G., Oct. 4, 1923; G. C. M. Rec. No. 58310).

[P. 13] SERVICE RECORDS: AS EVIDENCE.

An accused was tried by general court martial under two charges, charge I "Breaking arrest" and charge II "Desertion." The accused plead not guilty and was convicted of "Breaking arrest" and "Absence from station and duty without leave."

The only evidence presented by the prosecution was the following quoted entries from the service record of the accused:

P. 4. "Hq. Co., 2nd Bn., 5th Regt., M. B., Quantico, Va.
Deserted
May 28, 1923. Pvt.

(Signed) P_____ B_____ W_____
2nd Lt., U. S. M. C.

PP. 10–11.

While serving with Hdq. 2nd Battalion, 5th Regt., at M. B., Quantico, Va., from Feb. 12, 1923, to May 28, 1923. Confined in Post Prison, Marine Barracks, Quantico, Va., awaiting trial by general court martial _____. Escaped from sentry in charge of a working detail of prisoners at the hospital, Marine Barracks, Quantico, Va., at about 3 p. m., May 28, 1923. Uniforms and equipment turned into Regimental Quartermaster. Made no secret preparations as far as is known. Not known as to whether plain clothes were secured. Made No declarations. Had no desire to quit the service, except to avoid punishment. Not known as to whether or not passage had been taken to any distant point. Left no effects of any value. $50 reward offered for apprehension, arrest, and delivery at any marine barracks or Marine Corps recruiting station on or before July 27, 1927.

S. R. forwarded June 2, 1923."

From the above it will be noted that page 4 of the service records book contained the entry as to desertion and this entry was authenticated by the signature of the commanding officer. This entry together with the admission of the accused

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that he surrendered himself at the marine barracks, Navy Yard, Boston, Mass., July 27, 1923, made out a prima facie case of absence without leave and in view of lack of rebutting evidence by the defense the court was justified in its findings under charge II (Naval Courts and Boards, sec. 392).

It will be further noted that the extract purporting to be an entry on pages 10 and 11 of the service record does not show its authentication by the signature of the commanding officer.

Naval Courts and Boards, section 386, states that—

> "Every document must be authenticated, that is to say, its genuineness must be shown. This may be proved like any other fact—by calling a witness who saw it executed, or to testify as to handwriting. It may also be done under the exception of the hearsay rule for official statements (55), as where a notary's certificate of an absent party's acknowledgment is used, or where an official copy by the custodian is used. In all such cases of the use of official documents proof of genuineness is facilitated [P. 14] by the presumption of genuineness which attached to an official seal or signature, with recital of the official title of the person signing."

Naval Courts and Boards, section 392, in referring to the use of documentary evidence in connection with proof of desertion, states:

> "* * * While admissible, if properly authenticated by the signature of the commanding officer of the accused." * * *

It is the opinion of the department that, in order to be admissible as evidence before a general court martial, it is equally as necessary that service record book entries be authenticated by the signature of the commanding officer in the case of "Breaking arrest" as in the case of "Desertion" covered by the above-quoted extract from Naval Courts and Boards. Inasmuch, therefore, as the above-quoted unsigned entry in the record book was the only evidence introduced by the prosecution relating to charge I, "Breaking arrest," court's finding under this charge was set aside (26251–30972, J. A. G., Sept. 27, 1923; G. C. M. Rec. No. 58187).

DEATH GRATUITY: PAYMENT OF, UNDER ACT OF JUNE 4, 1920.

Held: That where an individual in the naval service, in the absence of a widow or child, has previously designated a dependent relative as his beneficiary, it becomes the duty of the Paymaster General under the terms of this act to immediately pay the amount of the death gratuity to said dependent relative upon receipt of official notification of the death from wounds or disease not the result of his or her own misconduct.

That in the absence of any provision in the statute relative to the date when the designation of a dependent relative shall be made, this office is also of the opinion that the determination of the exact date of the designation thereof is immaterial, provided, of course, it is shown that the designation of the dependent relative was actually made by the deceased.

That the payment of the six months gratuity may be made by the Paymaster General to the widow or child or children without their having been previously designated by the deceased, and in their absence to a dependent relative previously designated by him regardless of whether or not said relative was designated by the deceased prior or subsequent to June 4, 1920, provided, of course, it is shown that the designation was actually made by him.

[P. 15] That in deciding the question of dependency, the fact that the officer or man designates an individual as a dependent relative, should be given great weight as no one is better informed concerning the dependency of the relative than the person making the designation. The further fact that the law provides in clear and unambiguous terms that the payment of this gratuity shall be made "immediately upon official notification of the death from wounds or disease not the result of his or her own misconduct" of an officer, enlisted man, or nurse in the naval service, shows that Congress intended this relief to be rendered as expeditiously as possible and is an additional reason for accepting the designation made by the officer or enlisted man as final. In the case of a widow or child or children, said gratuity shall be paid immediately by the Paymaster General irrespective of their age or dependency.

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That the question of whether or not the death of the officer or man was due to his own misconduct is a matter to be determined by the Secretary of the Navy, but that in the absence of fraud all other questions determined by the Paymaster General in making the payments should be held as final and conclusive where made in accordance with the explicit terms of the statute (File 26543–360, J. A. G., Oct. 18, 1923).

NAVAL RESERVE FORCE: CONFIRMED COMMISSIONS OF OFFICERS TRANSFERRED FROM THE CLASS IN WHICH CONFIRMED.

Held: That where an officer of the Naval Reserve Force, confirmed in one class thereof, is qualified for transfer to another class in his confirmed rank or rating, he may be transferred upon his own application or with his consent, and a new confirmation in the class to which transferred is not required (File 26254–2593: 454, J. A. G., Oct. 30, 1923).

NAVAL RESERVE FORCE: DATE OF CONFIRMED PROMOTION OF OFFICERS.

Held: Where officers of the Naval Reserve Force are promoted to the next higher grade, up to and including the grade of lieutenant commander with their running mates, their commissions should be dated from the date of the running mate's promotion in the Navy, regardless of whether or not they passed the required professional and physical examination prior to that date; provided they have had the prescribed amount of sea service, and that they subsequently pass the prescribed examinations (File 11130–87: 1, J. A. G., Oct. 18, 1923).

SENTENCES OF SUMMARY COURTS MARTIAL.

Section 953, Naval Courts and Boards, 1923, note 74, states that in no case shall the loss of pay per month adjudged by a summary court martial exceed such an amount as will leave sufficient pay remaining to cover the premium of war-risk insurance plus the sum of five dollars per month. In other words there must remain sufficient [P. 16] pay after checkage is made to pay the insurance premium of the accused, and allow him to draw the further sum of five dollars per month for necessary expenses.

It has been noted that in some summary courts martial cases the loss of pay adjudged has been such as will not leave sufficient pay for the purposes set forth above, thus necessitating further appropriate mitigation by the Secretary of the Navy upon final review of these cases. It is therefore directed that convening authorities carefully check sentences involving loss of pay, so that the sentences as approved will not exceed the limit given above. Where the sentences exceed this limit the excesses should be remitted.

Change in Navy Regulations Number 5, which was issued to the service in September 1923, removes from article 1877 all provision for the conditional remission of sentences involving loss of pay. This change is effective upon the date of receipt, and subsequent to the receipt thereof, there is no authority for convening or reviewing authorities to make a remission of a fine imposed by sentence of court martial, conditional upon that article. Action by a convening or reviewing authority remitting loss of pay subject to article 1877, Navy Regulations, taken prior to the receipt of the change in that article, is valid, and refund upon discharge should be made accordingly.

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[P. 6] BUREAU MANUALS: COURT SHOULD TAKE JUDICIAL NOTICE OF.

An officer was recently tried and acquitted on the following charge and specification.

Charge.—Neglect of duty.

Specification.—In that O_____ W. G_____, now a lieutenant (junior grade), U. S. Navy, while so serving on board the U. S. S. *W*_____ as engineering

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officer of said vessel, did, on or about June 30, 1923, on board said ship, neglect and fail to carry out the test required by the Manual of Engineering Instructions, chapter IV, section I, 4–1 (o), to wit: "Open the throttle slowly and run the blower slowly under no load for several minutes. If all conditions are normal, open the throttle wide and then cut-in the hand nozzles marked 'high pressure' one at a time until the emergency governor valve trips or until the throttling governor takes hold, which is 10 percent above the normal speed stamped on name plate and at the same time check the revolutions with a tachometer. If the emergency governor or the throttling governor does not function, the blower shall not be used, except in emergency, until the trouble is rectified." when starting the steam turbine-driven forced draft blower No. 3 as it was his duty to do.

ACTION OF CONVENING AUTHORITY

The proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant, (Junior Grade), O_____ W. G_____, U. S. Navy, are disapproved.

The court failed to develop in the proceedings the responsibility of the accused for testing blower No. 3 before the *W*_____ got under way. The court also failed to develop the possibility of testing this blower while the *W*_____was under way by shutting off the fires in the boiler room in which blower was located, and using steam from the other boiler rooms.

Findings of the court were based apparently on the probability of danger of testing the blower when the vessel was under way or more properly when the boiler room in which the blower was located was under steam. Other means of carrying out engineering instructions, comprising even stopping, anchoring, and shutting off all fires were not considered by the court.

The commanding officer of the *W*_____ testified; that accused was instructed to carry out strictly all regulations and precautions in engineering department; that the accused reported the engineering department as ready to get under way, which could only mean, when no reservations are made, that these regulations and instructions had been carried out; and that the accused was the officer responsible for carrying [P. 7] out these requirements. R_____, chief water tender, testified that No. 3 blower was only tested once, and this when under way with blowers 1 and 2 in operation. He also testified that there was no emergency requiring the rapid cutting in of No. 3 forced draft blower, and his testimony was likewise not impeached or refuted.

In regard to the comment and discussion of the applicability of instructions in Manual of Engineering Instructions the court was apparently influenced to regard them as incorrect or inapplicable. When official instructions are issued by proper authorities and errors or discrepancies are found in them it is the duty of all officers to call official attention to the fact, otherwise an officer who disregards such instructions does so solely on his own responsibility.

Lieutenant (Junior Grade) O _____ W. G _____, U. S. Navy, will be released from arrest and restored to duty.

The record was forwarded with the following endorsement from the Chief of the Bureau of Navigation to the Chief of the Bureau of Engineering for comment:

> "1. The accompanying record is forwarded for comment, particularly page 10, reading as follows: 'All parties to the trial entered and the court announced that it had taken judicial notice of chapter 25, U. S. Navy Regulations, 1920, but formed the opinion that it does not consider the Manual of Engineering Instructions a matter of which judicial notice can properly be taken.'
>
> "2. Prompt return of record to this Bureau requested."

COMMENT OF THE CHIEF OF BUREAU OF ENGINEERING

"1. Returned.

"2. The Bureau of Engineering understands 'judicial notice' to be a mere technicality affecting the Bureau's Manual of Engineering Instructions as a whole and which in no way operates to prevent specific provisions of the Manual being introduced into the proceedings of a court or board.

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"3. It is not the intent of the Bureau that its Manual should have the stern inflexibility of the Navy Regulations, but rather that it should in general be regarded as a means of setting forth 'best engineering practice.' However, there are certain provisions of the Manual which are for the specific purpose of safeguarding life and to a lesser degree material. It is of paramount importance that instructions of this nature be faithfully followed.

"4. The Bureau is of the opinion that the acquittal of the accused was brought about by the court being led to misconstrue the requirements of certain paragraphs contained in chapter 4, Manual of Engineering Instructions, relative to starting and testing of blowers. It is unfortunately [P. 8] a fact that these paragraphs are somewhat loosely worded, but the spirit of the contained instructions is perfectly apparent and was absolutely disregarded.

"5. In this particular case, it was well-known before the W ------ got under way that the high speed to be made would require the use of all blowers. Therefore, if the contention of the accused were correct that the provisions of the Manual regarding starting and testing blowers were impracticable to carry out after getting under way, it would seem that the logical procedure to follow would have been to make the required tests before getting under way. Had this been done the Bureau is of the opinion that the defect in the governing mechanism of the blower would have been found and the accident thereby avoided.

"6. Furthermore, it is brought out in the testimony of R ------, C. W. T. who was charged with the duty of starting blowers, that not only had he never been given instructions concerning the provisions of chapter 4, Manual of Engineering Instructions, but that he did not even know of the existence of these instructions and that they in consequence habitually were not carried out.

"7. The Bureau will immediately proceed to revise Chapter 4 of its Manual in order that the requirements will be made more definite and positive.

"8. It is recommended that the substance of this endorsement be published to the service in conjunction with this general court-martial case so that the Department's views will be brought forcibly to the attention of those who either deliberately or unthinkingly disregard provisions of the Manual of Engineering Instructions which are designed for the protection of life and property."

ACTION OF CHIEF OF BUREAU OF NAVIGATION

"1. Forwarded recommending disapproval of the proceedings, findings, and acquittal in the foregoing case of Lieut. (j. g.) O ------ W. G ------, U. S. Navy.

"2. This Bureau concurs with the remarks of the Convening Authority and recommends that they be published to the service in conjunction with the pertinent comments of the Bureau of Engineering as expressed in second endorsement hereon."

ACTION OF SECRETARY OF THE NAVY

"In reviewing the record of proceedings in the foregoing case, it is noted that the court failed to take judicial notice of the Bureau of Engineering Manual of Engineering Instructions. The Department deems it an error on the part of the court not to have taken judicial notice of the Manual of the Bureau of Engineering, in view of paragraph 74, U. S. Navy Regulations, 1920, sections 3 and 530 [P. 9], Naval Courts and Boards, and of General Order No. 105, dated May 3, 1923. The manuals issued by the Bureaus of the Navy Department, have full force and effect for the government of persons in the Naval establishment.

Subject to the foregoing remarks, and the remarks of the Chief of the Bureau of Engineering contained in the second endorsement hereon, the Department concurs in the action of the convening authority in disapproving the proceedings, findings, and acquittal in this case" (File 26262–10590, J. A. G., Nov. 26, 1923; G. C. M. Rec. No. 58333).

CHALLENGE: ERROR NOT TO SUSTAIN ON SUFFICIENT GROUNDS.

A member of a court was objected to by an accused on the ground that as executive officer of the ship he had been active in the preferment of the charges against the accused. The member replied, that although he had, as executive

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officer, taken part in the preliminary investigation of the case, he did not believe that the opinion he had formed was so positive as to influence his opinion based on evidence brought before the court. The challenge was not sustained. The fact that the member challenged had taken part in the preliminary investigation of the case, and according to his own statement had formed an opinion, was, in the opinion of the Department, sufficient to disqualify him (File 26262–10594, J. A. G., Oct. 26, 1923; G. C. M. Rec. No. 58366).

CHARGE: UNAUTHORIZED.

The use of the charge "Knowingly and willfuly applying to his own use the property of another person in the naval service," is not authorized by the Articles for the Government of the Navy, or any of the provisions of Naval Courts and Boards (File 26262–10594 J. A. G., Oct. 26, 1923; G. C. M. Rec. No. 58366).

SPECIFICATION: DOES NOT SUPPORT CHARGE.

An accused was convicted of "Scandalous conduct tending to the destruction of good morals," the specification being as follows:

> "In that L_____ D. A_____, then a sergeant, now a private, U. S. Marine Corps, having been charged from April 1 to September 30, 1922, while serving as Post Exchange Steward at the U. S. Marine Barracks, Naval Operating Base, Pearl Harbor, T. H., under Captain J_____ E. B_____, U. S. Marine Corps, Post Exchange Officer at the said Barracks, with the keeping and accounting for post exchange goods of the value of about one thousand seventy-nine dollars and fifty cents ($1,079.50), did fail to enter invoices for same in steward's [P. 10] daily reports, cashbook journal and petty ledger, as it was his duty to do, and did thereby unlawfully cover a shortage of about one thousand sixty-six dollars and eighty-six cents ($1,066.86) due the said Post Exchange."

This specification alleges nothing more than neglect of duty and is not, therefore, properly chargeable under "Scandalous conduct tending to the destruction of good morals." The specification does not allege that the accused deliberately and willfully failed to enter the invoices in question for the purpose of covering the alleged shortage. It alleges that the accused failed to enter these invoices in the proper books and that this failure on his part resulted in a shortage being covered. Insofar as the statement of the alleged offense is concerned it is covered by the words "did fail to enter invoices for same in steward's daily reports, cashbook journal and petty ledger, as it was his duty to do" which allegations set out neglect of duty. As specification does not support the charge, the proceedings and finding on this charge and specification were set aside (File 26262–10392 J. A. G., Oct. 18, 1923; G. C. M. Rec. No. 57760).

UNCORROBORATED EXTRAJUDICIAL ADMISSIONS AND CONFESSIONS: VALUE OF AS EVIDENCE.

An accused was convicted of "Wrongfully and knowingly disposing of property of the United States intended for the naval service thereof," the specification alleging that he disposed of certain articles of uniform clothing to a civilian.

To prove the specification the prosecution called to the stand the quartermaster sergeant of the marine barracks, who testified that on August 15, 1923, he issued a complete outfit of clothing, including the articles mentioned in the specification, to the accused. Through the instrumentality of other witnesses, the prosecution then introduced certain alleged extrajudicial statements of the accused in which he confessed that he committed the irregularities mentioned in the above-quoted specification. This evidence comprised the prosecution's case under the charge, and no evidence was introduced by the defense. As pointed out in C. M. O. 4, 1922, 8, it is a well-settled principle of the law of evidence that the uncorroborated extrajudicial admissions and confessions of a defendant will not sustain conviction. (See also Winthrop's Military Law

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and Precedent, page 495; *U. S.* v. *Boese*, 46 Fed. 917; *U. S.* v. *Martin*, 264 Fed. 950; Greenleaf, par. 217; C. M. O. 12, 1921, 7; C. M. O. 2, 1921, 18; Naval Courts and Boards, sec. 354.) The conviction on this charge was therefore set aside (File 26251–31172, J. A. G., Nov. 16, 1923; G. C. M. Rec. No. 58538).

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[P. 6] ACCUSED: NOT PROPERLY DEFENDED.

The specification under the charge "Conduct to the prejudice of good order and discipline" alleged that the accused created a disturbance on board ship and conducted himself in such a disorderly manner that it was necessary to [P. 7] hold him down and gag him and to administer apomorphine. This specification did not set forth the facts and circumstances constituting the alleged offense with the required certainty and precision, but merely stated a conclusion of fact (C. M. O. 10, 1921, 9). The record shows, however, that the accused had no objection to make to this specification. The defect, therefore, being in matter of form only may be deemed to have been waived. The only evidence presented before the court in support of this specification was that given by the counsel for the accused who was called as a witness for the prosecution by the judge advocate. The evidence consisted of the following two leading questions asked by the judge advocate and answers thereto by the counsel as a witness which amount to nothing more than the judge advocate telling the witness what to say concerning the same conclusion of fact contained in the specification:

"Q. Did or did not the accused create a disturbance on board the *Quiros* on the night of April 8, 1923?

"A. He did.

"Q. Did or did not the accused conduct himself in such a disorderly manner on board that it was necessary to hold him down, gag him, and, for the medical officer then attached to the ship, to administer apomorphine?

"A. It was."

The counsel's answers do not explain the acts of the accused which caused the disturbance. His testimony merely amounted to a conclusion of fact which it was for the court to draw after listening to evidence describing the specific acts which constituted the alleged disorderly conduct. No such evidence was presented for the court's consideration. Consequently this specification was not proved, inasmuch as the court had no facts before it upon which to base its findings. It is the opinion of the department that the counsel for the accused, in view of his status as the only prosecuting witness was precluded from properly safeguarding the rights of the accused. The accused, presumably on advice of counsel, plead not guilty and then was confronted with the anomaly of having his own counsel take the stand and give the only evidence that would show his guilt. Furthermore the questions above quoted being highly leading and incompetent should have been objected to, but inasmuch as the accused's counsel was himself the witness under examination, there was no one to make such objection and otherwise protect the interests of the accused. Counsel for the accused should, under the circumstances, have advised the procurement of other counsel. The findings on this charge were set aside (File 26262–10450, J. A. G., Dec. 12, 1923; G. C. M. Rec. No. 57924).

[P. 8] EMBEZZLEMENT: FUNDS NOT THE PROPERTY OF THE U. S. GOVERNMENT.

An accused was convicted of embezzlement, the specification alleging the embezzlement and conversion to his own use of certain sums of money belonging to the Bachelor Operators' Mess at the Naval Station, Cavite.

Held: Embezzlement being a statutory and not a common law offense, statutory authority is required to bring the accused to trial under this charge. The Articles for the Government of the Navy do not make embezzlement of private funds an offense of which a naval court martial may take cognizance, unless there be a local statute making it a crime, nor is there any Federal Statute on this subject applicable to the present case. In the Philippine Islands and other places where there is no local State law making embezzlement a crime the accused should be brought to trial under the charge of "Scandalous conduct

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tending to the destruction of good morals" (C. M. O. 76, 1920, 11; C. M. O. 2, 1921, 14; Naval Courts and Boards, sec. 195; File 26262–10588, J. A. G., Nov. 27, 1923; G. C. M. Rec. No. 335).

SPECIFICATIONS: MUST ALLEGE AN OFFENSE.

An accused was convicted of the following specifications:

Specification I.—"In that * * * did, on April 8, 1923, while on shore in a foreign country, conduct himself in such a manner as to foment trouble which resulted in an attack on the American Sailors' Club by a mob of Chinese citizens, and the ordering ashore of the ship's landing force for protection. And that he therein and thereby did endanger the lives and property of both American sailors and Chinese citizens."

Specification II.—"In that * * * did, on April 8, 1923, while on shore in a foreign country, conduct himself in such a manner as to foment trouble which resulted in an attack on the American Sailors' Club by a mob of Chinese citizens, and the ordering ashore of the ship's landing force for protection. And that he therein and thereby did seriously threaten the destruction of the friendly relations existing between the local Chinese and American citizens."

It is noted after considering the above specifications that no allegations are made that the accused conducted himself in a disorderly manner or that his conduct was in any way unlawful. It is therefore the opinion of the department that these specifications do not allege an offense and consequently the proceedings and findings thereon were set aside (File 26262–10450, J. A. G., Dec. 12, 1923; G. C. M. Rec. No. 57924).

[P. 9] STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

An accused plead guilty to the charge of theft. He introduced no evidence in extenuation but made a statement that he was intoxicated at the time of alleged offense, did not realize what he was doing, had no intention to steal the articles and as soon as he became sober he turned the articles over to his commanding officer who returned them to the owner.

Held: Statement inconsistent with plea of guilty. Theft is a crime in which specific intent is an essential element. A person whose mind is so overcome by reason of overindulgence in intoxicating liquor that he cannot entertain the specific intent, cannot commit the crime, theft (File 26262–10631, Nov. 20, 1923; G. C. M. Rec. No. 58605).

BOARD OF INVESTIGATION: DISCIPLINARY ACTION AS THE RESULT OF.

Where the reviewing authority recommends that a letter of an apparently disciplinary nature be attached to the official record of an officer and that officer had not appeared before the board in the status of a defendant, it was held that the record, or pertinent extracts therefrom should be referred to the officer for statement prior to taking final action on the record (File 26283–5043. J. A. G., Dec. 4, 1923).

CERTIFICATE OF DISCHARGE: CIVIL WAR SERVICE, APPLICATION FOR.

R_____ applied for a certificate of discharge and the removal of the charge of desertion now standing against him. This man enlisted in the Navy November 19, 1864, for three years; served on the U. S. S. *Vermont* and the U. S. S. *Chenango* until June 28, 1865, upon which date he was transferred to the U. S. S. *Princeton*, and the rolls of that vessel contain the entry of "Never reported."

Held: The Secretary of the Navy is not authorized to remove the charge of desertion now standing against the above-named man for the reason that he had not served a period of six months prior to May 1, 1865 (25 Stat. 442; 31 Stat. 183; File 26539–837, J. A. G., Dec. 14, 1923).

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EX-MIDSHIPMAN: ELIGIBILITY FOR ADMISSION TO ST. ELIZABETHS HOSPITAL.

C_____, ex-midshipman, tendered his resignation as midshipman January 20, 1921, while undergoing treatment at the U. S. Naval Hospital, Washington, for neurasthenia, in line of duty, not misconduct. Resignation was accepted effective [P. 10] January 31, 1921. Question presented is whether there is any provision of law whereby Ex-midshipman C_____ may be given benefits of treatment by the Government.

Held: Under the provisions of section 4843 and 4844 of the Revised Statutes, the Secretary of the Navy may direct that he be received at St. Elizabeths Hospital for care and treatment, and retained at said hospital until cured or until removed by the same authority which ordered his reception (File 9438–159, J. A. G., Dec. 18, 1923).

FLEET NAVAL RESERVE: LEGALITY OF ENROLLMENT IN.

A _____ enlisted August 3, 1917, was discharged August 25, 1919, enlisted August 26, 1919, and was honorably discharged July 20, 1921. On August 20, 1921, he enrolled in the Fleet Naval Reserve, class 1–B. The question was presented as to whether or not this man was eligible for membership in the Fleet Naval Reserve.

Held: Under the provisions of the acts of August 22, 1912 (37 Stat. 331), August 29, 1916 (39 Stat. 589), and July 11, 1919 (41 Stat. 139), A _____ is entitled to have his enlistment counted as one four-year term of enlistment for the purpose of rendering him eligible for membership in the Fleet Naval Reserve, and is therefore eligible for such membership (File 28550–1715, J. A. G., Dec. 22, 1923).

MEDAL OF HONOR: CLAIM FOR.

S _____ was commended by Rear Admiral Fletcher and was highly complimented by the Department for his conspicious courage, coolness, and skill in action at Vera Cruz, Mexico, in 1914. He was accorded the privilege of taking the examination for warrant officer on account of said service and was promoted to that grade pursuant to article 3661 (1), Navy Regulations, 1913, and section 1407 R. S.

Held: The above-named man is entitled to receive a medal of honor and a gratuity of $100, as recommended by the Bureau of Navigation (File 9644–635, J. A. G., Dec. 26, 1923).

MINOR: DISCHARGE OF, ON REQUEST OF PARENT.

F _____ enlisted June 16, 1923, alleging that he was born on May 9, 1905, which allegation was substantiated by an age certificate signed by his mother, who sanctioned the enlistment. His father subsequently submitted evidence to show that the above-named man was born on November 19, 1906, and requested that he be discharged by reason of under-age enlistment.

Held: The sanctioning of the enlistment of the above-named man constitutes a complete compliance with so much of the law that requires the consent of parents, for the enlistment of [P. 11] a minor under 18 years of age and that the Department is not required to discharge this man upon the request of his father (File 7657–1545, J. A. G., Dec. 22, 1923).

NATURALIZATION: NATIVE OF GUAM.

The record of B _____ shows that he was born December 18, 1899, at Agana, Guam, and contained the following entry: "September 19, 1919, produced satisfactory evidence of citizenship this day. Naturalization certificate No. 1188130." The question was presented as to whether or not this man was legally naturalized and a citizen of the United States, in view of C. M. O. 4, 1923, 8.

Held: The general rule contained in C. M. O. 4, 1923, 8, is applicable in all cases except where the applicant is a free white person or of African nativity or descent, but in view of the fact that a question of the eligibility of an in-

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dividual for naturalization may be determined only by a court of competent jurisdiction, it follows that the evidence that was made the basis of the entry in the service record book of the above-named man is binding upon the Navy Department (File 26252–176, J. A. G., Dec. 11, 1923).

OFFICER: PAYMENT OF BILLS INCIDENT TO THE LAST ILLNESS OR DEATH OF.

Held: There is no provision of law authorizing the reimbursement of bereaved families for expenses incurred incident to the last illness of an officer of the Navy dying in the service, but the necessary expenses for the transportation of the remains from the place of death to the place of burial will be paid under proper claim (File 26545–366, J. A. G., Dec. 18, 1923).

PAY: OFFICER HOLDING TEMPORARY COMMISSION WHO IS GIVEN PERMANENT COMMISSION IN LOWER GRADE.

R_____, while a permanent commissioned warrant officer in the Navy was commissioned a temporary lieutenant, and later, on September 21, 1920, accepted a permanent commission as ensign. He was notified by the Bureau of Navigation that his temporary appointment as lieutenant was terminated by his acceptance of commission as permanent ensign. However, his temporary commission was never revoked by the President, and the Secretary of the Navy on March 2, 1922, decided that the letter of the Bureau of Navigation was in error and that the temporary appointment as lieutenant continued in force until terminated on December 31, 1921, by operation of the act of June 4, 1920.

Held: The acceptance of a commission as permanent ensign in the Navy did not vacate the temporary appointment as lieutenant (File 29226–31: 8, Dec. 17, 1923).

[P. 12] PERSONAL EFFECTS: DISPOSITION OF IN CASE OF DEATH.

An officer's widow was appointed administratrix of his estate by the Supreme Court of the District of Columbia. His widow is also named as beneficiary but he gave his official residence as 114 Q_____ L_____, Philadelphia. His mother, who resides at 444 Q_____ L_____, received a letter from the deceased which she contemplates having probated as his will. The attorney for the widow and the attorney for the mother each claim the effects of the deceased on behalf of their respective clients.

Held: That widow having been appointed administratrix of the estate of the deceased is entitled to receive his effects, her bond being ample security for the Department (File 26250–3296: 3, J. A. G., Dec. 20, 1923).

PRIVATE PROPERTY: REIMBURSEMENT FOR LOSS OF.

Lt. (j. g.) B_____ submitted a claim for reimbursement under the act of October 6, 1917, for loss of personal property as result of the grounding of the U. S. S. *Eagle*. The Bureau of Navigation disallowed this claim on the ground that the claimant as commanding officer was found to have been responsible for the grounding of the vessel, and that his negligence was the proximate cause of the loss of his personal effects. The claim was again submitted for reimbursement under the act of December 28, 1922, the claimant averring that one of the contributory causes of the loss was neglect on the part of the Newport Station to send aid to him to salvage the Government property as well as personal property on board of the vessel.

Held: The negligence of the claimant which was the proximate cause for the loss of his personal effects defeats his claim for reimbursement under either the act of October 6, 1917, or the act of December 28, 1922 (File 26514–259: 2, Dec. 22, 1923).

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RETIREMENT OF OFFICERS OF NAVAL RESERVE FORCE: WRIT OF MANDAMUS WILL NOT LIE AGAINST SECRETARY OF THE NAVY.

A, an officer of the Naval Reserve Force was found by a board of medical survey to be under a permanent disability, incurred in line of duty and not the result of his own misconduct. The board recommended that he be sent before a retiring board. The Secretary of the Navy disapproved this and directed that he be ordered to proceed to his home and be released from active duty. He then wrote asking that he be ordered before a retiring board which was refused. He then applied for a writ of mandamus to compel the Secretary to revoke the order and to make an order sending him before the retiring board. The writ was granted and appeal was taken to the Supreme Court.

Held: Naval Regulations and Courts and Boards cannot be made a basis for a proceeding in mandamus against the Secretary [P. 13] of the Navy. A board of medical survey and retiring board are simply executive instruments which the Secretary may use to secure expert opinion as to the physical condition of an officer or man, and its recommendations must always come to him for approval. If he disapproves the application for a retiring board, the officer may appeal directly to the President (*Denby* v. *Berry*, U. S. Supreme Court, 11–12–23).

REVENUE CUTTER SERVICE: ELIGIBILITY OF FORMER MEMBER OF, FOR ADMISSION TO NAVAL HOME.

B_____ enlisted in the Revenue Cutter Service December 1, 1897, and served on board the Revenue Cutter *McCullough* until January 12, 1899. From April 4, 1898, the *McCullough* was by order of the President under the direction of the Secretary of the Navy for the purpose of cooperating with the Navy. B_____ applied for admission to the Naval Home.

Held: The service rendered by B_____ in the Revenue Cutter Service while it was cooperating with the Navy by virtue of an Executive order of the President did not change his status to that of an enlisted man in the Navy, and that such service does not render him eligible for admission to the Naval Home (File 21138–71, J. A. G., Dec. 22, 1923).

U. S. NAVAL RESERVE FORCE: RETIREMENT OF OFFICER AFTER 20 YEARS' SERVICE.

Captain W_____ USNRF–2, enlisted in the Naval Militia on September 21, 1891, and served therein until July 18, 1898, when he was commissioned in the Navy, serving under said commission until October 12, 1898, from which date he reverted to his status in the Naval Militia and continued to serve in the Naval Militia, National Naval Volunteers, and Naval Reserve Force until August 4, 1919, from which date he was relieved from active duty. He continued in the Naval Reserve Force on inactive duty from August 4, 1919, to October 11, 1923, on which date his enrollment was terminated by virtue of the fact that he had attained the age of 64 years. During his last enrollment he did not perform any active service or duty in the Naval Reserve Force.

Held: Under the provisions of the acts of August 29, 1916, (39 Stat. 588) and July 1, 1918 (40 Stat. 710) the failure of this officer to perform the necessary amount of active service or duty during his current enrollment required for maintaining his efficiency in the Naval reserve Force renders him ineligible for retirement under the provisions of said acts (File 27231–250, J. A. G., Dec. 22, 1923).

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[P. 3] BURGLARY: SPECIFICATION NOT SUPPORTING CHARGE.

An accused pleaded guilty to the charge of burglary. The specification alleging the felonious and burglarious breaking and entering of the cashier's desk in the Y. M. C. A. building.

Held: The specification does not support the charge of burglary, a necessary element of which is "breaking and entering the dwelling house of another in the nighttime." It merely alleges that the accused broke into the "cashier's desk" which clearly cannot be construed as the dwelling house of another. The proceedings and findings on this charge were set aside (File 26262–10668, J. A. G., Jan. 10, 1924; G. C. M. Rec. No. 58770).

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EXCEPTIONS AND SUBSTITUTIONS: SPECIFICATION AS FOUND PROVED MUST SUPPORT THE CHARGE OF WHICH THE ACCUSED IS FOUND GUILTY.

Charges: "Knowingly and willfully applying to his own use property of the United States intended for the naval service thereof" is not "Scandalous conduct tending to the destruction of good morals."

An accused was tried on the charge, "Stealing property of the United States intended for the naval service thereof" (revolver, holster, and belt, total value $18.32). The court after finding certain words of the specification not proved and substituting certain others instead, found the accused guilty in a less degree than charged, guilty of "Scandalous conduct tending to the destruction of good morals." The accused was sentenced to be reduced to the rating of apprentice seaman, confinement for six (6) months, bad-conduct discharge and accessories.

The specification as found proved by the court reads as follows:

> "In that ------, now a seaman first class, U. S. Navy, while so serving on board the U. S. S. ------, did, on or about August 1, 1923, on board said ship, knowingly and willfully without leave from proper authority, take and carry away from the possession of the United States, to wit: from the commanding officer's stateroom on board said ship, one automatic pistol of the value of about fourteen dollars and fifty-three cents ($14.53), one automatic pistol holster of the value of about two dollars and ten cents ($2.10), and one automatic pistol belt of the value of about one dollar and sixty-nine cents ($1.69), said revolver, holster, and belt being the property of the United States intended for the naval service thereof, and did then and there appropriate the same to his own use."

[P. 4] It appears from the evidence on record that the offense of stealing which includes as one of its essential elements the intent to permanently deprive the owner of possession was not established to the satisfaction of the court. The evidence clearly establishes that the accused knowingly and willfully applied the articles set-out in the specification to his own use and the court should have found him guilty of the lesser and included offense of "Knowingly and willfully applying to his own use property of the United States intended for the naval service thereof" (G. C. M. Record No. 56322), in view of the fact that the specification as found proved by the court alleges this offense.

However, the finding of the court that the accused is guilty of "Scandalous conduct tending to the destruction of good morals" is not supported by the specification as found proved. "Knowingly and willfully applying to his own use property of the United States intended for the naval service thereof" is not "Scandalous conduct tending to the destruction of good morals" within the meaning of paragraph I, article 8, Articles for the Government of the Navy, inasmuch as it is not conduct of a similar kind or nature as embraced within the offenses mentioned in paragraph 1, article 8 (C. M. O. 21, 1910, 10), in that it is not such conduct as offends the moral senses or brings shame and infamy upon the accused or the naval service. Accordingly it is the opinion of the Department that the specification as found proved does not support the charge as found proved, and the findings and sentence were disapproved (File 26251–31312, J. A. G., Jan. 9, 1924; G. C. M. Rec. No. 58888).

BOARD OF INQUEST: ILLEGALLY CONSTITUTED.

While the record of a board deriving its authority from an illegal convening order is not legal, if it contains sufficient matter of record, of a conclusive nature, it may be used as a basis to decide as to the line of duty and misconduct status of the deceased at the time of his death (File 26250–3338, J. A. G., Jan. 21, 1924).

[P. 5] CERTIFICATE OF DISCHARGE: APPLICATION FOR.

Held: The Secretary of the Navy is not authorized to remove the charge of desertion on the record of a Civil War deserter who had not served for a period of six months prior to the first of May 1865 (25 Stat. 442, as amended by 31 Stat. 483; File 26539–838, Dec. 15, 1923).

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CIVILIAN: ELIGIBILITY FOR RETIREMENT.

Held: There is no provision of law which confers jurisdiction upon a naval retiring board to hear and determine the case of a civilian. There is no general provision of law authorizing the placing of civilians upon the retired list of the Navy under any circumstances (File 27231–154: 26–9, Jan. 30, 1924).

CLOTHING LOST IN MARINE DISASTER: REIMBURSEMENT OF DISCHARGED ENLISTED MEN FOR.

Held: Since the articles of clothing prescribed for enlisted men in the Navy are customarily issued in kind, reimbursements in cash may not be made under the act of October 6, 1917 (40 Stat. 389), to discharged enlisted men for articles of clothing which were lost by them in marine disaster (File 25614–280, Dec. 15, 1923).

ENLISTMENT: TIME LOST DUE TO DISABILITY INCURRED PRIOR TO ENLISTMENT.

_____ enlisted in the Navy December 6, 1920, for a period of three years; during this enlistment 73 days were lost due to physical disability incurred prior to enlistment; not in line of duty, not due to his own misconduct. The question was presented as to whether or not the above-named man should be held in the service to make up the time lost.

Held: The provisions of the act of August 29, 1916, 39 Stat. 580, do not apply where the disability complained of existed prior to enlistment, and that an enlisted man who has lost time due to such disability is not required to make up the said time prior to his discharge (File 7657–1560, J. A. G., Jan. 10, 1924).

FLEET NAVAL RESERVE: PAYMENT OF RETAINER PAY IN CASE OF INSANE MEMBER.

Held: Retainer pay should be paid to the guardian having actual and legal custody of the person of the insane man and charged with his care and maintenance, for the reason that it is only in this manner that a former enlisted man may receive the benefits thereof (File 26254–2593–466, J. A. G., Jan. 10, 1924).

[P. 6] MEDICAL RECORD: REQUEST FOR CHANGE IN.

_____ was admitted to the hospital in October 1918, with a diagnosis of poison (alcohol), acute, not in line of duty and the result of his own misconduct due to an alcohol debauch occurring two days prior to his admission to the hospital. He made no statement at that time. In May 1919, his physical examination at the time of his release from active duty did not disclose any physical defects, and on the same date he certified over his own signature that he had no disability entitling him to compensation under war-risk insurance. He now alleges that the diagnosis was in error and requests that the entry in his medical record be changed to nervous break-down in line of duty not due to his own misconduct.

Held: The Department is without authority to change or alter the entry in the medical record in the absence of specific evidence that the said entry is in error (File 29372–280, Dec. 15, 1923).

MIDSHIPMEN: STATUS.

Held: Midshipmen are persons in the naval service whose status is not dissimilar to a commissioned officer undergoing training. They are not only officers of the Navy, but they serve in the Navy under their appointments as midshipmen (File 5252–137: 17, Jan. 5, 1924).

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NAVAL RESERVE FORCE: ELIGIBILITY OF MEMBERS TO CONTINUOUS SERVICE UPON REENLISTMENT IN THE REGULAR NAVY.

Held: Only enrolled members of the Fleet Naval Reserve are entitled to receive benefits of continuous service (File 28550–1735, Jan 5, 1924).

PROMOTION: ON RETIRED LIST PURSUANT TO SECTION 11 OF THE ACT OF MARCH 3, 1899.

Lieutenant _____, U. S. Navy, retired, was appointed a midshipman July 21, 1864, and served continuously in that grade until July 12, 1870, when he was appointed to the grade of ensign. He was promoted to the grade of lieutenant July 11, 1877, and retired in that grade September 15, 1897, on account of disability contracted in line of duty. He served as a midshipman during the Civil War from date of appointment on board the U. S. S. frigate _____, at Newport, R. I. He now requests promotion to the next higher grade in accordance with section 11 of the act of March 3, 1899.

Held: The Court of Claims in the case of *Jasper* v. *United States*, 43 Ct. Clms. 368, held that the words of the act of June 29, 1906, "otherwise than as a cadet" prohibited the retirement [P. 7] of an officer of the Navy in the next higher grade where the only service rendered by him during the Civil War prior to April 9, 1865, was as a midshipman. Lieutenant _____ is therefore not eligible for advancement to the rank of lieutenant commander on the retired list of the Navy (File 27231–265, J. A. G., Jan. 10, 1924).

REPEATED TRAVEL ORDERS ISSUED TO OFFICERS.

Held: Under the law the Secretary of the Navy may determine generally that repeated travel between certain designated places is appropriate and direct that actual and necessary expenses only be allowed for such travel. Orders to perform such travel may be signed by the Chief of the Bureau of Navigation but should contain a statement in each case that the Secretary of the Navy has determined that repeated travel between the points involved is appropriate and has directed that actual and necessary expenses only be allowed for such travel (File 9160–10120, J. A. G., Jan. 3, 1924).

RESERVE NURSES: ISSUING CLOTHING AND EQUIPMENT TO.

Held: Reserve nurses appointed under the provisions of the act of May 13, 1908, 35 Stat. 146, are, when on active duty, in the same status as other nurses and accordingly, reserve nurses on active duty at this time, or hereafter ordered to active duty, are entitled to receive the same outfit of clothing as regular nurses of the Navy Nurse Corps. They may not be required to return said issues or refund the value of said issue upon being discharged or relieved from active duty (File 26477–111:1; J. A. G., Jan. 15, 1924).

RETIRED OFFICER: EMPLOYMENT OF BY PRIVATE CORPORATION.

Held: Any question affecting the legality of employment of a retired officer of the Navy is one to be determined by the officer concerned upon his own responsibility, for the reason that the Government would not become interested until, or unless, the question was presented indicating that said employment had been accepted contrary to law (21 Op. Atty. Gen. 510; File 9736–135; Feb. 1, 1924).

TELEPHONE SERVICE: INSTALLATION TO INCREASE FACILITIES.

Held: If the entire expense of the installation and maintenance of the proposed system including trunk and switchboard is apportioned between the officers having telephones in their quarters and the Government according to the

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number of telephones [P. 8] used by each respectively so that the Department bears no part of the expense of telephones installed in private quarters except for long distance tolls strictly on public business, no objection is perceived to the proposed installation (Telephone Service at Dover, N. J., File 8130–8124; J. A. G., Dec. 11, 1923).

U. S. NAVAL RESERVE FORCE: RETIREMENT OF OFFICER AFTER 20 YEARS' SERVICE.

Captain ------, USNRF–2, enlisted in the Naval Militia on September 29, 1891, and served therein until July 18, 1898, when he was commissioned in the Navy, serving under said commission until October 12, 1898, from which date he reverted to his status in the Naval Militia and continued to serve in the Naval Militia, National Naval Volunteers, and Naval Reserve Force until August 4, 1919, from which date he was relieved from active duty. He continued in the Naval Reserve Force on inactive duty from August 4, 1919, to October 11, 1923, on which date his enrollment was terminated by virtue of the fact that he had attained the age of 64 years. During his last enrollment he did not perform any active service or duty in the Naval Reserve Force.

Held: Under the provisions of the acts of August 29, 1916 (39 Stat. 588), and July 1, 1918 (40 Stat. 710), the failure of this officer to perform the necessary amount of active service or duty during his current enrollment required for maintaining his efficiency in the Naval Reserve Force renders him ineligible for retirement under the provisions of said acts (File 27231–250, Dec. 22, 1923).

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[P. 3] CLEMENCY: NOT A PREROGATIVE OF COURT.

In a recent case the Convening Authority in his action remarked that—

> "In awarding a sentence the court has evidently given full consideration to the excellent record of the accused, his meritorious conduct subsequent to the stranding of the vessels of his squadron and the manly stand he took in attempting to assume the entire responsibility for this disaster."

From the above-quoted remarks of the convening authority, it appears that the convening authority has approved of an apparent exercise of clemency by the court in adjudging the sentence. Article 51 of the Articles for the Government of the Navy provides that "It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate, to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing." The Department has pointed out in numerous court-martial orders that in every case the provisions of this article must be scrupulously followed and that the exercise of clemency is a prerogative of the convening and reviewing authorities. (See Naval Courts and Boards, secs. 396, 705, 741; C. M. O. 35, 1920, 20; C. M. O. 10, 1916, 1; C. M. O. 28, 1913, 6; C. M. O. 1892, 42; File 26262–10683A, J. A. G., Dec. 12, 1923; G. C. M. Rec. No. 58791.)

COMMANDING OFFICER: RESPONSIBILITY FOR NAVIGATION WHEN CRUISING IN FORMATION.

Several officers were recently tried by general court martial convened by the Commander-in-Chief, Battle Fleet, U. S. Fleet, and acquitted of the charge, "Through negligence suffering a vessel of the Navy to be run upon rocks."

ENDORSEMENT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

The specification under which each of the accused was tried alleged in substance that the accused as commanding officer of the U. S. S. ------ neglected to take proper precautions for the safety of the vessel under his command and that as a result of such neglect the U. S. S. ------ was wrecked and became a total loss.

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In the opinion of this office, the evidence clearly establishes that the navigational information in the possession of the accused at 9 p. m. was such that a reasonably prudent navigator would not be justified in taking up the new course then followed. The accused was therefore under a substantial doubt, or at least should have entertained such a doubt, and consequently was under the positive duty of fixing his position [P. 4] accurately before undertaking the change of course that was made. There have been so many holdings of naval courts martial in accord with this view that its correctness in law is not open to doubt. As stated in article 880, U. S. Navy Regulations, "_____ he (the commanding officer) is always responsible for the safe conduct of the ship."

However, the evidence further shows that the U. S. S. _____ was in formation following the movements of the flagship of Squadron X, Destroyer Squadrons, Battle Fleet. But this further fact cannot be said legally to relieve the commanding officer of the safe navigation of the vessel under his command, in the light of the law above stated, when he knows or should know that his information places in doubt the position of the vessel under his command and likewise that of the other ships in formation with him. Paragraph 5, article 838, U. S. Navy Regulations, reads as follows:

> "If, when in fleet, squadron, or division, the commanding officer finds that the course directed is leading the ship under his command, or any other, into danger, he shall promptly give notice to the commander in chief, division commander, or other officer in direct authority over him, and to the ship endangered."

In the opinion of this office, the evidence in this case shows clearly that although the accused had grounds for believing that the position of the vessel under his command was in doubt and that the course directed by the squadron commander was leading the ship under his command, as well as the vessels in formation with the U. S. S. _____, into danger, he did not give notice of that fact to the officer in direct authority over him or to the other ships endangered, and as the result of this failure on the part of the accused, the U. S. S. _____ was wrecked as alleged and became a total loss.

The court found the accused not guilty of the charge and specification thereunder and did "fully acquit" him of the charge. Article 686, Naval Courts and Boards, states in part as follows:

> "A court should not 'fully acquit' in cases where the record shows any uncontroverted facts whatever reflecting on the accused."

For the reasons above enumerated, this office is of the opinion that the evidence adduced not only fails to warrant the action of the court in "fully" acquitting the accused, but also fails to warrant an acquittal, and it is therefore recommended that the proceedings be approved, and that the finding and acquittal be disapproved.

Referred to the Chief of the Bureau of Navigation for his information.

[P. 5] Recommendations of the Chief of the Bureau of Navigation

The Bureau is of the opinion that no deduction from the evidence herein nullifies the long-established custom and regulation of the Navy that the "commanding officer is always responsible for the safe conduct of the ship."

The accused was not in possession of adequate data to justify a reasonably prudent navigator in changing course to the eastward. He was at liberty to ask permission to sheer out and slow down for soundings, which would have shown him at once the danger of his position and would have indicated his doubts to the leader.

Any contingencies that inspired this unquestioning confidence in the leader's position, and blind adherence to "follow the leader" doctrine, do not relieve the commanding officer from the charge of negligence.

Knowing his position doubtful, the accused failed to take the initiative to obtain better information and as a result (in part at least) of this failure, his vessel was wrecked. The Bureau therefore concurs in the opinion of the Judge Advocate General that the proceedings be approved, and that the findings and acquittal be disapproved.

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ACTION OF THE SECRETARY OF THE NAVY

The remarks of the Judge Advocate General and the Chief of the Bureau of Navigation and the recommendations of the Judge Advocate General which are concurred in by the Chief of the Bureau of Navigation in the foregoing case, are approved.

The Department cannot approve the acquittal of a commanding officer of negligence when the vessel for which he was responsible has been lost, and he has failed to utilize fully the aids available for safe navigation. A vital element in the equipment of an officer for command is a complete appreciation on his part of his full personal responsibility for the safety of his ship at all times (File 26262–10724A, J. A. G., Jan. 5, 1924; G. C. M. Rec. No. 58956).

COMMANDING OFFICER: RESPONSIBILITY FOR SAFE CONDUCT OF HIS SHIP.

An officer was recently tried by general court martial convened by the Commander in Chief, Battle Fleet, on the charge, "Through negligence suffering a vessel of the Navy to be run upon rocks." The court found the accused guilty in a less degree than charged, guilty of "Neglect of duty," and sentenced him to lose ten (10) numbers. The convening authority approved the proceedings but disapproved the finding and sentence, and in explanation of his action stated that, "in the opinion of the convening authority, the testimony adduced, together with the circumstances surrounding this case, does not warrant a finding of guilty."

[P. 6] ENDORSEMENT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

The specification under which the accused was tried alleged in substance that the accused as commanding officer of the U. S. S. _____ neglected to take proper precautions for the safety of the vessel under his command and that as a result of such neglect the U. S. S. _____ was wrecked and became a total loss.

In the opinion of this office, the evidence clearly establishes that the navigational information in the possession of the accused at 9 p. m. was such that a reasonably prudent navigator would not be justified in taking up the new course then followed. The accused was therefore under a substantial doubt, or at least should have entertained such a doubt, and consequently was under the positive duty of fixing his position accurately before undertaking the change of course that was made. There have been so many holdings of naval courts martial in accord with this view that its correctness in law is not open to doubt. As stated in article 880, U. S. Navy Regulations, "_____ he (the commanding officer) is always responsible for the safe conduct of the ship."

However, the evidence further shows that the U. S. S. _____ was in formation following the movements of the flag ship of Squadron 11, Destroyer Squadrons, Battle Fleet. But this further fact cannot be said legally to relieve the commanding officer of the safe navigation of the vessel under his command, in the light of the law above stated, when he knows or should know that his information places in doubt the position of the vessel under his command and likewise that of the other ships in formation with him. Paragraph 5, article 838, U. S. Navy Regulations, reads as follows:

> "If, when in fleet, squadron, or division, the commanding officer finds that the course directed is leading the ship under his command, or any other, into danger, he shall promptly give notice to the commander in chief, division commander, or other officer in direct authority over him, and to the ship endangered."

In the opinion of this office, the evidence in this case shows clearly that although the accused has grounds for believing that the position of the vessel under his command was in doubt and that the course directed by the squadron commander was leading the ship under his command, as well as the vessels in formation with the U. S. S. _____, into danger, he did not give notice of that fact to the officer in direct authority over him or to the other ships endangered, and as the result of this failure on the part of the accused, the U. S S. _____ was wrecked as alleged and became a total loss.

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For the reasons above enumerated this office is of the opinion that the evidence adduced establishes the guilt of the accused of the charge and specification preferred against him, and as the charge on which he was found guilty by the court, is a lesser charge and included in that preferred against him, it is recommended that the proceedings be approved and that the action [P. 7] of the convening authority on the finding and sentence be disapproved.

Referred to the Chief of the Bureau of Navigation for his information.

ENDORSEMENT OF THE CHIEF OF THE BUREAU OF NAVIGATION

The Bureau is of the opinion that no deduction from the evidence herein nullifies the long established custom and regulation of the Navy that the "commanding officer is always responsible for the safe conduct of the ship."

The accused was not in possession of adequate data to justify a reasonably prudent navigator in changing course to the eastward. He was at liberty to ask permission to sheer out and slow down for soundings, which would have shown him at once the danger of his position and would have indicated his doubts to the leader.

Any contingencies that inspired this unquestioning confidence in the leader's position, and blind adherence to "follow the leader" doctrine, do not relieve the commanding officer from the charge of negligence.

Knowing his position doubtful, the accused failed to take the initiative to obtain better information, and as a result (in part at least) of this failure, his vessel was wrecked, with the injury of three (3) of the naval personnel aboard. The Bureau therefore concurs in the opinion of the Judge Advocate General that the proceedings be approved and that the action of the convening authority on the findings and sentence be disapproved.

ACTION OF THE SECRETARY OF THE NAVY

The remarks of the Judge Advocate General and the Chief of the Bureau of Navigation and the recommendations of the Judge Advocate General which are concurred in by the Chief of the Bureau of Navigation in the foregoing case, are approved.

The Department cannot approve the action of the convening authority in this case since the vessel for which the accused was responsible was lost, and he failed to utilize fully the aids available for safe navigation. A vital element in the equipment of an officer for command is a complete appreciation on his part of his full personal responsibility for the safety of his ship at all times (File 26262–10761A, J. A. G., Jan. 7, 1924; G. C. M. Rec. No. 59006).

DIVISION COMMANDERS: RESPONSIBILITY FOR SAFE NAVIGATION WHEN CRUISING IN FORMATION.

Two officers were recently tried and acquitted by a general court martial convened by the Commander in Chief, Battle Fleet, on the charge, "Through negligence suffering vessels of the Navy to run upon rocks."

The Judge Advocate General of the Navy in his remarks on these cases said:

[P. 8] The specification under which each of the accused was tried alleged in substance that the accused as Commander of Division ------ of Squadron ------, Destroyer Squadrons, Battle Fleet, neglected to take proper precautions for the safety of the vessels under his command, and that as a result of such neglect, four vessels were wrecked and became a total loss.

In the opinion of this office, the evidence clearly establishes that the navigational information in the possession of the accused at 9 p. m. was such that a reasonably prudent navigator would not be justified in taking up the new course then followed. An officer charged with the safety of a vessel of the Navy was then under a substantial doubt, or at least should have entertained such a doubt, and consequently was under the positive duty of fixing his position accurately before undertaking the change of course that was made. There have been so many holdings of naval courts martial in accord with this view that its correctness in law is not open to doubt.

The question of whether an officer in command of a division of ships is charged, under the regulations and the approved practice of the Navy, with the

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safety of the vessels under his command, was raised in the courts-martial cases growing out of the grounding of the U. S. S. *San Francisco* on May 17, 1916. In that case, the Division Commander took positive action while the ship's position was in doubt, in that he gave the commanding officer an order to make a certain change in course; while in this case, the Division Commander took no action when such facts as were in his possession should have created a doubt in his mind as to the correctness of the assumed position, and the change in course then being made. In the opinion of this office, the responsibility of a Division Commander, as laid down in C. M. O. 27, 1916, for the safety of the vessels under his command, applies with equal force in this case. That order reads in part as follows:

> "The situation involved in this case is not covered by the Navy Regulations, but this fact in no wise relieves an officer of culpability for the neglect of duty which his seniority may impose upon him. Not only is it impracticable to anticipate in the Navy Regulations every contingency which may possibly arise, but an attempt to do so would not be conducive to the proper development of character and officer-like qualities. Neither is it considered in the interests of efficiency to restrict too closely the performance of duty by officers, especially those of the higher ranks. Officers have duties and obligations, imposed upon them by the commissions which they hold and the positions which they occupy, which are as binding as express provision of the regulations could be. The language used in an officer's commission imposes upon him the responsibility for the efficient performance of duties of his grade and no court would be justified in relieving of culpability an officer who failed to perform such duties [P. 9] as were imposed by the broad terms of his commission and by the customs of the service, merely because such duties were not definitely enumerated in the regulations."

However, the evidence further shows that Division 33 was in formation following the movements of the flag ship of Squadron 11, Destroyer Squadrons, Battle Fleet. But this further fact cannot be said legally to relieve the Division Commander of his responsibility for the safety of the division under his command, stated supra, as in like case it does not relieve the commanding officer of a vessel when he knows or should know that his information places in doubt the position of the vessel under his command, and likewise that of the other ships in formation with him. See paragraph 5, article 838, U. S. Navy Regulations, which reads as follows:

> "If, when in fleet, squadron, or division, the commanding officer finds that the course directed is leading the ship under his command, or any other into danger, he shall promptly give notice to the commander in chief, division commander, or other officer in direct authority over him, and to the ship endangered."

In the opinion of this office, the evidence in this case shows clearly that although the accused had grounds for believing that the position of the vessels under his command was in doubt and that the course directed by the squadron commander was leading the division under his command, as well as other vessels composing the squadron, into danger, he did not give notice of that fact to the officer in direct authority over him or to the other ships endangered, and as the result of this failure on the part of the accused four vessels of the division were wrecked as alleged and became a total loss.

The court found the accused not guilty of the charge and specification thereunder and did "fully acquit" him of the charge. Article 686, Naval Courts and Boards, states in part as follows:

> "A court should not 'fully acquit' in cases where the record shows any uncontroverted facts whatever reflecting on the accused."

For the reasons above enumerated, this office is of the opinion that the evidence adduced not only fails to warrant the action of the court in "fully" acquitting the accused, but also fails to warrant an acquittal, and it is therefore, recommended that the proceedings be approved, and that the finding and full acquittal be disapproved.

Referred to the Chief of the Bureau of Navigation for his information.

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ENDORSEMENT OF THE CHIEF OF THE BUREAU OF NAVIGATION

The Bureau is of the opinion that the long-established custom and regulation of the Navy that "The commanding officer is always responsible for the safe conduct of his ship" applies in princple to the responsibility of a division commander for his division of ships.

[P. 10] The accused was not in possession of adequate data to justify a reasonably prudent navigator in changing course to the eastward. He was at liberty to ask permission to sheer out and slow down for soundings, which would have shown him at once the danger of his position and would have indicated his doubts to the leader.

Any contingencies that inspired this unquestioning confidence in the leader's position, and blind adherence to "follow the leader" doctrine, do not relieve the division commander from the charge of negligence.

Knowing his position doubtful, the accused failed to take the initiative to obtain better information, and as a result (in part at least) of this failure, the following vessels of his division, U. S. S. ------, U. S. S. ------, U. S. S. ------, and U. S. S. ------, were wrecked, with the loss of twenty (20) lives and the injury of seven (7) others of the naval personnel abroad. The Bureau therefore concurs in the opinion of the Judge Advocate General that the proceedings be approved and the findings and acquittal be disapproved.

ACTION OF THE SECRETARY OF THE NAVY

The remarks of the Judge Advocate General and the Chief of the Bureau of Navigation and the recommendations of the Judge Advocate General which are concurred in by the Chief of the Bureau of Navigation in the foregoing case, are approved.

The Department cannot approve the acquittal of a division commander of negligence when the vessels for which he was responsible have been lost, and he has failed to utilize fully the aids available for safe navigation. A vital element in the equipment of an officer for command is a complete appreciation on his part of his full personal responsibility at all times for the safe conduct of the vessels present and under his command (File 26262–10680A, J. A. G., Jan. 9, 1924; G. C. M. Rec. No. 58810).

MEMBERS OF COURT: CHALLENGED BY ACCUSED.

In a recent case it was noted that the accused by counsel objected to each and every member of the general court martial on the ground that each member "has personally investigated the charge upon which the accused was being tried and had expressed an opinion thereon," they having been members of a court which had tried another officer on charges growing out of the same occurrence. In reply, one member stated that "I do not believe that the opinion I have formed is positive so as to prevent my determining this case according to the evidence"; another member stated, "I do not believe that the opinion already formed is such that it would prejudice the trial of Lieutenant Commander ------"; another member stated, "Any opinion formed by me during the hearing of the evidence in the case of Captain ------ would not prejudice the accused in **[P. 11]** my mind"; another member stated, "I have read the specification and charge under which the accused is to be tried and I can state that I have not formed a positive nor definite opinion as to the guilt or innocence of the accused"; another member stated, "I will say that although the evidence to be presented by the defense in this case may be identical with that presented in the case of Captain ------, that I have formed no definite opinion as to the guilt or innocence of the accused and can sit as a member of this court and can give an impartial trial to the accused"; while the remaining two members stated that they have formed no opinion. The court refused to sustain the respective challenges of the accused.

In view of the challenges as aforesaid, and the facts above stated, the Department advised the accused that the question of a new trial in his case would be considered if he made formal petition therefor. The accused in reply stated that he did not desire a new trial and that he had full confidence in the court before which he was tried. The accused having thus declined the opportunity for a new trial, the Department approved the sentence (File 26262–10682A, J. A. G., Dec. 18, 1923; G. C. M. Rec. No. 58789).

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RESPONSIBILITY OF NAVIGATOR: CONSTRUCTION OF REGULATIONS RELATING THERETO.

An officer was tried and fully acquitted by general court martial convened by the Commander in Chief, Battle Fleet, on the charge of "Culpable inefficiency in the performance of duty." The convening authority approved the proceedings, finding, and acquittal.

The Judge Advocate General of the Navy in his remarks on this case said:

The gist of the specification under which the accused was tried was that as navigator of the U. S. S. _____ he failed to advise properly his comanding officer as to the safe conduct of the ship just prior to her wreck at Point Arguello.

The evidence adduced in this case clearly establishes the culpably inefficient navigation of the U. S. S. _____ on the afternoon and night of the grounding and shows that the accused did not advise his commanding officer to pursue a safe course as it was the duty of the navigating officer of the ship to do. This office cannot feel that the court in fully acquitting the accused intended to go on record as being of the opinion that the navigation was all that good seamanship and navy regulations would require, but from an examination of the evidence is constrained to the opinion that the court must have arrived at its finding from one or both of the two following erroneous considerations: either the (1) youth and inexperience of the accused taken in connection with the fact of the squadron commander and the commanding officer being on the bridge and fully acquainted with the situation, the accused should not be held to the strict accountability for his acts of commission or omission [P. 12] as would otherwise obtain when such circumstances did not prevail or (2) the accused was not in fact the navigating officer of the U. S. S. _____.

As to the first possible reason for the court's acquittal in this case, C. M. O. 24, 1916, is directly in point. The accused in that case a lieutenant, junior grade, was tried for failing to advise properly his commanding officer as to the safe navigation of the U. S. S. *San Francisco* and the circumstances were analogous to the present case in that the division commander and captain were both on the bridge and were as familiar with the navigational situation as was the accused. The Department, in disapproving the acquittal, discussed certain grounds assumed as the basis of the action of the court in reaching its finding and then remarked that:

> "It is not believed that it was on account of lack of responsibility of Lieutenant _____ as navigator. It is not believed that the court considered that the navigational methods employed were such as the Government has a right to require of officers charged with that responsible duty. A careful review of the case leads to the conviction that the court acquitted him because of his comparative youth, and because he was associated on the bridge with the captain and division commander, whom it appears were practically as familiar with the situation as was the navigator. If this is correct, in the opinion of the Department such a verdict is not justified, does not protect the Government in the navigation of its vessels, would establish an undesirable precedent, and would not carry out the spirit of the Navy Regulations, which impose concurrent responsibility upon the navigator for the safety of the ship. Where concurrent responsibility is imposed by the Regulations upon several individuals and an accident occurs, it is illogical to hold that a junior is guiltless because a senior was present. The concurrent responsibility which has been established by the Navy Regulations is an additional safeguard of the Government in keeping its ships afloat; not to recognize this in effect nullifies this feature of the Regulations. In such cases an endeavor to place the burden of entire responsibility upon some one individual results in confusion and a miscarriage of justice. The only logical method is to hold each individual concerned responsible not for the accident itself, but for the neglect of such of his individual duties as may have contributed to the accident."

So, in the present case, the accused, a commissioned officer, must be held to the responsibilities of his rank. The fact that his superiors were themselves culpably negligent and inefficient in the performance of their duties in this instance cannot be held in law to relieve him from the responsibility of his office.

Considering the second possible ground for the acquittal of the accused, the commanding officer testified that Lieutenant (j. g.) _____ had assumed the

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duties of head of the navigation department on about June 15. It also appears that the judge advocate [P. 13] introduced in evidence extracts from the testimony of the accused before the court of inquiry which investigated the grounding and loss of the U. S. S. _____. In the course of the testimony thus of record before this court martial, the accused stated that he was the navigator of the U. S. S. _____, and in effect that he had performed navigational duties up to the moment of the grounding. In the opinion of this office there was no evidence before the court disproving the fact thus attested. This office therefore deems it established that the accused was in fact and in law the navigator of the U. S. S. _____ at the time of her loss and his acquittal by the court on the second assumption above stated is in no sense warranted.

In view of the above remarks, this office is of the opinion that the evidence adduced not only fails to warrant the action of the court in "fully" acquitting the accused, but also fails to warrant an acquittal. As stated in section 686, Naval Courts and Boards, the term "fully acquit" means that the court finds no facts whatever which reflect adversely on the conduct of the accused in connection with matters pertaining to the charge and specification.

It is accordingly recommended that the proceedings be approved, and that the finding and acquittal be disapproved.

Referred to the Chief of the Bureau of Navigation for his information.

ENDORSEMENT OF THE CHIEF OF THE BUREAU OF NAVIGATION

This Bureau concurs fully in the statement of the Judge Advocate General in this case.

Lieutenant _____ was the head of the Navigation Department of the U. S. S. _____ for some time previous to and on the occasion of the loss of that vessel, and it was his duty to safely navigate the ship unless specifically relieved of this responsibility by the commanding officer. There is no evidence to show he was so relieved and, therefore, the responsibility was his to accurately navigate the ship and advise the commanding officer as to the ship's position. The Bureau is of the opinion that no matter how much of the actual navigating of any ship is done by the commanding officer that the navigator is in nowise relieved of his responsibility in the premises and as navigator should be held to full responsibility as an adviser to the commanding officer as to the accurate position of the ship.

The Bureau fully concurs in the views of the Judge Advocate General "that the evidence adduced not only fails to warrant the action of the court in 'fully' acquitting the accused, but also fails to warrant acquittal."

ACTION OF THE SECRETARY OF THE NAVY

The Department approves the recommendation and remarks of the Judge Advocate General, which are concurred in by the Chief of the Bureau of Navigation in the foregoing case of Lieutenant (j. g.) _____, U. S. Navy (File 26262–10681A, J. A. G., Dec. 18, 1923; G. C. M. Rec. No. 58790).

[P. 14] FRAUDULENT ENLISTMENT: CLOTHING AND PAY STATUS OF MEN AUTHORIZED TO CONTINUE SERVING UNDER.

In a case of a fraudulent enlistment which is merely voidable, and not void, the question of whether or not a man should be discharged from the naval service or retained therein under a fraudulent enlistment rests in the discretion of the Department. The Department is authorized to retain him unconditionally under his fraudulent enlistment or place him on probation. If he is retained in the service under his fraudulent enlistment, either conditionally or by placing him on probation, he must be considered for the purpose of clothing and pay as though no fraud had occurred in his enlistment (File 7657–1565; Feb. 9, 1924).

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FRAUDULENT ENLISTMENT: CLOTHING AND PAY STATUS OF ENLISTED MEN AUTHORIZED TO CONTINUE SERVING UNDER.

Held: If an individual is retained in the service under a fradulent enlistment which is voidable, and not void, either unconditionally or by placing him on probation, he must be considered for the purpose of clothing and pay as though no fraud had occurred in his enlistment (File 7657–1565; Feb. 28, 1924).

HONORABLE DISCHARGE: CANCELLATION OF: DISCHARGE OBTAINED UNDER FALSE PRETENSES, LIABILITY TO TRIAL FOR DESERTION.

L_____, seaman 2c, U. S. N., enlisted October 21, 1920, for a period of two years. The following entries appear in his service record:

"July 24, 1922. Discharged with honorable discharge three months prior to expiration of enlistment in order to reenlist for four years.
"July 25, 1922. Failed to return to reenlist.
"August 31, 1922. Declared a deserter from July 25, 1922, etc."

There is no evidence to show that L_____ signed an agreement to reenlist. The question presented was (*a*) Can the honorable discharge issued to L_____ be cancelled? (*b*) Can L_____ be tried for desertion and obtaining a discharge under false pretenses? *Held:* The honorable discharge issued to L_____ cannot be cancelled because of his failure to reenlist [P. 15] in the Navy. But the promise of a man to reenlist in the Navy if discharged within three months prior to expiration of enlistment even if he has no intention of fulfilling such promise cannot be regarded as having procured his early discharge because under the act of August 22, 1912, and regularly approved by the President such early discharges are not offered to a man as an inducement to reenlist. The discharge in such case is not, therefore, a discharge procured by fraud. L_____ cannot be tried for desertion and obtaining a discharge under false pretenses (File 7657–1747, Feb. 15, 1924).

INSULAR FORCE: TRANSFER OF, FROM PHILIPPINE ISLANDS.

Held: The Insular Force U. S. Navy, which was established by an Executive order on April 5, 1901, are enlisted men in and of the Regular U. S. Navy and members thereof may be transferred away from the Philippine Islands for duty (File 26254–3591: 9, Feb. 9, 1924).

PAY: CHECKAGE OF, FOR OVERPAYMENT.

On August 5, 1918, First Lieutenant _____ and others, was recommended for appointment as major in the Medical Reserve Corps by the Commander in Chief of the American Expeditionary Forces. On August 22, 1918, the Surgeon General of the Army by endorsement recommended that these officers be appointed with the rank of captain. On September 23, 1918, the Adjutant General cabled General Pershing that Lieutenant _____ had been appointed a major and on September 28, 1918, Lieutenant _____ was notified. He submitted his letter of acceptance and took the oath of office on October 18, 1918. On November 21, 1918, the Commanding General in France was notified by the Adjutant General that his former cablegram was an error, that the appointment was to the rank of captain, not that of major. On February 19, 1919, Captain _____ then being in the United States was informed that he had been commissioned major, Medical Corps, U. S. Army, with rank from February 17, 1919. He was paid as major from October 18, 1918, until the date of his appointment as such in February 1919. The difference between the pay of captain and the pay of major for that time being $240.19. Upon his discharge in August 1919, this sum was deducted from the amount due the plaintiff for which he filed suit in the Court of Claims. The court entered judgment for the plaintiff for the amount of claim, the plaintiff having been ordered by competent authority to assume the rank of major and having discharged the duties of that rank in good faith in time of war and having been paid the emoluments of that rank in good faith

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by the officers who are intrusted with the duty of making such payments, he cannot be required to return the money so received to the Government.

[P. 16] The plaintiff being entitled to the pay of major at the date of being discharged was entitled to be paid the money due him as major, as he could not have been required in the circumstances of this case to return the money which the Government claimed from him on account of money which it had overpaid him, such overpayment having been made prior to the time of his having been regularly appointed major. If the Government had set up this claim as a counterclaim against the officer in his suit such a counterclaim could not be allowed (Court of Claims No. 34193, Jan. 28, 1924).

PAY: CONSERVATOR OF RETIRED OFFICER.

Mrs. J_____, wife of Lieutenant (j. g.) J_____, U. S. Navy, Retired, was duly appointed conservator by a state court in Connecticut and appointed the Ancillary Committee of the estate of this officer by the Supreme Court of the District of Columbia.

Held: On and after the date of her appointment by the Supreme Court of the District of Columbia as Ancillary Committee of the estate of Lieutenant J_____, the officer in charge of the pay accounts of Lieutenant J_____ located within the jurisdiction of the court is without any authority to make any disbursements in this case other than to Mrs. J_____ as Ancillary Committee of his estate (File 8528–503:12, Feb. 9, 1924).

UNDESIRABLE DISCHARGE: AS SEPARATE AND DISTINCT ACTION WHERE DISCHARGE UNDER COURT MARTIAL SENTENCE IS REMITTED.

Held: Where the sentence of discharge adjudged by court martial is remitted by the Secretary of the Navy and he directs as a separate and distinct action that the man be discharged as undesirable, this action on the part of the Secretary is a direct order to all concerned and further special orders from the Bureau of Navigation are not necessary (File 26837–39:11, Feb. 25, 1924).

WARRANT OFFICERS: SERVICE TO BE COUNTED FOR PROMOTION TO CHIEF WARRANT RANK.

P was temporarily appointed gunner from July 2, 1917, and served under such appointment until October 9, 1917, when he was appointed permanent gunner. Subsequently he was temporarily advanced to the rank of ensign, lieutenant (j. g.) and lieutenant and on November 10, 1921, he was commissioned an ensign to rank from June 6, 1919. He served continuously as ensign until August 13, 1923, when said appointment was revoked due to failure on examination and accordingly he reverted to his permanent rank as gunner on that day. *Held:* The temporary advancement of P to the rank of ensign, [P. 17] lieutenant (j. g.) and lieutenant does not affect his right to count said service, as service in his permanent warrant grade for the purpose of rendering him eligible to the grade of chief warrant officer, also that the service rendered by him in the grade of ensign may be counted in computing the necessary six years' service.

A was temporarily appointed boatswain July 2, 1917, and temporarily appointed an ensign January 2, 1918, serving as such until November 21, 1921, when he accepted a permanent appointment as boatswain to rank from August 5, 1920. *Held:* All the service from the date of appointment as a temporary boatswain, namely, July 2, 1917, may be counted in computing the six years' service.

B was temporarily appointed boatswain July 2, 1917, and chief boatswain July 1, 1919. On December 2, 1921, he accepted a permanent appointment as boatswain. A temporary commission was terminated by operation of law December 31, 1921. *Held:* All service rendered from the date of appointment as a temporary boatswain may be counted in computing the necessary six years' service.

C was temporarily appointed an ensign on December 15, 1921, accepted a permanent appointment as boatswain to rank from August 5, 1920. *Held:* C

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is entitled to count only his service from August 5, 1920, in computing the necessary six years' service.

D was appointed a boatswain in the Naval Reserve Force January 1, 1918, and served continuously on active duty until November 15, 1921, when he accepted a permanent appointment as boatswain in the regular Navy to rank from August 5, 1920. *Held:* D may be credited only with service from August 5, 1920, for the purpose of computing the necessary six years' service.

E was appointed boatswain in the Naval Reserve Force January 1, 1918, and chief boatswain in said force on March 1, 1919, serving continuously on active duty in said force until November 15, 1921, when he accepted an appointment as boatswain in the regular Navy to rank from August 5, 1920. *Held:* Only so much of the service as has been rendered by E since August 5, 1920, may be counted in computing the six years' service from date of warrant necessary to render him eligible for promotion to the grade of chief boatswain.

F was appointed a boatswain in the Naval Reserve Force September 1, 1918, and appointed an ensign in said force April 1, 1919. Serving continuously on active duty until November 15, 1921, when he accepted an appointment as boatswain in the regular Navy to rank from August 5, 1920. *Held:* Only so much of the service rendered by F since August 5, 1920, may be counted in computing the necessary six years' service.

G was appointed a temporary gunner July 2, 1917, and was appointed a temporary machinist in November 1921, to rank from August 5, 1920. He accepted his appointment as [P. 18] machinist December 10, 1921, his temporary appointment as a gunner was terminated by operation of law, December 31, 1921. *Held:* G is entitled to count all of his service from July 2, 1917, in computing the necessary six years' service. The provisions of the act of June 4, 1920, do not require in terms that the service from date of warrant should be rendered in a particular branch of the warrant grade (File 29226–32:1, Feb. 15, 1924).

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[P. 3] BAD-CONDUCT DISCHARGE: SHOULD NOT BE ADJUDGED IN CASES WHERE ACCUSED IS CONVICTED OF OFFENSES INVOLVING MORAL TURPITUDE.

An accused pleaded guilty to the charges: (I) "Forgery" (2 specifications); (II) "Uttering a forged writing" (2 specifications—total value $210.91); and (III) "Desertion." The court adjudged a sentence of confinement for three (3) years, bad conduct discharge and accessories. The Department is at a loss to understand the line of reasoning followed by the court in adjudging a bad conduct discharge. The accused in this case was convicted of two very serious crimes involving moral turpitude and a sentence based on offenses of that character should always include a dishonorable discharge. In this connection section 714, Naval Courts and Boards, provides in part that "In general, dishonorable discharges should be reserved for crimes involving moral turpitude and the serious military or naval crimes."

Article 51 of the Articles for the Government of the Navy provides that "It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency, and state, on the record, their reasons for so doing." It appears that the court in connection with the discharge adjudged in the sentence in this case exercised clemency which is a prerogative of the convening or reviewing authority only (File 26251–31564A, J. A. G., February 18, 1924; G. C. M. Rec. No. 59196).

EVIDENCE: ERRONEOUS RULINGS.

During the progress of a trial the court made numerous erroneous rulings which tended more or less to the prejudice of the rights of the accused. These errors were: (*a*) The court refused to allow counsel for the accused to introduce the record of proceedings of a board of investigation previously held in connection with the irregularities in question to impeach one of the chief prosecuting witnesses, W_____. A proper foundation [P. 4] had been laid for this by the counsel for the accused and the ruling of the court was clearly erroneous (Naval Courts and Boards, secs. 416, 417). (*b*) The court refused to allow

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counsel for accused to ask certain questions of V_____, one of the witnesses for the prosecution, to show bias, and similarly refused to allow Lieutenant B_____, a witness for the defense, to testify as to the alleged bias and ill feeling of W_____, toward the accused. It is fundamental that the prejudice or bias of a witness toward the accused may be shown in any criminal trial. (See Naval Digest 1921, p. 66). (c) Over the objection of the counsel for the accused, one of the witnesses for the prosecution, Commander C_____ (SC), was allowed to testify as follows:

"Q. Assuming that you were paymaster of a vessel of the Navy and you found that your pay clerk had overdrawn his personal account in the sum of anywhere from twenty-five to thirty dollars, what would you consider that?

"A. I would consider him guilty of technical embezzlement."

The above question called for a conclusion of law and the answer thereto was clearly a matter for the determination of the court (Greenleaf, 16th ed., par. 441c). (d) The court refused to allow counsel for the accused to question _____, the executive officer, as to the duration and extent of the excessive use of intoxicating liquors by A_____. Inasmuch as A_____ was the chief prosecuting witness and the question of the excessive use of intoxicating liquors by this witness during the period referred to in the specification was material from the standpoint of indicating his recollection (Greenleaf, 16th ed., par. 370c), and also his susceptibility to fraud such as was perpetrated in the forged pay check incident, it is the opinion of the Department that the question should have been allowed.

While the accused was on the stand in his own defense, the following question was asked the accused by the court:

"Q. Did you ever attempt to obtain a loan from any civilian loan company?

"A. I did; yes, sir."

Inasmuch as the record prior to this entry contains nothing that would suggest any borrowing of money by the accused from a civilian loan company, it is apparent that the court based its question in this instance on matter derived from outside source, and the result thereof was to bring out matter detrimental to the interest of the accused. As explained in section 499, Naval Courts and Boards, while members of a court may ask questions, such questions should, in general, be for the purpose of making clear the meaning of testimony already given, and the court should not originate evidence (File 26251–31705A, J. A. G., Mar. 10, 1924; G. C. M. Rec. No. 59123).

EXCEPTIONS AND SUBSTITUTIONS: INCONSISTENT.

In a recent case the specification as found proved by the court is as follows: "In that _____ now a fireman, third class, U. S. Navy, did, on or about July 5, 1923, while serving on board the U. S. S. _____, remain without leave from proper authority [P. 5] from said ship, and from the U. S. Navy, and did remain absent over leave until he was delivered on board said ship, on or about September 20, 1923, in civilian clothing." This specification does not allege that _____ was ever granted leave from his ship or that he failed to return to his station and duty upon the expiration of any authorized leave. Insofar as the specification indicates the absence prior to July 5, 1923, was an unauthorized one and from that date until September 20, 1923, he simply remained in unauthorized absence. The further allegation in the specification that the accused "did remain absent over leave" is, therefore, clearly inconsistent with the allegation that he did "remain absent without leave from proper authority." These two offenses, "Absence from station and duty without leave" and "Absence from station and duty after leave had expired" are separate and distinct under the A. G. N. Furthermore, the court found the accused guilty of the charge "Absent over leave." This is not the charge authorized by paragraph 19 article 8 of the A. G. N., or any other article for the Government of the Navy. The authorized charge is "Absence from station and duty after leave had expired" as outlined in section 248, Naval Courts and Boards (File 26262–10679, Jan. 18, 1924; G. C. M. Rec. No. 58801).

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GUILTY IN A LESS DEGREE THAN CHARGED: PROCEDURE UPON A PLEA OF.

B, seaman second class, U. S. Navy, was tried by general court martial on the charge of "Desertion" and was found guilty in a less degree than charged of "Absence from station and duty after leave had expired."

The specification of the charge upon which B was tried reads as follows:

> "In that B, now a seaman second class, U. S. Navy, did, on or about July 27, 1923, while so serving on board the U. S. S. ------, desert from said ship and from the U. S. Navy, and did remain a deserter until he surrendered himself on board said ship, on or about September 22, 1923."

When arraigned on the specification the accused pleaded "guilty except as to the words 'desert' and 'a deserter', to which words 'not guilty' and to the charge 'not guilty'." The court accepted these pleas. The specification of the charge after making the exceptions set-out in the plea of the accused alleges that the accused "did, on or about July 27, 1923, while so serving on board the U. S. S. ------, * * * from said ship and from the U. S. Navy, and did remain * * * until he surrendered himself on board said ship, on or about September 22, 1923."

It is clear that this specification alleges no offense though it appears that the court and the judge advocate were of the opinion that the plea of the accused to the specification was a judicial admission of unauthorized absence. Such, however, was not the effect of the plea. It was the duty of the court to reject the plea to the specification and to direct the judge advocate to proceed as though a plea of not guilty had been entered. [P. 6] Having accepted the plea the court was precluded from arriving at any finding other than in accordance therewith and, therefore, as had been pointed out above, it could not properly have convicted the accused of any offense based upon the specification in question. In this connection Naval Courts and Boards, section 653, provides as follows:

> "*Guilty in a less degree than charged.*—This plea is not looked upon with favor. Save in exceptional cases, a court martial should try the accused for the offense as charged, and the judge advocate or recorder should produce all the available evidence. Such a plea must be wholly accepted or rejected, and if accepted, the findings should be in accordance therewith. It is improper to accept such a plea and then allow the prosecution to introduce evidence to prove the accused guilty as charged. A finding of partially proved by plea and the balance by evidence is illegal. The acceptance of this plea by the court upon the advice of the judge advocate or recorder ordinarily indicates that the case has been tried out of court by the judge advocate or recorder, who has thereby been allowed to usurp the courts functions."

In view of the foregoing the proceedings, findings, and sentence in this case were set aside.

It is also noted in reviewing the record in this case that the court convicted the accused of "Absence from station and duty after leave had expired" whereas no evidence appears in the record to support such a finding. The plea of the accused discussed above in no way tends to establish absence over leave and such evidence as was presented at the trial and upon which the court must have based its finding of absence over leave, indicated absence without leave (File 26262–10750A, J. A. G., Feb. 7, 1924; G. C. M. Rec. No. 59031).

SENTENCE: MEANING OF "ACCESSORIES."

The sentence adjudged in a recent case provided as follows: "to be discharged from the United States naval service with a bad-conduct discharge and to suffer all the other accessories of said sentence, as prescribed by section 883, Naval Courts and Boards." Inasmuch as the term accessories in a sentence means that the person so sentenced shall perform hard labor and shall forfeit all pay except a certain amount exempted for prison expenses, etc., while serving a sentence of confinement, it is apparent that the provision in the sentence in this case relative to accessories is of no effect as no confinement was adjudged (Naval Digest, 1921, Accessories, 2; Naval Court and Boards, section 883, note 30; File 26251–31788A, J. A. G., March 8, 1924; G. C. M. Rec. No. 59344).

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"UNAUTHORIZED USE OF AN AUTOMOBILE OF ANOTHER."

Charge of "Unauthorized use of an automobile of another" does not allege an offense in violation of the A. G. N. or any other enactment of Congress. Section 284, Naval Courts and Boards, contains a sample charge and specification for this offense. However, the use of such a charge as given in the [P. 7] above-quoted section presupposes a statute making such an act a criminal offense in the State, Territory, or district where such act takes place, and the specification should be alleged in the words of the statute concerned. Such a statute should be alleged and proved in order that the accused, the court, and the reviewing authorities may know that the acts of the accused set-out in the specification are contrary to the law of the place where committed (File 26262–10679, Jan. 18, 1924; G. C. M. Rec. No. 58801).

DEATH GRATUITY: DEATH OF NAVAL PRISONER.

T_____ was sentenced to be reduced from the rating of commissary steward U. S. Navy, to the rating of apprentice seaman, to be confined for a period of twelve months, dishonorable discharge and accessories. He died while in confinement. The question was presented as to whether or not his widow is entitled to the six months' gratuity.

Held: The record of the Department shows that the death of T_____ was incurred in line of duty and not the result of his own misconduct. It follows therefore that the widow is clearly entitled to the gratuity under the provisions of the act of June 4, 1920 (File 26262–10812: 4, March 22, 1924).

DESERTION: WAR WITH SPAIN.

Held: There is no law providing that persons serving faithfully in the Navy during the war with Spain and who deserted after the termination of said war may be restored to the same status as if they had not deserted. The act of May 24, 1900 (31 Stat. 183), applies only to the War of the Rebellion and not to the Spanish War (File 26516–496: J, March 28, 1924).

DISCHARGE: CERTIFICATE OF.

C_____, private, U. S. Marine Corps, was given a bad-conduct discharge on December 31, 1922, pursuant to a sentence of a summary court martial. The sentence was set aside by the Department on February 9, 1923, as illegal, but C_____'s whereabouts being unknown it was impossible to advise him in the premises and issue instructions for his return to the Marine Corps. C_____, on February 26, 1924, requested that a new discharge be issued with character suitable to his service, he having been informed relative to the action of the court martial.

Held: The discharge in the case of the above-named man being illegal he is still in the naval service, and should be considered for all purposes as having been absent by proper authority from December 31, 1922, until the date of his discharge. He is entitled to receive the discharge which the character of his service [P. 8] warrants as of the date of issue and not as of the date when his enlistment expired (File 26287–9265: 3 J, March 28, 1924).

EXPIRATION OF ENLISTMENT: RETENTION IN SERVICE.

Held: When an enlisted man has been named a defendant before a court of inquiry and the proceedings have been entered upon prior to the expiration of his enlistment, he may be retained in the service for the convenience of the Government as a defendant before said court of inquiry (File 26835–2470: 4, March 5, 1924).

FLAG: FURNISHED TO RELATIVES OF DECEASED.

Held: The Department is without authority under the provisions of the Act of June 30, 1914 (38 Stat. 406), to furnish a flag to the relatives of a deceased officer or enlisted man of the Navy or Marine Corps whose body was not recovered (File 3768–837: 2J, March 27, 1924).

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FLEET NAVAL RESERVE: ELIGIBILITY FOR TRANSFER TO CLASS 1–C.

P——, enlisted in the Navy for minority April 20, 1908, was discharged and reenlisted for four years April 17, 1912, deserted November 26, 1912, remained in desertion for a period of eight months and two days. He was tried by general court martial for desertion, found guilty, but was not discharged from the service. This enlistment was extended for four years from which extension he was discharged February 9, 1920, and reenlisted February 10, 1920, for four years. The question was presented as to whether or not the above-named man was eligible for transfer to the Fleet Naval Reserve after sixteen years' naval service in view of eight months and two days lost through desertion.

Held: The above-named man is not now eligible for transfer to the Fleet Naval Reserve as there has not been a substantial compliance with the terms of the act of August 22, 1912 (37 Stat. 331; File 28550–1739, C. M. A., March 18, 1924).

FLEET NAVAL RESERVE: RE TRANSFER TO.

O—— first enlisted in the Navy December 6, 1910, to serve during minority until December 7, 1913. He was discharged November 18, 1913, in accordance with article 3601, Navy Regulations, nineteen days prior to the expiration of his enlistment.

Held: The above-named man is entitled to have his minority enlistment, which was terminated by special order of the Secretary of the Navy nineteen days prior to the date upon which he attained his majority, credited as four full years' service for the purpose of transfer to the Fleet Naval Reserve (File 27550–1754: J, March 28, 1924).

[P. 9] NAVAL COURTS MARTIAL: STATUS OF.

SENTENCE OF COURTS MARTIAL: HAVING BEEN EXECUTED CANNOT BE REOPENED.

Naval courts martial are judicial tribunals constituted by statutory authority and organized in pursuance of statutory regulations for the administration of naval law. They are therefore, in a stricter sense, courts of justice having jurisdiction over the personnel of the Navy. Their judgments in cases committed for their consideration and determination are as final, conclusive and authoritative as those of any judicial tribunal of the country. After the sentence of a naval court martial has been approved and carried into effect, there is no revisory power by which it can be rescinded, annulled, or modified. It must stand forever as the judgment of a court. (11 Op. Atty. Gen. 137). Furthermore, when the sentence of a court martial has been lawfully confirmed and executed, the proceedings in the case are no longer subject to review by the President or any other lesser administrative officer; they have passed beyond supervision and are at an end (15 Op. Atty. Gen. 290; 17 ibid 297; *Runkle* v. *United States*, 122 U. S. 543, 558; File 26251–26920: 2, March 5, 1924).

PENSION: CLAIM OF WIDOW.

F——, ex-ordinary seaman, U. S. N., enlisted in the Navy October 14, 1862, for one year and served until February 10, 1864, when he was discharged. He reenlisted October 20, 1864, for three years and deserted on May 30, 1865. He died on June 21, 1897.

Held: The mark of desertion may be removed from the records of the Department in the case of the above-named man for the reason that he served faithfully until the first day of May 1865, having previously served six months or more during the War of the Rebellion (25 Stat. 442). In the event that the mark of desertion is removed from the rolls in his case on account of said faithful service, it follows that his service may be held to have been terminated under honorable conditions for the purpose of enabling his widow to receive the pension authorized under such circumstances (File 26510–1951J, March 22, 1924).

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SUMMARY COURT MARTIAL: RECONSIDERATION BY DEPARTMENT OF ITS ACTION ON.

Held: The Secretary of the Navy having legally set aside the proceedings of a summary court martial his power in the premises has been exhausted (File 26287–9684: 1C, Feb. 25, 1924).

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[P. 3] INSANITY: AS A DEFENSE.

An officer was tried upon the charges: (I) "Drunkenness," (II) "Conduct to the prejudice of good order and discipline," (III) "Absence from station and duty without leave," and (IV) "Neglect of duty." The accused pleaded not guilty to all the charges and specifications thereunder and then admitted the charges and specifications, setting up as a defense that he was suffering from a mental disorder. The court acquitted the accused of all the charges and specifications.

The evidence presented by the accused, who was represented by civilian counsel, to establish his mental condition consisted of the testimony of five witnesses, two marine officers, two medical officers, one civilian specialist and also evidence in the form of two documents. The civilian specialist, Dr. S, was the only witness who qualified as an expert on mental diseases. Lieutenant B, testified that his observations of the accused led him to believe that the accused had a very peculiar type of mind, because during the midst of a conversation he would become morose and uncommunicative, stop in the middle of the conversation and stare fixedly at an object; that witness had occasion to interview the accused concerning his offenses while he was in the hospital on August 17, 1923; that at that time it appeared to witness that the accused was in a state of mind where he could not hold an intelligent conversation because his answers were very vague and incoherent; and that he discovered no sign of alcohol about the accused. When asked to explain what he meant by a "peculiar type of mind" witness testified that as a layman it was hard to make that clear but the accused did not appear to him to be mentally normal. However, witness could not cite any particular act which would tend to show that the accused was not responsible for his acts. All he would say was that from his observation of the accused's general attitude during a conversation he was led to believe that the accused was at times not mentally normal and that when he observed him on August 17, 1923, witness did not think he was mentally responsible at that time.

[P. 4] Gunner A testified that he had worked with the accused at times in the post exchange and that during these times the accused was very nervous but he did not know whether this nervousness was the result of drinking liquor.

Lieutenant Commander S, (MC) U. S. Navy, testified that he did not feel qualified as an expert on mental diseases. Witness testified that he had examined and observed the accused on several occasions; that during the summer of 1922 he had examined the accused for promotion which examination the accused passed successfully; that in January 1923, he again examined the accused for his annual physical test and at that time witness found the accused was slightly deaf; that because of the attitude of the accused towards this deafness he examined his health record and found a history of psychosis; that after this annual physical examination he sent the accused to the hospital for study of his general condition and that the hospital returned him to duty. Witness further testified that on August 16, 1923, at the instigation of the commanding officer, Marine Barracks, he examined the accused and found him to be suffering from the effects of poisoning by alcohol and transferred him to the naval hospital.

Dr. S, a civilian, testified that he had specialized in mental diseases and had testified as an expert in the courts. Witness testified that some time in September, 1923, at the suggestion of Dr. H of the Naval Hospital, _____, he had examined the accused; that he did not make a final diagnosis but came to the conclusion "that there was a nervous instability characterized chiefly by mental unrest and emotional instability; that this had been complicated by the periodic use of alcohol"; that he knew at the time doctors who had ex-

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amined the accused prior to his examination had inserted on his health record "Psychosis unclassified" and that in his opinion this was correct. Witness defined the term "Psychosis unclassified" as a mental disorder which doctors were unable to put in any of the disease groups. Witness testified that the accused had a mental depression at times but that he could not say that if the accused did any wrongful acts as the result of taking a drink because of mental depression that the acts were caused directly by his mental depression or directly by taking the drink. Witness when asked a hypothetical question, based upon the facts in this case most favorable to the accused as to whether such a man was irresponsible for any act he might commit testified, "I don't think from what you said that it would show irresponsibility."

Lieutenant Commander H, (MC) U. S. Navy, testified that the accused was admitted to the hospital and placed under his observation August 16, 1923, with the diagnosis "Poisoning by alcohol acute"; that after a few days this diagnosis was changed to "Malaria anemia"; that the accused appeared nervous; that [P. 5] the accused was mentally depressed as a result of a derangement of his mind; that he considered the fits of depression responsible for the drinking and that he relied on consulting Dr. S. Witness identified his report which appeared in the health record of the accused. This report also included the result of Dr. S's examination (exhibit 1), which states that the accused "is responsible and can be a total abstainer if he chose." Witness testified that he did not concur in this part of Dr. S's report. In this connection it is to be noted that no notation to this effect appears upon witness's report of which the report of Dr. S was a part, and that the witness discharged the accused to duty September 6, 1923. Witness testified that he now feels that the accused is not responsible; that the irregularities in the post exchange were the result of the accused's mental depression; and that the accused can not resist drinking if he has an attack of mental depression.

At this stage of the proceedings the court adjourned notifying the convening authority that the evidence offered raised some doubt in the minds of the court as to the mental condition of the accused. The court was authorized to adjourn November 9, 1923, and did not reconvene until January 31, 1924. The defense called the judge advocate as a witness and introduced the report submitted by the medical officer at the naval hospital, Washington, D. C., while the accused was under observation at that place.

The above-mentioned report was submitted by Lieutenant Commander Z, (MC) U. S. Navy, and is attached to the record as exhibit 2. It established that the accused was admitted to the naval hospital, Washington, D. C., December 19, 1923, and discharged January 16, 1924. It stated that during this period of observation the accused has not shown any evidence of psychosis but that he is an individual of psychopathic personality with a tendency to dipsomania; that he is fully responsible for his acts and that for these reasons his diagnosis is changed to "Constitutional psychopathic states, inadequate personality."

Dr. S was recalled as a witness by the defense and asked to explain the above-mentioned report of Lieutenant Commander Z, (MC) U. S. Navy. Witness testified that he concurred in the diagnosis made in this report and that it was the same as his although he did not use the same terms. Witness testified that according to this diagnosis the accused's reasoning power was not affected although it meant he had a form of mental disease and that he did not think a person so diagnosed should be returned to duty in the service.

An insane person is not responsible for criminal acts nor can an insane person be legally tried for an offense committed while sane (Clark and Marshall, par. 93; Naval Courts and Boards, sec. 660). The rule for determining responsibility for criminal acts, in law, is, broadly stated, the capacity of the accused to [P. 6] distinguish between right and wrong, or, more specifically, his capacity to understand, at the time of doing a forbidden act, that it is contrary to law (CMO, 24, 1914, p. 7) Judge Cox in Guiteau's case (10 Fed. 161, 166, 186), charged the jury as follows:

> "If you find from the whole evidence that, at the time of the commission of the homicide the prisoner, in consequence of disease of mind, was laboring under such a defect of his reason that he was incapable of understanding what he was doing, or that it was wrong, * * * then he was not in a responsible condition of mind, and was an object of compassion, and not of justice, and ought to now be acquitted.

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"On the other hand, if you find that he was under no insane delusion such as I have described, but had possession of his faculties and the power to know that his act was wrong, and of his own free will deliberately conceived, planned, and executed this homicide, then whether his motive was personal vindictiveness or political animosity, or a desire to avenge a supposed political wrong, or a morbid desire for notoriety, or fanciful ideas of patriotism or of the divine will, or you are unable to discover any motive at all, the act is simply murder, and it is your duty to find him guilty.

"You must bear in mind that a man does not become irresponsible by the mere fact of being partially insane. Such a man does not take leave of his passions by becoming insane, and may retain as much control over them as in health. He may commit offenses, too, with which his infirmity has nothing to do. He may be sane as to his crime, understand its nature, and be governed by the same motives in regard to it as other people; while on some other subject, having no relation to it whatever he may be subject to some delusion."

It does not apear from the evidence on record that the mental condition of the accused was such that his offenses could be excused on the ground of insanity, as it is manifest from the evidence presented that the accused was not within the meaning of the law insane. The Department after a careful review of this case, finds absolutely no evidence to support a finding that the accused was insane at the time he committed the alleged offenses or at the time of his trial. Although the court had before it two medical officers of the Navy and one civilian doctor who testified as an expert on mental diseases, each of whom testified that they had examined the accused, there was not one word of testimony offered to the court by any one of these medical witnesses, that in his opinion the accused was insane. There is some testimony to the effect that, during periods of depression, the accused was irresponsible; but there was no testimony that he was suffering from such a period of depression at the time he committed these alleged offenses or during his trial, and certainly no witness testified that he was insane while [P. 7] before the court. On the contrary the testimony of Dr. S and the report of Lieutenant Commander Z (MC) U. S. Navy, clearly establishes that the accused was at the time of their examinations responsible for his acts.

In this case the accused's desire to drink alcoholic liquor in order to overcome his mental depression cannot be regarded in law as irresistible merely because he did not resist, for the law does not excuse criminal acts committed under the impulse of an appetite which by long indulgence has acquired a mastery over the accused. It is no mark of derangement to have an irresistible desire to drink alcoholic liquor provided the mind of the accused is not so destroyed by disease that he is unable to reason that the taking of the liquor is contrary to law. A test that may be applied to establish whether the accused would have resisted the impulse to commit these alleged offenses is, would be have committed these alleged offenses had he, at the time, beeu in the presence of his commanding officer (C. M. O. 24, 1914, 20). It is undoubted from the evidence adduced in this case that the accused was able to distinguish between right and wrong, and that he knew he was doing wrong in gratifying his desires for drinking alcoholic liquor. There is nothing to establish that his actions were other than deliberate, and those of a sane and reasonable man.

In view of the above the proceedings were approved, but the findings and acquittal disapproved (File 26251–31254, J. A. G., April 2, 1924; G. C. M. Rec. No. 59451).

MEMBERS OF COURT: AS WITNESSES, PROCEDURE ON.

Lieutenant M, a member of the court martial before which a case was tried, testified at the trial, his testimony being prejudicial to the accused. Upon completion of his testimony, Lieutenant M was reseated as a member and assisted the court in arriving at a finding and sentence.

Section 624 of Naval Courts and Boards provides that "When a member is called and has testified as a witness for the prosecution or for the court, on any matter material to the issue or prejudicial to the accused, he shall thereupon be considered as challenged by the accused, unless the accused expressly request that he be not so considered, which must appear affirmatively on the record and

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he shall be forthwith excused by the court from further attendance as a member thereof." No entry appeared in the record of proceedings, as required by section 624, that the accused expressly requested that Lieutenant M be not considered as challenged and upon revision the court stated that it "decided that the accused did not expressly request that Lieutenant M be not considered as challenged after that officer, [P. 8] who sat as a member of the court, had testified as a material witness for the prosecution on January 8, 1924."

The effect of section 624 of Naval Courts and Boards is to disqualify an officer as a member of a court martial who has testified for the prosecution of the court against an accused unless the accused expressly requests that such officer be not disqualified. In the present case Lieutenant M was automatically disqualified as a member of this court after testifying and as the accused did not expressly request that he be continued as a member, Lieutenant M's further participation in this trial was unauthorized. From the time of giving his testimony Lieutenant M was in the same status as an officer sitting as a member of a court who had been challenged by the accused, and the challenge sustained by the court or improperly overruled. The Department has held in numerous instances that such irregularities invalidate the proceedings (Naval Digest, 1921, challenge, 2; Naval Digest, 1916, challenge, 17).

In view of the foregoing the proceedings, findings, and sentence in the case were disapproved (File 26251–31715, J. A. G., April 10, 1924; G. C. M. Rec. No. 59337).

STATEMENT OF ACCUSED: INCONSISTENT WITH PLEA.

DRUNKENNESS: AS A DEFENSE.

An accused was recently tried by general court martial on the charges I "Threatening to assault his superior officer while in the execution of the duties of his office" (2 specifications), and II "Treating his superior officer with contempt" (3 specifications). He pleaded guilty to all charges and specifications, was convicted, and sentenced to reduction to the rating of machinist's mate first class, restriction to his ship or station for a period of six (6) months, and loss of pay amounting to four hundred dollars ($400). On January 29, 1924, the convening authority approved the proceedings, findings, and sentence but remitted the loss of pay adjudged.

After pleading guilty to the charges and specifications, as indicated above, the defense introduced evidence tending to show that the accused had partaken of intoxicating liquor on the night in question, while on liberty. The accused took the stand, at his own request, and testified as follows:

> "On the night of October 24 I went ashore with Reynolds, chief pharmacist's mate, and Roberts, chief commissary steward, with the intentions of going for supper and take in a show. But as we got ashore we got hold of some liquor on the dock of which we drank some at supper in coffee. After that we went to the show and after the show we went back to the same restaurant and had some more coffee with whisky. Then we started [P. 9] back to the ship and on our way back we stopped in at a saloon and I remember in there having one glass of whisky and one glass of beer; and I faintly remember asking for another drink. But I do not remember getting it or drinking any more, after that. After that I don't remember anything until I woke up in the handling room."

From the above it is apparent that the contention of the accused was that he was so drunk at the time of committing the alleged offenses that he did not know what he was doing and was unable to recollect any of the circumstances attendant thereto.

Drunkenness as a defense is explained in C. M. O. 6, 1922, 9. (in connection with that C. M. O. attention is invited to the fact that charge IV "Disobeying the lawful order of his superior officer" should be added to the list of charges enumerated in the first paragraph of that opinion.) The circumstances of that case are analogous to the one now under consideration, the salient points being that the accused pleaded guilty to charges III "Using abusive, obscene, and profane language toward his superior officer" and IV "Disobeying the lawful order of his superior officer," and then made a statement to the general effect that he was so drunk that he did not know what he was doing. In acting on the

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case, the Department pointed out the necessity of specific intent being a requisite element of the two offenses mentioned and held that the statement of the accused was inconsistent with his plea.

In the case now at hand, the charges under which the accused was tried are similar to the charges mentioned in the C. M. O. cited above in that in each case an important element of the alleged offense was the wilful act against a superior officer, and knowledge on the part of the accused of the other person being a commissioned officer was necessary for him to be properly convicted thereunder. (See also C. M. O. 8, 1922, 14.) It is the opinion of the Department that the statement of the accused wherein he alleged in effect that his mind was mentally incompetent to entertain the necessary specific intent to commit the offenses charged, was clearly inconsisent with his plea of guilty. The court should forthwith have proceeded as if a plea of not guilty had been entered (Naval Courts and Boards, sec. 662).

In view of the above, the proceedings, findings, and sentence were set aside (File 26262–10828, J. A. G., March 12, 1924; G. C. M. Rec. No. 59414).

STATEMENT OF ACCUSED: INCONSISTENT.

An accused who was absent from the Navy for a period of one month and one day, at the expiration of which he surrendered, pleaded guilty to the charge of "Desertion" and was [P. 10] sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of six (6) months, dishonorable discharge, and accessories. After pleading guilty, the accused made the following statement and the court then found the charge and specification proved by plea:

> "I have been about two years and a half in the naval service, up to this, with a good record, of which I am proud. I would like to be given another chance for the reason that when I went on leave I had no idea of staying away. Having run foul of a plain clothes police official in Los Angeles and getting the worst of the argument to the extent of a sentence of ten days, my efforts to communicate with the naval authorities at the time with a view of getting back to my ship before my leave expired were unavailing. Being anxious to get back to my ship, I volunteered, and was given the opportunity to work off my sentence in half the time by going to work at the labor farm. Upon my release I endeavored to get to my vessel by reporting to the recruiting station at Los Angeles, by reporting aboard the U. S. S. _____ at San Pedro, but that vessel could not take aboard any more stragglers, and after many vicissitudes, I reported in at the destroyer base, _____, still in full uniform. I have the honor to admit full responsibility for my unauthorized absence. I request clemency of the court and an opportunity to redeem myself. I can make good."

After careful consideration of the above statement, it is the opinion of the Department that it is inconsistent with the plea of the accused. The whole tenor of the statement is that the accused did not intend to desert, but on the contrary that he was endeavoring to the best of his ability to report back to the Navy at all times. It is, therefore, recommended that the proceedings, finding, and sentence in this case be disapproved.

Courts martial should carefully scrutinize statements presented by the accused and should the tenor of the statement be anything more than a mere request for clemency the latter should be rejected and the procedure outlined in section 662, Naval Courts and Boards, followed. (See secs. 666 and 667, Naval Courts and Boards.)

Before the trial of a case, counsel should carefully go over with the accused the facts in his case and should such facts indicate a legal defense, the accused should be advised to plead not guilty. In this connection see section 588, Naval Courts and Boards (File 26251–32362, J. A. G., March 28, 1924; G. C. M. Rec. No. 59738).

[P. 11] COAST GUARD: TERMINATION OF SERVICE WITH NAVY.

Within the meaning of the War Risk Insurance Act (40 Stat. 402) the Coast Guard ceased to serve with the Navy on August 26, 1919 (File 28762–720J, April 9, 1924).

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DEATH: DATE OFFICIALLY DECLARED.

E, seaman, 2c, USN, was last seen on board the U. S. S. _____ about 5:30 a. m. April 4, 1921, at which time that vessel was at sea off the coast of Cuba being between 4 a. m. and noon from seven to seventeen miles distant from nearest land and in water over 100 fathoms deep. *Held:* E should be officially declared dead as of April 4, 1921, no further information having been received relative to his whereabouts since that day (File 26250–2730:1J, April 21, 1924).

DEATH GRATUITY: DEATH OCCURRING AFTER DISCHARGE.

J, ex-seaman, was discharged pursuant to the recommendation of a board of medical survey, September 15, 1923, for "sarcoma," origin in line of duty, not misconduct. He died December 5, 1923, approximately three months after discharge. The question was presented, whether his parent was entitled to the death gratuity. *Held:* Parent not entitled to the payment of the gratuity for the reason that J was not in the naval service at the time of his death (File 26543–390J, April 18, 1924).

MIDSHIPMEN: ASSIGNMENT TO SUPPLY CORPS ON GRADUATION.

Held: The provisions of the act of July 9, 1913, authorizing the Secretary of the Navy to assign midshipmen to fill vacancies in the lowest commissioned grades of a Staff Corps of the Navy constitutes an exception to section 1379 of the Revised Statutes, and that midshipmen so assigned by the Secretary of the Navy [P. 12] are not subject to examination for the purpose of determining their physical, mental, and moral qualifications for the reason that said qualifications have been properly determined prior to their graduation from the Naval Academy (File 27223–125J, April 11, 1924).

SURRENDER TO NAVAL AUTHORITY: TERMINATION OF UNAUTHORIZED ABSENCE.

A straggler from the U. S. S. _____ surrendered at the office of the Naval Attaché, Paris, France, January 27, 1924, and was furnished commercial transportation and orders to report to the commanding officer of the receiving ship at New York for return to his ship, but arriving in New York the man returned directly to his ship on February 18. The question was presented as to the date of termination of his unauthorized absence within the meaning of the term "Naval Authority."

Held: The date of his surrender to the naval attaché should be considered as the date of the termination of his unauthorized absence from naval authority (File 12823; 10J, April 18, 1924).

U. S. NAVAL RESERVE FORCE: ELIGIBILITY FOR CONFIRMATION.

Held: Under the act of August 29, 1916, the active service required of members of the Naval Reserve Force to qualify for confirmation in their rank or rating in class 2, must be active service performed in the Naval Reserve Force pursuant to orders issued by competent authority. There is no provision of law which authorizes the counting of duty performed in the Naval Militia for the purpose of confirmation in rank or rating (File 28550–1750J, April 16, 1924).

U. S. S. "SHENANDOAH": STATUS OF DUTY ON.

Held: The *Shenandoah* is not a vessel within the meaning of the laws relating to sea duty. That duty on the *Shenandoah* does not afford officers the benefits of sea duty either under the provision of the act of August 29, 1916, relating to promotion or to the provisions of section 6, of the act of June 10, 1922, relative to the accrual of rental allowance while on field or sea duty (File 9886–147J, April 18, 1924).

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[P. 3] STATEMENT OF ACCUSED: VALUE AS EVIDENCE.

An accused, pleading not guilty to the charge of desertion, made an oral statement that it was his intention to return to his station and duty as soon as circumstances permitted.

Held: If the facts as related in the statement of the accused were true, he never had any intention of abandoning the naval service and accordingly was not guilty of desertion. But a statement of an accused not under oath and not subject to cross-examination by the prosecution "cannot legally be acted upon as evidence by the court nor can it be a vehicle of evidence" (Naval Courts and Boards, sec. 665). This limitation on the consideration to be given an oral statement by the court was apparently not realized by counsel for the accused in view of his argument wherein he called attention to the facts contained in such statement. Argument of counsel cannot properly embrace any matter of fact as to which there has been no evidence (Naval Courts and Boards, sec. 669), and since there was no evidence contained in the record as to the facts alleged by the accused in his statement, reference thereto by counsel was not permissible.

In such a case as this where the accused desires to present facts to the court bearing on the merits of the case, such facts should be presented under oath in the form of evidence. Subject to the foregoing remarks the proceedings, finding, and sentence were approved (File 26251–32368, J. A. G., April 24, 1924; G. C. M. Rec. No. 60038).

FORGERY: NECESSARY ELEMENTS TO SUBSTANTIATE CHARGE OF.

A man was tried for forgery, the specification alleging the uttering, offering, and presenting of a blank draft bearing a certain signature.

Held: Forgery is defined to be the false making, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability (Clark and Marshall, The Law of Crimes, par. 392). Therefore before a person can be convicted of uttering a forged instrument it must be shown that the instrument in question, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. It is apparent that a blank draft could have no legal efficacy or could not be the foundation of a legal liability, and is therefore incapable of being the subject of forgery (24 L. R. A. 35).

In view of the above the proceedings and finding were set aside (File 26262–10914A, J. A. G., April 9, 1924; G. C. M. Rec. No. 59778).

[P. 4] DESERTERS AND STRAGGLERS: WHO MAY RECEIVE PAYMENT OF REWARD FOR APPREHENSION AND DELIVERY OF.

Held: The payment of the reward is based upon the contractual relation of the Government and the person who complies with the terms of the offer. It does not depend upon the determination as to who may legally arrest such deserters and stragglers. The person delivering the deserter or straggler to the naval authorities is entitled to be paid the amount of the reward offered whether or not such person was legally authorized to arrest such deserter or straggler (File 26516–493–N, May 9, 1924).

LINE OF DUTY.

------ enlisted with normal eyesight, but subsequently developed farsightedness, necessitating the use of glasses. The board of medical survey stated that the disability was due to congenital refraction error.

Held: Disability originated in line of duty and not due to own misconduct, for reason that there were no facts showing that disability was present at time of entry into service or that it was caused by any intervening causes outside naval service (File 29372:244J, May 27, 1924).

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LINE OF DUTY.

_____ driving borrowed motorcar, exceeded authority as to places to which car should be driven and through collision with another car sustained injury.

Held: Injury sustained not in line of duty, but due to fact that accident was caused by reckless driving on part of another party. Disability should be held not due to own misconduct (File 29372–228J, May 26, 1924).

LOSS OF PAY.

For absence on account of sickness or injury resulting from intemperate use of drugs or alcoholic liquors or other misconduct.

Held: In future cases where an individual is already absent from duty on account of a disability originating in the line of [P. 5] duty and while so absent is found to be suffering from another disability due to his own misconduct, the entry in the medical record should indicate whether or not the disability due to his own misconduct is in fact the cause of the absence from duty, in order to avoid the checkage of pay under the act of August 29, 1916, in those cases where the absence from duty is not due to his own misconduct (File 29372–240J, May 8, 1924).

MILITARY STORES, SUPPLIES AND EQUIPMENT: TRANSFER OF, BETWEEN ARMY AND NAVY.

Held: Property acquired with funds appropriated prior to July 12, 1921, do not fall within the prohibitory provisions of the act of that date, but may under the authority of the act of July 11, 1919, be transferred to the War Department. No material procured with funds appropriated for subsequently to July 12, 1921, should be transferred for use for purposes other than that for which the appropriation was made (File 29440–173P, May 2, 1924).

NAVAL RESERVE FORCE.

Re confirmed commission in case of former officer of the U. S. Coast Guard.

The question was presented as to whether or not a former officer of the United States Coast Guard may be confirmed in the Naval Reserve Force in the same rank held at the time of resignation in the Coast Guard without examination other than physical examination.

Held: Under the provisions of the act of August 29, 1916, a former officer of the Coast Guard should not be given a confirmed commission in the Naval Reserve Force until he had been examined and recommended for such appointment and commission by a board of three naval officers as provided in the above act. A former officer of the Coast Guard does not come within the exception provided for a former officer or midshipman of the Navy (File 26254–2593: 418–2J, May 27, 1924).

NATIVE OF GUAM: DISPOSITION OF, AS A RESULT OF MEDICAL SURVEY RECOMMENDING HIS DISCHARGE, HE NOT BEING A NATURALIZED CITIZEN.

_____, served in the Navy for more than eighteen years and nine months, his present enlistment having been entered into March 28, 1921; a board of medical survey found him to be suffering from tuberculosis and recommended that he be discharged [P. 6] from the naval service and detained as a supernumerary until taken up by the Veterans Bureau.

Held: In view of the fact that _____ is not a naturalized citizen he cannot be transferred to the Fleet Naval Reserve and the procedure recommended by the board of medical survey is the proper action to take in his case (File 26252–165: 2, March 5, 1924).

PERMANENT APPOINTMENT: DATE EFFECTIVE.

Bureau of Navigation authorized change in rating from C. C. M., acting appointment, to C. C. M., permanent appointment. Man died before authorization reached ship to which he was attached.

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Held: Authorization does not become effective until received by commanding officer, consequently the permanent appointment did not become effective prior to death (File 26250–3339: 2J, May 24, 1924).

PRECEDENTS OF REAR ADMIRALS AND MAJOR GENERALS.

Rear Admiral John D. McDonald, U. S. Navy, was temporarily commissioned as rear admiral with date of rank, October 15, 1917; he was permanently commissioned as rear admiral with date of rank December 31, 1918; he entered the upper half of the rear admiral list April 1, 1919; his temporary commission as rear admiral was vacated December 31, 1921.

Major General Charles P. Summerall, U. S. Army, served in the emergency forces as a temporary major general with rank as such from June 26, 1918; he was permanently commissioned as major general in the Regular Army with date of rank April 5, 1920; his office as major general in the emergency forces was vacated on April 30, 1920, the date on which he accepted the office of major general in the Regular Army.

Held: That Rear Admiral McDonald is entitled to precedence over Major General Summerall by right of seniority (Atty. Genl.'s Opinion of May 19, 1924, to the Secretary of War, Navy, Dept. File 11130–83: 25).

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[P. 3] EVIDENCE: FAILURE TO INTRODUCE, ON THE PART OF THE PROSECUTION.

An accused, after pleading guilty to a charge of desertion, took the stand as a witness in his own behalf in extenuation. Having made statements inconsistent with his plea, the court directed that his plea of "guilty" be withdrawn and a plea of "not guilty" entered therefor.

The prosecution introduced no evidence to establish the material allegations of the specification, nor did the reexamination or cross-examination of the accused establish these allegations. The accused was convicted of the charge.

Held: The court apparently overlooked the fact that this change of plea placed an entirely different aspect on the case; it being in effect a recommencement of the trial, as a new plea had been put in issue. The next stage of the new proceedings was for the prosecution to prove its case, and as the record in this case stood there was no evidence on record on which the court could arrive at a finding on the charge and specification. In view of the foregoing the Department disapproved the proceedings, findings, and sentence (File 26251–32610A, G. C. M. Rec. No. 60190, May 15, 1924).

EVIDENCE: HEARSAY.

The commanding officer and the executive officer of the station where the offenses were alleged to have occurred were allowed to testify as witnesses for the defense in reply to question by [P. 4] counsel for the accused as to what occurred at mast held by the commanding officer approximately one-half hour after the occurrence in question, primarily for the purpose of having the statements made by the accused at that time presented to the court.

Held: These statements were self-serving and hence were inadmissible (Naval Courts and Boards, 361). Furthermore, they were mere narratives of past occurrences and could not be deemed to be part of the res gestae (Naval Courts and Boards, 371). Even more objectionable was the testimony of the commanding officer replying to a question by the court in which he gave his own deductions and conclusion resulting from his investigation. (See Naval Courts the Boards, 421.) This testimony was decidedly prejudicial to the prosecution's case and should have been objected to by the judge advocate.

Subject to the foregoing remarks, the proceedings, findings, and sentence were approved (File 26251–31638A, G. C. M. Rec. No. 60301, May 12, 1924).

[C. M. O. No. 6—1924]

EVIDENCE: INTRODUCTION OF.

In a recent trial, the judge advocate attempted to introduce into evidence a written statement, signed by the accused, in which he admitted his guilt of the offense alleged in the specification. Upon the request of counsel for the accused, the court, before considering the question of the admission of this statement, very properly permitted the defense to cross-examine the witness before whom the statement was made and to produce additional witnesses to show the circumstances surrounding its making. Evidence was presented by both the prosecution and defense pertaining to the statement in question, but the judge advocate failed to again offer it for admission in evidence and it was not called for by the court.

Held: The admissibility of the statement was not definitely passed upon by the court. It was the duty of the judge advocate to have offered this statement for final determination as to its admissibility after all of the evidence pertaining to it had been received. The failure to take this action precluded the possible admission of very material evidence for the prosecution (File 26251–32268A, G. C. M. Rec. No. 60010, May 15, 1924).

[P. 5] INSANITY: IMPROPER EVIDENCE IN CASE OF.

An accused whose plea in bar of trial on the ground of insanity was overruled, then pleaded not guilty to all charges and specifications. The court then adjourned for a month, at the end of which time it met again. The judge advocate took the stand and offered in evidence a letter from the convening authority authorizing the court to proceed with the trial and also a report of a board of medical survey, which declared the accused fit for duty. These communications although objected to were received in evidence. Later the accused took the stand and testified that his mind was a blank during the period in which the alleged offenses occurred; that he had no recollection of committing the offenses charged and that he believed his insanity was hereditary because his mother had at one time been confined in an asylum.

Held: This evidence was sufficient to raise the question of the sanity of the accused and require the court to consider that issue. If from the whole evidence there was a reasonable doubt as to whether the accused had sufficient mentality to know the nature of the acts committed by him and whether or not the same were wrongful; then, and in that event he should be acquitted * * *. No competent evidence as to the mental condition of the accused was presented. The certificate of the medical officer who had observed the conduct of the accused subsequent to the time of postponement was offered and received in evidence over the objection of the accused. This certificate should not have been received either as evidence of the mental condition of the accused at the time of the trial or as evidence of his condition at the time of the alleged commission of the offenses with which he was charged. It was hearsay evidence. It is probable that the court also considered this evidence in arriving at a finding in the matter, and for that reason the Department set aside the proceedings, findings and sentence (File 26262–10869A, G. C. M. Rec. No. 59620, Mrch 24, 1924).

SENTENCE: TO BE DISCHARGED AS UNDESIRABLE, NOT AUTHORIZED.

A general court martial, having convicted an accused of the offense alleged against him, sentenced him "to be discharged from the United States Naval Service as undesirable."

[P. 6] *Held:* The discharge of an enlisted man as undesirable is an administrative action provided for by the Bureau of Navigation Manual D8310–8313, and is intended merely to terminate an existing contract of enlistment where the man concerned has demonstrated his undesirability for retention in the naval service. The sentence by a naval court martial of an undesirable discharge is not authorized by the Articles for the Government of the Navy nor by any provision of Naval Courts and Boards. The sentence of undesirable discharge adjudged by the court in the case under discussion being illegal the Department disapproved it (File 26251–32124A, G. C. M. Rec. No. 59967, May 29, 1924).

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SENTENCE OF SUMMARY COURT MARTIAL: EFFECT OF REMISSION BY THE SECRETARY OF THE NAVY.

Held: That when the Secretary of the Navy has exercised his discretion in setting aside or modifying the sentence of a summary court martial his action is final and to the extent of his modification of the sentence "restores the subject to the same status he occupied prior to the finding and sentence of the court, and the sole duty of the Comptroller General in regard to such action is to be governed by it in adjusting the amount of pay to which the enlisted man is entitled" (Op. Atty. Gen., May 8, 1924; File 26254–3477:8 & 9 AD/3, June 2, 1924).

SUMMARY COURTS MARTIAL: EFFECT OF ACTION BY SECRETARY OF THE NAVY.

In all cases of trial and sentence by summary court martial it is within the power of the Secretary of the Navy to review the proceedings and sentence, and either to set aside or to modify them as he may consider proper, and when he has exercised his discretion in that respect his action is final, and to the extent of the modification of the sentence restores the subject to the same status the latter occupied prior to the finding and sentence of the court.

The sole duty of the Comptroller General in regard to such action is to be goverened by it in adjusting the amount of pay to which the enlisted man is entitled. As to the pay actually due in the respective cases that must be left to the determination of the Comptroller General subject to the effect of the action of the Secretary of the Navy (Op. Atty. Gen., May 8, 1924).

BULLETIN

[P. 7] COAST GUARD: RECRUITING AND TRAINING MEN FOR.

Held: Members of the naval service may be employed in training personnel of the Coast Guard in connection with and in addition to their regular naval duties, but that no transfer of funds may be made to pay the salaries of such naval personnel.

The services performed for the Treasury Department should only be undertaken upon the request of the Secretary of the Treasury and approved by the Secretary of the Navy. Reimbursement for expenses incident to such service should be made in accordance with the provisions of the act of May 21, 1920 (41 Stat. 613, sec. 7; File 28762–721J, May 14, 1924).

DESERTER: REWARD FOR APPREHENSION OF.

A police officer who apprehended a deserter from the naval service and who subsequently took him to a civil hospital for treatment, though not releasing him from arrest, is entitled to receive the reward offered, even though a naval ambulance removed the man from the civil hospital to the naval hospital (File 26516–492–N, May 31, 1924).

DISABILITY: DEFECTIVE VISION, ORIGIN OF.

A man upon enlisting in October 1920, had the vision of his left eye noted as 13–20. In March 1924, the vision in the same eye was noted as 1–20.

Held: The man was suffering from choroiditis at the time of his enlistment, which disease gradually grew more pronounced with the passage of time. Origin not in line of duty and not the result of his own misconduct (File 29372–252J, June 2, 1924).

[P. 8] NAVAL RESERVE FORCE: AUTHORITY OF THE SECRETARY OF THE NAVY TO WAIVE PHYSICAL DEFECTS IN CASES OF ORIGINAL ENROLLMENT, REENROLLMENT OR PROMOTION IN AND TO CONFIRMED RANK.

Held: No reservist shall be appointed or commissioned in any rank in any class, or promoted to a higher rank therein, until he shall have been found

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physically qualified by a board of medical officers to perform the duties required in time of war.

No person shall be enrolled or transferred to class 2 of the Naval Reserve Force unless he establishes satisfactory evidence as to his qualifications for duty on board combatant ships of the Navy. This applies equally to reenrollment in this class. Candidates presenting themselves for original enrollment and reservists presenting themselves for reenrollment, except in class 2, are not required by statute to take a physical examination before a board of medical offcers, or otherwise to determine their qualifications to perform the duties of their rank in time of war, or for duty on board combatant ships of the Navy. However, the Secretary of the Navy, acting under his authority to make regulations for the Naval Reserve Force, has provided physical examinations for enrollment and reenrollment.

In the case of an appointment, commission, or promotion, the Secretary of the Navy is without authority to waive physical defects, established by a board of medical officers, which would prevent a reservist from performing his duties in time of war. In the case of enrollment or transfer, or reenrollment in class 2 of the Naval Reserve Force, the Secretary of the Navy is without authority to waive physical defects which would disqualify said reservists for duty on board combatant ships of the Navy.

The Secretary of the Navy has general authority to waive physical defects in cases of enrollment or reenrollment, except in class 2 (File 28550–1757J, May 13, 1924).

RETIREMENT: DATE EFFECTIVE.

A lieutenant on the active list of the Navy became 45 years of age November 22, 1923; he would be eligible for promotion to the grade of lieutenant commander on June 5, 1924; question involved when would his retirement become effective.

Held: Retirement effective on the date he becomes eligible for promotion to the grade of lieutenant commander, if confirmed by the Senate prior to that date; otherwise, retirement effective on the date of confirmation (File 27231–264, June 7, 1924).

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[P. 3] EVIDENCE: HEARSAY, INADMISSIBILITY OF.

A court overruled objections of counsel for the accused to certain testimony given by Commander G_____. This officer testified to certain matters relative to the offense charged against the accused, information of which he had obtained from other persons while making an official investigation of the accused's conduct.

Held: The testimony objected to was clearly hearsay and was not admissible under any exception to the hearsay rule; consequently the accused's objection should have been sustained. In this connection see section 350, Naval Courts and Boards, and C. M. O. I. 1922, 12 (File 26251–32691A, J. A. G., June 20, 1924; G. C. M. Rec. No. 60319).

MISSING SHIP: ELEMENTS NECESSARY TO PROVE IN SPECIFICATION ALLEGING.

An accused was convicted of two charges, the specification under charge II alleging in effect that although the accused well knew his ship was to sail on or about January 2, 1924, he did, without authority, deliberately and wilfully in order to avoid duty thereon, miss said ship when she sailed as aforesaid.

Held: In order for an accused properly to be convicted of the offense of missing ship, it must be established that he knew of the sailing date in question (C. M. O. 12, 1922, 9; C. M. O. 141, 1918, 16). In the case under consideration, such knowledge on the part of the accused was not shown, nor were there any facts adduced that would reasonably indicate that the missing of the ship was deliberate. In view of the above, the Department set aside the finding on charge II, and on the specification thereunder, and reduced the sentence as approved by the convening authority (File 26262–11076A, J. A. G., June 28, 1924; G. C. M. Rec. No. 60598).

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PAY: WITHHELD BECAUSE OF SENTENCE OF COURT MARTIAL.

Held: When the pay due an enlisted man in the Navy has been withheld because of sentence of a naval court martial, and the Secretary of the Navy for any reason sets aside the proceedings [P. 4] or remits the sentence of the court, it immediately becomes the duty of the proper disbursing officer of the Navy to pay such enlisted man, if still in the Navy, the amount so withheld unless some reason to the contrary exists independently of the sentence.

If the man's connection with the service has been terminated without payment to him of the amount due, it becomes necessary for him to apply to the Comptroller General for such amount (File 26254–3477: 9–1 AD/3, July 22, 1924).

WITNESS: MEMBER OF COURT MAY TESTIFY OTHER THAN FIRST.

In a recent general court martial case, the convening authority disapproved the proceedings, findings, and sentence for the reason that a member of the court was not called as a witness for the prosecution in the proper order, and also because the manner of introducing the statement of the accused was entirely irregular.

Held: Section 436 Naval Courts and Boards, which provides that where an officer is called as a witness before the court of which he is a member he should be called first, is directory only, and the failure of the court to comply therewith does not invalidate the proceedings. In regard to the introduction of the statement, inasmuch as the accused admitted in open court the essential allegations contained in his statement, the statement was of doubtful assistance to the case of either the prosecution or the defense. Moreover, the accused having made no objection to its introduction into evidence, his rights were not prejudiced thereby. The irregularities noted and upon which the proceedings, findings, and sentence were disapproved do not constitute such material defects as to invalidate the case which, however, the action of the convening authority has in fact nullified (File 26262–10992A, J. A. G.; G. C. M. Rec. No. 60294, June 23, 1924).

CONSERVATRIX: PAYMENT OF RETAINER PAY TO.

The mother of an enlisted man who is now a patient in St. Elizabeths Hospital, was appointed his conservatrix by the probate court for the county of Bridgeport, State of Connecticut, and thereupon requested that future retainer pay checks due her son be sent to her.

Held: it will be necessary for the mother to obtain an ancillary decree in the Supreme Court of the District of Columbia, [P. 5] in order to entitle her to receive and to have paid to her any sums of money now due or hereafter due to her son (File 26254–2593: 4985, July 17, 1924).

DISABILITY: NOT IN LINE OF DUTY, NOT DUE TO OWN MISCONDUCT.

Present disability is not due to an injury received on board ship, but originated subsequent to desertion of the man therefrom. There is, however, no evidence that said disability is in any way traceable to his desertion from the naval service or to any other misconduct.

Held: Present disability should be held to have originated not in line of duty and not due to own misconduct (File 29372–257J, July 23, 1924).

DISABILITY: NOT IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

The board of medical survey convened in the case of an enlisted man concluded that the arteriosclerosis from which he is suffering is a sequel to the disease of syphilis with which he was previously found to be afflicted.

Held In accordance with the holding in the case of E. W_____, approved December 18, 1923, file 29372–203, in which it was stated:

> "That where the disability complained of, as in this case, is a separate and distinct disability from that which he was originally admitted to the

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sick list with a diagnosis 'due to his own misconduct,' it should not be held to be due to his own misconduct, although the Board of Survey is of the opinion that the latter disability is a sequel to the former disability."

The disability should be held to have originated not in the line of duty and not due to own misconduct (File 29372–225J, July 9, 1924).

FLEET MARINE CORPS RESERVE: ELIGIBILITY FOR ENROLLMENT IN.

Held: Under the provisions of the act of August 29, 1916, an individual must not only be a citizen of the United States to be eligible for enrollment in the Fleet Marine Corps Reserve, but he must have served at least one four-year term of enlistment, or an enlistment during minority, in the Navy or Marine Corps, or the equivalent of a four-year term of enlistment in the Navy or Marine Corps. Service in the National Naval Volunteers, or service in the Marine Corps Reserve, class 2, may not be counted for that purpose (File 28553–513J, July 23, 1924).

[P. 6] FLEET NAVAL RESERVE: ELIGIBILITY FOR TRANSFER TO, REGARDLESS OF CITIZENSHIP.

Two Filipinos, native born, not having been naturalized and not having declared their intentions of becoming citizens of the United States, completed respectively twenty years service in the Navy on May 16, 1924, and sixteen years service in the Navy on March 1, 1924. The question involved is whether they may be transferred to the Fleet Naval Reserve regardless of citizenship.

Held: In accordance with the provisions of the act of August 29, 1916, and of the act of July 1, 1922, neither of the above-mentioned Filipinos may legally be transferred to the Fleet Naval Reserve until he has become a citizen of the United States. It will be noted, in this connection, that each Filipino is eligible for naturalization under the provisions of the act of May 9, 1918 (40 Stat. 542; File 26254–3591: 9–2J, July 14, 1924).

FLEET NAVAL RESERVE: TRANSFER FROM CLASS 1–C *to* CLASS 1–D.

An enlisted man on July 1, 1922, had 18 years and 26 days service to his credit, but not claiming prior service in the Marine Corps as he was entitled to do, he was transferred to class 1–C instead of class 1–D. The question involved is whether or not the records may now legally be changed to show that he was transferred to class 1–D instead of to class 1–C.

Held: The provision of the act of July 1, 1922, authorizing his transfer to class 1–D was terminated on January 1, 1923, and there is no longer any authority for transferring him to class 1–D (File 28550–1780J, July 24, 1924).

HOSPITAL: SERVICE TO DEPENDENTS OF NAVAL PERSONNEL.

Held: The law under which the Army provides hospitalization for dependents of officers and enlisted men is the Act of July 5, 1884 (23 Stat. 112). Under this act the Army for forty years has been rendering hospital treatment to dependents of officers and enlisted men. The same law (the act of July 5, 1884) is applicable to the Army and to the Navy; therefore it must be conceded that the Navy needs no more Congressional authority than does the Army in order to extend hospital treatment to dependents. Certain changes in Navy Regulations should, however, be made (File 9438–138 N, July 19, 1924).

INSANITY: AFFIRMATIVE PROOF NECESSARY.

Held: The facts that H_____ was admitted to the Brooklyn State Hospital on November 25, 1920, and to Matteawan State Hospital on March 8, 1922, do not establish that he was insane at the time of his desertion on February 10, 1919. Therefore, [P. 7] the mark of desertion in his case cannot be legally removed in the absence of affirmative proof that H_____ was insane at the time of his desertion (File 26516–502 N, July 23, 1924).

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INTERNATIONAL GEOPHYSICAL UNION: AUTHORITY TO SEND DELEGATE TO CONVENTION OF.

Held: In view of the prohibitions contained in section 8 of the act of June 26, 1912, and in the absence of specific appropriation, or of a provision in the general appropriation acts for the fiscal year ending June 30, 1925, covering the expenses of the representative of the Hydrographic Office, there is no authority permitting the Navy Department to send a delegate to the convention of the International Geophysical Union, a branch of the International Research Council to be held at Madrid, Spain (File 28997–26:2 J, June 21, 1924).

OFFICER, RETIRED: ACCEPTANCE OF POSITION IN A FIRM FURNISHING MATERIAL TO THE GOVERNMENT.

The question involved is whether the acceptance by a retired officer of a position as director in a firm being organized which might in the future furnish material to the Federal Government is in violation of the act of June 10, 1896 (29 Stat. 361) which provides in part:

> "That hereafter no payment shall be made from appropriations made by Congress to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed, after June thirtieth, eighteen hundred and ninety-seven, by any person or company furnishing naval supplies or war material to the Government; and such employment is hereby made unlawful after said date."

Held: The above question is not only hypothetical but one over which the Navy Department is not authorized to exercise final jurisdiction. The question of the legality of accepting civil office is one which must be determined by the retired officer concerned upon his own responsibility, and the Government does not become interested in the matter until the office has actually been accepted contrary to law (File 9736–136J, July 12, 1924).

PARDON: EFFECT OF UPON RECORD OF SERVICE.

The President of the United States having granted to F. K_____ a full and unconditional pardon for the offense of desertion committed July 4, 1922, the question arises as to the effect of such pardon upon the service record of F. K_____.

Held: Although the pardon renders F. K_____ as innocent in the eyes of the law as if he had never committed the offiense, and [P. 8] releases him from the consequences of his offense, yet it does not remove that fact that he committed the offense (*Carlesi* v. *New York*, 233 U. S. 51; File 26510–1434:1N, July 22, 1924).

PROFESSORS: DISMISSAL OF CERTAIN CIVILIAN.

Held: The action taken by the Superintendent of the Naval Academy in notifying certain civilian professors that their services would no longer be needed after the termination of their contract is not a violation of the provisions of the act of May 28, 1924 (File 11168–9J, June 25, 1924).

REQUISITION: BY CIVIL AUTHORITIES, TERMS OF SEEMINGLY NOT COMPLIED WITH.

An enlisted man was delivered to the civil authorities upon requisition signed by the Acting Governor of Massachusetts for the sole purpose of prosecuting him for the crime of "neglecting to provide for family." An agent of the State of Massachusetts upon receiving custody of the said enlisted man signed an agreement to the effect that the said man would be returned to the naval authorities immediately upon the completion of his trial upon the charge aforesaid in the event that he was acquitted, or immediately upon satisfying the sentence of the court in the event that he was convicted and a sentence imposed.

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Held: It is now represented to the Department that immediately following the aforesaid man's delivery for the sole purpose of prosecuting him for the alleged crime of "neglecting to provide for family," the aforesaid man was "sentenced to nine months imprisonment for contempt of court" and that he "was tried for failure to carry out a previous court sentence and not for the crime mentioned in the papers of his case." In view of the foregoing, an investigation is desired with a view of determining whether the terms of the requisition and agreement were strictly complied with (File 26524–1553: 8N, July 23, 1924).

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[P. 3] ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED: DURATION OF, NOT ESTABLISHED.

In a recent general court-martial case the accused was found guilty of "Absence from station and duty after leave had expired" for a period of about one month and eighteen days. The prosecution established the fact that the accused was granted a furlough and had failed to return upon the expiration thereof. In addition, the accused took the stand and admitted that he was absent over leave at the time he was delivered to the naval authorities although he did not establish the date of this delivery.

Held: The fact that the accused was absent over leave was therefore established. As the unauthorized absence is the gist of the offense (Naval Digest, p. 7) it is clear that the accused was legally convicted of the offense found proved by the court even though the duration of the unauthorized absence was not established (File 26251–33068A, G. C. M. Rec. No. 60847, August 13, 1924).

CHARGE: NO OFFENSE ALLEGED.

In a recent general court-martial case the accused was tried and convicted of several charges, charge I alleging the "Unauthorized use of an automobile of another."

Held: The charge "Unauthorized use of an automobile of another" does not allege an offense in violation of the Articles for the Government of the Navy or any other enactment of Congress. Section 284, Naval Courts and Boards, contains a sample charge and specification for this offense. However, the use of such a charge presupposes a law making such an act a criminal offense where such act takes place and is particularly applicable to states which have enacted statutes making such acts offenses. Inasmuch as the irregularities described in the specification of charge I took place in Haiti, a foreign country, a naval court martial could not take judicial notice of the laws of that country and as no specific law of Haiti was shown to have been violated the acts charged do not allege an offense. In view of the above the Department set aside the proceedings and finding on charge I (File 26262–11092A, G. C. M. Rec. No. 60649, July 19, 1924).

CLEMENCY: IMPROPER RECOMMENDATION TO.

In a recent general court-martial case two members recommended the accused to clemency "in view of the excellent appearance of the accused before the court, his appearance of [P. 4] truthfulness, and the belief that he never intended to desert or separate himself from the naval service."

Held: It is improper to recommend an accused to clemency because of doubt as to his guilt of the offense of which he has been convicted as such procedure results in a violation of the oath of the members making such recommendation, not to divulge the vote or opinion of any particular member (Naval Courts and Boards, sec. 705). The proceedings, findings, and sentence being legal, the Department approved them (File 26251–33165A, G. C. M. Rec. No. 60866, August 13, 1924).

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DECK COURT: CIVIL-SERVICE EMPLOYEE AS RECORDER OF.

Held: Under the provisions of the act of February 16, 1909 (see sec. 160, Naval Courts and Boards, 1923), which provides that:

> "Any person in the Navy under command of the officer by whose order a deck court is convened may be detailed to act as recorder thereof."

A civil service employee is not legally qualified to act as recorder of a deck court, and his appointment as such would invalidate the proceedings (File 37217-5635-C, August 12, 1924).

FINDINGS: WHEN APPROVED NO LONGER OPEN TO REVIEW.

An officer, G. F. O_____, having been tried and convicted by general court martial and sentenced to dismissal, which sentence was duly approved by the Secretary of the Navy and by the President and carried into execution, the question arises as to whether the findings of the general court martial are now open to review.

Held: The Supreme Court of the United States held that neither the Navy Department nor the President could change the findings of a retiring board which the Secretary of the Navy had previously reviewed and approved. The findings having already been approved were no longer open to review because the action of the President in approving the findings was equivalent to the judgment of an appropriate tribunal upon the facts as found, and because the said judgment as a judgment could not be disturbed (*U. S.* v. *Burchard*, 125, U. S. 176; 27 Op. Atty. Gen. 225). In view of the foregoing, and many other authorities to the same effect, it is the opinion of the Department that the case of G. F. O. _____ is res judicata and therefore not subject to review (File 12761-57 AD/3, July 25, 1924).

[P. 5] MISSING SHIP.

A specification under the charge "Conduct to the prejudice of good order and discipline" as found approved, alleged that the accused "well knowing that his ship was to sail, missed said ship when she sailed." The question involved is whether or not missing ship without specific intent to do so, constitutes an offense separate from the unauthorized absence which usually accompanies such cases.

Held: It was the duty of the accused to exercise the highest degree of care and the utmost prudence to the end that he would return to his ship prior to its sailing. Instead of doing this the accused himself testified that he drank "a couple of bottles of beer" and "two or three cocktails" on the night of March 28, and as a result became sick. He engaged a room in a Panama hotel and thereafter knew nothing more until he awoke the following afternoon at about 2 p. m. in a roadhouse some distance from town. Under the circumstances as set forth above, the court's finding of guilty on the charge of "Conduct to the prejudice of good order and discipline," after eliminating from the specification the averment imputing to the accused a positive intent to miss his ship in order to avoid duty thereon, can be explained by the fact that the conduct of the accused was lacking in that degree of care, attention, prudence, and forethought which was required of him at this particular time. This finding amounted to more than a mere finding of guilty of unauthorized absence, and was a proper finding under the charge of "Conduct to the prejudice of good order and discipline" (File 26251-32989A, G. C. M. Rec. No. 60695, August 6, 1924).

SPECIFICATION: CHARGE NOT SUPPORTED BY.

An accused was tried under the charge of "Scandalous conduct tending to the destruction of good morals," a specification alleging that the accused "having, on or about May 16, 1924, unlawfully and without justifiable cause, en-

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tered the private residence of one Stanislas King, located at 14 Yalu Road, in the city of Shanghai, China, did, when requested by the lawful occupants to leave, refuse to leave said residence, and did remain in said residence against the wishes and without the consent of said occupants."

Held: The specification sets out a civil trespass which, in civil practice, in the absence of statutory prohibition would not constitute a crime and which does not constitute "Scandalous conduct tending to the destruction of good morals." The Department therefore set aside the proceedings and finding on this specification (File 26262–11108A, G. C. M. Rec. No. 60714, August 13, 1924).

[P. 6] ACTIVE SERVICE: INTERPRETATION OF TERM.

Held: The term "active service" as used in title II, section 201, World War Adjusted Compensation Act of May 19, 1924, was intended by Congress to include only service on the active list as differentiated from service on the retired list or while in inactive service in the reserve force, for the reason that this is remedial legislation, and had Congress intended the term "active service" to be employed in a restricted sense it would have so stated in its definition of terms as it did in the case of the term "veteran." Accordingly, no time should be deducted in the case of an individual sick in a hospital due to his own misconduct or not due to his own misconduct, or sick but not in a hospital, and that said period of time should be counted as active service in all cases except where his misconduct resulted in his separation from the naval service under other than honorable conditions, as provided in title I, section 2, of the aforesaid act in defining the term "veteran" (File 29460–3:1J:AC, July 31, 1924).

COMPENSATION: ADJUSTED TO VETERANS OF THE WORLD WAR.

The question presented to the Attorney General concerned the construction to be placed upon the term "active service" as employed in section 201 of Public Act No. 120, 68th Congress, entitled "An act to provide Adjusted Compensation for Veterans of the World War and for other purposes."

Held: I concur in the opinion of the Judge Advocate General of the Navy as follows:

> "* * * All service in the military or naval forces of the United States between April 5, 1917, and July 1, 1919, entered into prior to November 12, 1918, and from which said individual was not separated under other than honorable conditions, should be counted in computing his active service except as provided in sections 2 and 202 of this act, including absence without proper authority, absence in the hands of civil authorities, absence on account of sickness or injury due to his own intemperate use of drugs or alcoholic liquors, or other misconduct, and for the period while in confinement under sentence or awaiting trial and disposition of his case if the trial resulted in [P. 7] confinement, and other situations not enumerated which did not result in his separation from the service under other than honorable conditions, but that the period of time in desertion should not be counted except where tried for desertion and acquitted, or conviction did not result in his separation from the service under conditions other than honorable, for the reason that a desertion is deemed to be a separation from the service under other than honorable conditions."

I am, therefore, of the opinion that the words "active service," as used in section 201 of the Adjusted Compensation Act, should be so applied as to include all service from the time of induction into the military or naval forces until separated therefrom, and to include also persons on the retired list assigned to active service in connection with the conduct of the war, except as otherwise specifically provided by sections 2 and 202, but any period of time during which a person may have actually absented himself from the service and been beyond the control of his superior officers and in a state of desertion should not be counted. In other words, the evident intention of Congress to differentiate between the words "active" service in the conduct of the war operations of the United States and "inactive" service on the retired list or in the reserve force should be observed and given effect (Op. Atty. Gen., July 26, 1924).

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COMPTROLLER GENERAL OF THE UNITED STATES: INSPECTION OF NAVY ACTIVITIES BY.

In accordance with the provisions of law contained in sections 312 and 313 of the Budget and Accounting Act, 1921, approved June 10, 1921, representatives of the Comptroller General from time to time will visit activities under the Navy Department.

Held: It is directed that when such representatives, properly accredited, report at a Navy activity for the purpose of making the inspections and investigations prescribed in the above quoted sections of the Budget and Accounting Act of 1921, they be given every assistance and be accorded all due courtesy in the conduct of their work (Secretary of the Navy letter No. 27223–134, 205–00–EDX SANDA, August 15, 1924).

CONTRACT: EXTENSION OF TIME FOR THE PERFORMANCE OF.

Held: The provisions of the contract of J. W. D._____ Co. with the government provide that the determination of the question whether delays in obtaining material were or were not unavoidable on the part of the contractor, was within the discretion of the Chief of the Bureau of Yards and Docks. This [P. 8] carries with it the duty of the Chief of the Bureau to exercise a reasonable judgment in making his determination, and when that judgment has been exercised it should not be lightly overruled by superior authority. A careful examination of the matter discloses no reason that would convince the Department that the Chief of the Bureau has not carefully weighed all the testimony offered to him, and reached a proper conclusion. Therefore, the action of the Chief of the Bureau in assessing liquidated damages for 54 days at $20 per day against the J. W. D_____ Co. should be approved (File 26801–1577S, May 6, 1924).

DEATH: NOT INCURRED IN LINE OF DUTY, AND RESULT OF OWN MISCONDUCT.

Held: The death of H. J. S_____ which occurred while he was absent without leave from his ship should be held to have occurred not in the line of duty and that it was the result of his own misconduct (File 26250–1968: 5J, August 21, 1924).

DESERTION: IN TIME OF WAR.

Held: No person is a "deserter in time of war" under the provisions of section 1420, Revised Statutes, unless he be convicted of such desertion by a court martial (File 26251–31838A–N, August 2, 1924).

DESERTER: STATUS OF.

Held: In the absence of evidence showing that D. K. J_____ met with foul play, he should be carried on the rolls of the Bureau of Navigation as a deserter (File 26516–503J, August 23, 1924).

DISABILITY: NOT IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

Held: The disability complained of had its inception on or about December 22, 1914, i. e., prior to the date of the act of August 29, 1916, making certain acts misconduct. Therefore the said disability should be held to have originated not in line of duty and not due to own misconduct (File 29372–259J, August 22, 1924).

DISABILITY: NOT IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

Held: The disability complained of in the case of D. B. T_____, namely, deformity of the spinal vertebra and curvature of the spine, existed prior to enlistment, and accordingly did not originate in the line of duty, and is not due to his own misconduct (File 29372–261J, August 23, 1924).

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[P. 9] DISABILITY: PAY WITHHELD PENDING DECISION IN REGARD TO CAUSE OF.

The disability complained of in the case of W. G. T_____, was decided to have been not incurred in the line of duty, but not due to own misconduct.

Held: While the question of whether the above-named man will be restored to duty depends wholly upon whether he is physically capable of performing regular duty, the effect of the decision above referred to will entitle him to receive his back pay which was being withheld while the question of whether or not his disability was due to his own misconduct was being determined (File 29372–255:1 J, July 11, 1924).

EMPLOYEE: CIVIL SERVICE, DISCHARGE OF.

G. W. W_____, a civil-service employee on duty as a machinist at the Navy Yard, Pearl Harbor, did not conduct any of his labor agitation activties within the navy yard, nor amongst the civil-service employees on duty there.

Held: Consideration of the matter transmitted relative to the activities of the aforementioned man failed to disclose any facts which would warrant his discharge as a civil-service employee so long as his work in the navy yard at Pearl Harbor is satisfactory (File 4488–1236 J, August 19, 1924).

ENLISTMENT: FRAUDULENT, VOIDABLE AND NOT VOID.

Held: A man who is charged with desertion in time of war and is never tried and convicted of this offense is not, under section 1420, Revised Statutes, a "deserter in time of war," and his subsequent fraudulent enlistment is voidable and not void. A naval court martial, therefore, has jurisdiction of such an offense (File 26251–31838A–N, August 2, 1924).

GRATUITY: PAYMENT OF BECAUSE OF DEATH.

Held: The act of June 4, 1920, specifically requires that the dependent relative of an enlisted man must have been previously designated by him before said dependent is eligible to receive the gratuity therein provided for, regardless of the fact that the individual claiming dependency was actually dependent upon said enlisted man at the time of his death (File 26250–3291:2 J, August 19, 1924).

PAY: DEDUCTION FROM, ON ACCOUNT OF LOSS OF GOVERNMENT PROPERTY.

Held: There is no statutory authority for deducting from the compensation due a civilian laborer not under bond with sureties, [P. 10] nor charged with receipt and disbursement of public money, the value of Government stores lost while in his custody (File 6692–430 S, May 8, 1924).

PAY CLERK, U. S. NAVY: NOT AN OFFICER OF THE SUPPLY CORPS.

A pay clerk was recently tried and convicted of two charges, charge II alleging "Conduct to the prejudice of good order and discipline." The specification under this charge alleged that he, "in violation of section two thousand and eighty-two, Manual of the Supply Corps, United States Navy, knowingly, wilfully, and without proper authority, in the presence of two civilians, names to the relator unknown, divulge the combination of the safe in the pay office of said hospital, committed to his, the said A_____, charge, for the purpose of keeping public funds therein, to one L. E. A_____, then a pharmacist's mate first class, U. S. Navy." Counsel for the accused contended that section 2082 aforesaid did not apply to the accused inasmuch as being a pay clerk he was not "an officer of the Supply Corps" within the meaning of the term as used in that section. Section 2082 of the Manual of the Supply Corps provides as follows:

> "The bulk of all currency which an officer of the Supply Corps has on hand shall be kept by him in his safe, the combination of which he shall not divulge to anyone * * *."

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Held: In view of sections 208, 103, and 2085 of the Manual of the Supply Corps, the Department is of the opinion that a pay clerk is not an officer of the Supply Corps within the meaning of the term in section 2082 of the Manual of the Supply Corps, and that this section applies to commissioned supply officers only. Consequently, the accused is not guilty of violating the provisions of section 2082 of the Manual of the Supply Corps as alleged in the specification of charge II. In view of article 151, Navy Regulations, and of chapters 33 and 34, Navy Regulations, pay clerks are warrant officers of the Navy, designated staff officers under a general classification for purposes of command, but are not officers of the Supply Corps. The proceedings and findings on charge II were therefore disapproved (File 26251–32594A, G. C. M. Rec. No. 60209, July 7, 1924).

RETIRED OFFICER: ELIGIBILITY OF TO ACCEPT APPOINTMENT OF POSTMASTER.

Held: An officer retired for physical disability incurred in line of duty may, under the provisions of the act of May 31, 1924, Public, No. 161, 68th Congress, accept the appointment of postmaster regardless of the compensation he will receive pursuant to said appointment (File 9736–138J, August 22, 1924).

[P. 11] RETIREMENT: SERVICE COUNTED IN COMPUTING TIME FOR.

Held: Service rendered while serving on board the *Kanawha*, a naval auxiliary vessel, from August 26, 1915, to August 20, 1917, as a civilian, may not be counted in computing time for retirement in the Navy (File 27231–266J, June 21, 1924).

WORLD WAR ADJUSTED COMPENSATION ACT: APPLICATION OF MINOR DEPENDENT UNDER THE PROVISIONS OF.

Held: Pursuant to the authority given in subparagraphs (c) and (d), section 604 of the above-mentioned act, the Secretary of War and the Secretary of the Navy have jointly agreed upon the following regulations concerning the applications of dependent minors:

> "An application will be received from a minor dependent of sixteen years of age or upward or his legally appointed guardian, but a minor dependent under sixteen years of age must apply through a legally appointed guardian, signing for the dependent and attaching to the application a copy of the court order appointing him or her the legal guardian of the said dependent, and an affidavit setting forth the fact that he or she is identical with the person set forth in the court order."

(File 29460–19J, August 15, 1924.)

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[P. 3] DECK COURT: CIVIL SERVICE EMPLOYEE AS RECORDER OF.

Held: Under the provisions of the act of February 16, 1909 (see section 160, Naval Courts and Boards, 1923) which provides that:

> "Any person in the Navy under command of the officer by whose order a deck court is convened may be detailed to act as recorder thereof."

A civil service employee is not legally qualified to act as recorder of a deck court, and his appointment as such would invalidate the proceedings (File 27217–5635C, August 12, 1924).

EVIDENCE: INTRODUCTION OF BOOKS OF ACCOUNT AS.

In a recent general court-martial case, for the purpose of showing that the accused had insufficient funds on deposit in bank to provide for the cashing of several checks, the prosecution called as a witness the assistant cashier of the

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bank upon which the check was drawn, and through this witness offered in evidence the original account of the accused at the bank. This documentary evidence was received over the objection of counsel for the accused. The witness was unable to testify concerning material facts of his own knowledge, but merely put into evidence the records of the bank, which records he had not personally compiled.

Held: There is no doubt that books of account kept in the usual and regular course of business when supplemented by the oath of the party who kept them may be admitted in evidence (*Bates* v. *Preble*, 151 U. S. 155) but as a general rule entries in such books to be admissible must be contemporaneous with the facts to which they relate; be made by parties having personal knowledge of the facts, and be corroborated by the testimony, if living and accessible, or by proof of their handwriting if dead, insane, or beyond the jurisdiction of the court (Greenleaf on Evidence, 15 ed., par. 115; *Chaffee* v. *U. S.*, 18 Wall. 516; see also in this connection Naval Courts and Boards, sec. 389). In the case now under consideration the requirements set out in the preceding paragraphs were not satisfied. The witness by whom the ledger account of the accused was intorduced was not the party who made the entries contained therein and it was not shown that the bookkeeper who made the entries was unavailable as a witness. It is apparent, therefore, that counsel's objection to the admission of the account and the testimony of the witness supplementary thereto should have been sustained by the court.

In view of the foregoing, the Department set aside the proceedings, and findings on the charge and specification involved (File 26251–32236A, G. C. M. Rec. No. 60810, August 25, 1924).

[P. 4] SENTENCE: COMMUTED AND NOT MITIGATED.

In a recent summary court-martial case the court sentenced the accused in part as follows "to be confined for a period of one (1) month." The convening authority, approving the proceedings, finding and sentence, took the following action: "that portion of the sentence which involves confinement for a period of one month is so far mitigated that he is restricted to the limits of the U. S. S. *Savannah* for the above-mentioned period."

Held: The action of the convening authority insofar as it concerns confinement is illegal in that the sentence has been commuted and not mitigated. Mere restriction to the limits of a ship is not regarded as being a form of confinement within the meaning of article 30. Articles for the Government of the Navy (Naval Digest 1916, p. 106, par. 12). Restriction and confinement being punishments of different character, it is evident that the sentence has been commuted rather than mitigated. In view of the foregoing, the Department set aside that portion of the sentence involving confinement (File 26287–100097C, July 21, 1924).

SENTENCE: MITIGATION OF, INVOLVING LOSS OF PAY.

Question involved, can a reviewing authority mitigate a sentence involving loss of pay by reducing the loss of pay per month, but increasing the number of months so that the total loss of pay remains the same.

Held: When definite limits have been established by the terms of a sentence, a reviewing authority cannot mitigate one part of a sentence and increase another part even though such action in its final analysis operates to reduce the sentence (File 26806–131:111C, August 12, 1924).

SENTENCE: MITIGATION OF, INVOLVING LOSS OF PAY.

Question involved, can a reviewing authority place a man on probation for 12 months or for the remainder of his enlistment in regard to a sentence involving loss of pay.

Held: The action of a reviewing authority in placing a man on probation for a period of time not extending beyond the period of enlistment in sentences involving loss of pay is legal (File 26806–131:111C, August 12, 1924).

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[P. 5] ACTIVE SERVICE: INTERPRETATION OF TERM.

Held: The term "active service" as used in title II, section 201, World War Adjusted Compensation Act of May 19, 1924, was intended by Congress to include only service on the active list as diffierentiated from service on the retired list or while in inactive service in the reserve force, for the reason that this is remedial legislation, and had Congress intended the term "active service" to be employed in the restricted sense it would have so stated in its definition of terms as it did in the case of the term "veteran." Accordingly, no time should be deducted in the case of an individual sick in a hospital due to his own misconduct or not due to his own misconduct, or sick but not in a hospital, and that said period of time should be counted as active service in all cases except where his misconduct resulted in his separation from the naval service under other than honorable conditions, as provided in title I, section 2, of the aforesaid act in defining the term "veteran" (File 29460–3: 1 J: AC, July 31, 1924.

COAST GUARD: SERVICE IN, COUNTED FOR PURPOSE OF RETIREMENT.

Held: In view of the act of June 4, 1920, service in the Coast Guard between the dates of April 6, 1917, and August 28, 1919, may be counted in computing the time for retirement of enlisted men of the Navy. Also, in view of the act of August 29, 1916, and of the act of January 28, 1915, service in the Coast Guard in time of war, or when operating with the Navy pursuant to the orders of the President may be counted for the purpose of computing time for transfer to the Fleet Naval Reserve (File 27231–268 J: AC, August 26, 1924).

COMPTROLLER GENERAL OF THE UNITED STATES: INSPECTION OF NAVY ACTIVITIES BY.

In accordance with the provisions of law contained in sections 312 and 313 of the Budget and Accounting Act, 1921, approved June 10, 1921, representatives of the Comptroller General from time to time will visit activities under the Navy Department.

Held: It is directed that when such representatives, properly accredited, report at a Navy activity for the purpose of making [P. 6] the inspections and investigations prescribed in the above-quoted sections of the Budget and Accounting Act of 1921, they be given every assistance and be accorded all due courtesy in the conduct of their work (Secretary of the Navy letter 27223–134, 205–00–EDX SANDA, August 15, 1924).

DISABILITY: IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

Held: In view of the fact that the above-named man had served for two years and six months during the World War without the disability now noted manifesting itself, and that he had also served in the Marine Corps from March 8, 1922, until December 17, 1923, without said disability having manifested itself, the said disability must be held to have originated in the line of duty and not due to his own misconduct (File 29372–258 J: AC August 22, 1924).

EMPLOYEE: CIVIL SERVICE, DISCHARGE OF.

G. W. W_____, a civil service employee on duty as a machinist at the Navy Yard, Pearl Harbor, did not conduct any of his labor agitation activities within the navy yard, nor amongst the civil service employees on duty there.

Held: Consideration of the matter transmitted relative to the activities of the afore-mentioned man fails to disclose any facts which would warrant his discharge as a civil service employee so long as his work in the Navy Yard at Pearl Harbor is satisfactory (File 4488–1236 J: AC, August 19, 1924).

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FRANCHISE: RIGHT OF NOT AFFECTED BY DISMISSAL.

Held: The character of the dismissal of an officer pursuant to a sentence of a general court martial for drunkenness is similar to that of a dishonorable discharge in the case of an enlisted man received pursuant to the sentence of a general court martial. A man's Federal right of franchise is not affected in any way by such dismissal from the service except where he has been dismissed by sentence of a general court martial for having deserted in time of war (File 26504–516 J: AC, August 27, 1924).

NAME: CHANGE OF SPELLING OF FAMILY.

Held: The spelling of the family name in the case of a certain officer having become a matter of official record in this country, it would appear that the only manner in which a change of spelling could be accomplished is through a proper decree of a court of competent jurisdiction (File 24368–44 J: AC, September 12, 1924).

[P. 7] OFFICERS, RETIRED: PUBLIC EMPLOYMENT OF.

Held: Under the act of May 31, 1924, an officer of the Navy who has been retired on account of physical incapacity incurred in line of duty may accept a position with the government without prejudice to his retired rank and pay. Special prohibitions against the employment of such retired officers in certain Government services have not been removed, however. These prohibitions apply to the diplomatic and consular services, etc. There is no prohibition against employment of retired officers in the United States Merchant Marine (File 9736–139 N, September 20, 1924).

RETIREMENT: SYSTEM IN EFFECT IN UNITED STATES NAVY.

Held: The retirement system in effect in the United States Navy has been created through a number of acts of Congress, the greater number of which are contained in sections 2620–2659a inclusive, United States Compiled Statutes, Annotated. There are no special provisions now in force referring to tropical or foreign duty, or any laws which provide for death or accident benefits, bonuses or other benefits which accrue through length of service (File 27231–270 J: AC, September 12, 1924).

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[P. 3] CHARGE: EVIDENCE DOES NOT SUPPORT.

In reviewing the record of proceedings in the general court-martial case of J. L. H _____, seaman first class U. S. Navy, it is noted that the court convicted the accused among other charges of "Striking his superior officer while in the execution of the duties of his office." The evidence shows that the superior officer in question was playing cards in the chief petty officers' quarters when he was struck by the accused and was not on duty.

Held: As the charge in question only covers cases where the officer is in the execution of some official duty at the time of the commission of the offense, it is apparent that the evidence in this case does not support the charge. Accordingly, the finding on that charge is set aside (Case of Joseph L. Hickey, File 26262–11258A, G. C. M. Rec. No. 61203, September 20, 1924).

EVIDENCE: INTRODUCTION OF COPY OF RECORD OF GENERAL COURT MARTIAL.

The objection of the judge advocate of a general court martial to the introduction by the defense of a copy of the record of proceedings of a general court martial was overruled by the court.

Held: The ruling of the court in this instance was clearly erroneous because the original record could have been produced in court or the impossibility of so doing explained. The effect of the court's ruling was to receive inadmissible

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evidence when as a matter of fact the original could have been produced and would have been admissible (Naval Courts and Board, sec. 381, 413). This irregularity was not fatal to the proceedings (Case of Farley, File 26251–33020A, G. C. M. Rec. No. 61205, September 19, 1924).

PLEA: REPUGNANT.

In a recent general court-martial case, upon being arraigned on a charge of breaking arrest and the specification thereunder, the accused pleaded not guilty to the specification and guilty to the charge.

Held: Such a plea is repugnant with itself and the court should have rejected the plea, directed the judge advocate to proceed as if a plea of not guilty had been made to both charge and specification, and caused an appropriate entry to be made in the record showing that this was done. Inasmuch, however, as evidence was introduced by the prosecution to establish the guilt of the accused on the charge and specification, and the findings of the court were recorded in the requisite form following a plea of not guilty, the irregularity was not sufficient to invalidate the proceedings (Case of Payne, File 26262–11230A, G. C. M. Rec. No. 61096, September 23, 1924).

[P. 4] SPECIFICATION: AS FOUND PROVED DOES NOT ALLEGE AN OFFENSE.

In a recent general court-martial case the accused was tried on the charge "Conduct to the prejudice of good order and discipline," the specification alleging that he, C. G. P_____, did, etc., willfully and maliciously and without justifiable cause, burn with acid one W. S. F_____, etc., who was then and there a patient in said hospital. The court found the specification proved in part, proved except the words "willfully, maliciously," which words were not proved.

Held: The specification as found proved by the court merely alleges that the accused did a certain act without justifiable cause. It is needless to remark that in order for an act to be a criminal offense there must be included within the act of the accused some element other than the fact that there was no justifiable cause therefor. The specification found proved would be satisfied even though the facts might show, for example, that the burning was purely accidental.

In view of the above, the findings on the charge and specification thereunder, and the sentence were set aside as illegal (Case of Parks, File 26262–11270A, G. C. M. Rec. 61261, September 30, 1924).

ENLISTMENT: FRAUDULENT.

Held: In all cases, where an individual procures his enlistment in the naval service by means of a willful misrepresentation in regard to a material fact, which misrepresentation results in an enlistment which otherwise would have been rejected, and receives pay or allowances such as food and clothing, the offense of "fradulent enlistment" has been consummated (File 7657–1659J: AC, October 16, 1924).

FIRE DEPARTMENT: AUTHORITY OF MUNICIPAL ORGANIZATION TO ENTER NAVAL TERRITORY.

Held: A local fire department is without authority to enter a naval station or to board a naval vessel in order to extinguish a fire unless requested to do so by the commanding officer (File 26630–75N, October 10, 1924).

[P. 5] FLEET NAVAL RESERVE: TRANSFER TO, OF FITA FITA GUARD OF TUTUILA, SAMOA.

Held: The Fita Fita Guard of Tutuila, Samoa, being entitled to all the privileges which other enlisted men of the Navy are entitled to except where the

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law provides otherwise, are entitled to retirement after 30 years' service in the same manner as other enlisted men of the Navy. But, in accordance with the opinion of the Attorney General (33 Op. Atty. Gen. 473) only those members of the Samoan Guard, if any, who are citizens of the United States may be transferred to the Fleet Naval Reserve after 16 or 20 years' service (File 27231–271J, October 14, 1924).

GAS PIPE LINE: CONTRACT FOR LAYING.

The Bureau of Aeronautics requested information as to whether the insertion in the usual form of contract of provisions expressive of certain conditions which the Bureau desired carried out would duly protect the interests of the Government against claims for damages incidental to the installation of a gas pipe line in the Nocona gas field located in the vicinity of Bowie, Tex., to the Government's natural gas pipe line now laid between Petrolia and North Fort Worth, Tex.

Held: It is first necessary to determine whether the Department has authority to enter into any contract, irrespective of the conditions incorporated therein, for the construction of such a pipe line. In accordance with the provisions of Revised Statute 3732, and of the absence of any general or specific provision of law authorizing the construction of this pipe line, and of the fact that there is no appropriation available for paying the cost of it, it is clear that there is no present authority to make a contract for constructing the pipe line contemplated (File 25917–76 Q, October 9, 1924).

INDEBTEDNESS: BETWEEN THE SHIPPING BOARD AND THE NAVY DEPARTMENT.

Held: The proposed canceling of indebtedness of the Shipping Board to the Navy Department and of the Navy Department to the Shipping Board would effect a disposition of public funds in the Treasury. This would require the exercise of legislative authority, as no law has been passed granting such power to the President (File 26509–473: 7, Div. 4, September 25, 1924).

SECRETARY OF THE NAVY: SIGNATURE OF.

Section 605 of the act entitled "An act to provide Adjusted Compensation for Veterans of the World War and for other purposes" passed over the President's veto May 19, 1924, provides that the Secretary of the Navy shall transmit to the Director of the Veterans' Bureau the applications for benefits by veterans and a certificate setting forth certain information.

[P. 6] *Held:* The instructions to the Secretary of the Navy embodied in the above-quoted provisions of said statute are not of such character that it may be said that they require the signature of the Secretary of the Navy or the seal of the Navy Department to be affixed to the certificates to be made and sent to the Director of the Veterans' Bureau. The effect of said instructions is merely to require that there be furnished authoritatively to the Veterans' Bureau certain information in the form of a certificate from the Navy Department, and such object would be accomplished with legal sufficiency if the Secretary of the Navy should authorize the Chief of the Bureau of Navigation or some other specified person in that Bureau to prepare an appropriate certificate in each case and forward it over his own signature without the seal of the Department to the Director of the Veterans' Bureau (File 26802–104, Div. 4, August 8, 1924).

SERVICE: ACTIVE, UNDER THE ADJUSTED COMPENSATION ACT.

Held: A man who served honorably during the period of the war and later extended his enlistment, or, if a reservist, transferred to the Regular Navy, and is subsequently discharged "not under honorable conditions," is entitled to receive credit for the period during which he served honorably prior to his extension of enlistment, or, if a reservist, for the period prior to his transfer to the Regular Navy.

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In all cases where the service of men attached to station ships was considered as sea service, they are entitled to have it counted as overseas service.

Enlisted men who were detailed for instruction to the Officers' Material School, or other officers' school, are entitled to have the period of such detail counted as active service for the purpose of adjusted compensation.

All members of the Lighthouse Service who were transferred to the jurisdiction of the Navy Department under the provisions of the act of August 29, 1916 (39 Stat. 417), during the World War are entitled to adjusted compensation for the period of their transfer regardless of whether or not they were appointed, enlisted or enrolled in the Navy or Naval Reserve Force.

A member of the Naval Reserve Force who was released from active duty and furnished transportation and subsistence to his home, receiving pay for the necessary travel time, is entitled to credit for active service under the Adjusted Compensation Act for the necessary days of travel time for which he received pay (File 29460-12: 2 J.A.G., August 20, 1924).

SERVICE CONTINUOUS: REENLISTMENT UNDER.

Held: Except in the cases of those men who had served twelve (12) years, or more than twelve (12) years, and less than sixteen (16) years on July 1, 1922, it is not mandatory upon the Bureau [P. 7] of Navigation to reenlist a man who has received an honorable discharge or a good discharge, and has been recommended for reenlistment, and who applies for reenlistment and is physically and in all other respects qualified for reenlistment (File 7657–1654 N, September 20, 1924).

UNIFORM: AUTHORIZED USE OF REGULATION NAVY.

Held: In accordance with the provisions of section 125 of the National Defense Act approved June 3, 1916 (39 Stat. 216), as amended by section 8 of the act of June 4, 1920 (41 Stat. 836), the organized band composed of members of the Veteran Soldiers', Sailors', and Marines' Association is forbidden to use the Navy uniform except upon occasions of ceremony (File 5012–293 N, September 22, 1924).

UNIFORM: UNAUTHORIZED USE OF REGULATION NAVY.

The question is as to the proper action to be taken in cases where the facts show that the uniform of the Navy is being worn in violation of the provisions of law pertaining thereto.

Held: One of two methods of procedure to abate such violation is open: Either report the matter fully to the Secretary of the Navy, so that he may bring the matter to the attention of the Department of Justice if he deems this course advisable, or the facts relative to the illegal wearing of the naval uniform may be brought to the attention of the United States District Attorney for the district in which the offense is committed, for such action as he may deem expedient (File 5012–292 J: AC, September 11, 1924).

WORLD WAR ADJUSTED COMPENSATION ACT: ACTING ASSISTANT SURGEONS, ELIGIBILITY OF TO RECEIVE ADJUSTED COMPENSATION UNDER.

J. H. P_____ was appointed an acting assistant surgeon, U. S. Navy, on June 29, 1898, under the provisions of the act of May 4, 1898, and served continuously on active duty as an acting assistant surgeon until the present day.

Held: The exceptions contained in section 202, subparagraphs (a) and (b) of the aforesaid act are not applicable to him, and consequently J. H. P_____ is entitled to receive the benefits of the World War Adjusted Compensation Act unless otherwise excluded by the exceptions contained in said act (Case of Payne, File 29460–27, J: AC, September 10, 1924).

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WORLD WAR ADJUSTED COMPENSATION ACT: APPLICANT'S STATEMENT UNDER OATH.

Held: The Secretary of the Navy on September 20, 1924, concurred in the proposed draft of a joint regulation submitted [P. 8] by the Secretary of War with reference to the statement under oath required of a father or mother making application as dependent under the provisions of section 602 (b) (2) of the World War Adjusted Compensation Act as follows:

> "Any oath or affidavit required under the provisions of the World War Adjusted Compensation Act, or pursuant to any regulation made thereunder, may be taken before any justice of the peace, notary public, or other person who is legally authorized to administer an oath in a State, territory, or the District of Columbia, or in a Federal judicial district; or in foreign places before any commissioned officer of the Army or of the Navy of the United States, or before any consul of the United States or any other person having in foreign places the general powers of a notary public or of a consul of the United States. The attesting officer, if having an official seal, shall affix the same, but his failure to do so, or the fact that he has no official seal, shall not be cause for rejection of the application. No certificate of the authority of the attesting officer shall be requested."

(File 29460–21:1 J:AC, September 20, 1924.)

WORLD WAR ADJUSTED COMPENSATION ACT: CREDIT ALLOWED OFFICER OF PUBLIC HEALTH SERVICE SERVING WITH THE NAVY.

An assistant surgeon, U. S. Public Health Service, was ordered to duty with the Navy on August 20, 1917, as a member of a retiring board, and served on said board until October 31, 1917. The question involved is whether he was entitled to receive adjusted service credit for this period.

Held: In accordance with the provisions of section 201, section 202 (f) and section 203 (d) of the World War Adjusted Compensation Act of May 19, 1924, the aforesaid assistant surgeon is entitled to receive adjusted service credit at the rate of $1 for each day of service under the order of the Secretary of the Navy of August 20, 1917, provided he has served 60 days in the Public Health Service between April 5, 1917, and July 1, 1919, other than in the military or naval forces of the United States (Case of Assistant Surgeon Acker, File 29460–30 J:AC, October 14, 1924).

WORLD WAR ADJUSTED COMPENSATION ACT: ELIGIBILITY OF ACTING CHAPLAINS TO RECEIVE ADJUSTED COMPENSATION UNDER.

P. E. S_____ was appointed as acting Chaplain, U. S. Navy, to rank from May 15, 1916, accepted his appointment June 3, 1916, and served continuously in that grade on active duty to May 21, 1920, when his resignation under honorable conditions became effective.

Held: In accordance with the provisions of section 202, subparagraph (b) of the World War Adjusted Compensation Act, [P. 9] acting chaplains are not eligible to receive adjusted service credit (Case of Seidler, File 29460–27 J:AC, September 10, 1924).

WORLD WAR ADJUSTED COMPENSATION ACT: FILING OF APPLICATION BY ONE UNDER A CONSERVATORSHIP.

Would a man who is under a conservatorship and who is rated competent for all purposes except the handling of money be allowed to file his own application?

Held: Since the conservator has been duly designated by law for the purpose of looking after the financial interests of the veteran, it appears that the proper method of procedure in a case such as is indicated above would be to authorize the conservator or guardian to make application under the same circumstances as though the veteran were wholly mentally incapacitated, in which case the conservator or guardian of the estate of the veteran would designate the estate of the veteran as the beneficiary (File 29460–22 J:AC, September 17, 1924).

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WORLD WAR ADJUSTED COMPENSATION ACT: INTERPRETATION OF THE TERM "OVERSEA SERVICE."

The question involved concerns the application of the term "oversea" to duty in such places as the Virgin Islands, Honolulu, Alaska, Canal Zone, Azores Islands, shore bases in Africa, Haiti, and Santo Domingo.

Held: Under the provisions of section 2 subparagraphs (b) and (c) of the World War Adjusted Compensation Act, Congress intended by the definition of "oversea service" to exclude all service on shore, except service on shore in Europe or Asia, exclusive of China, Japan, and the Philippine Islands. Applying this interpretation to the question presented above, service on shore in the Philippine Islands, Honolulu, Alaska, Canal Zone, Haiti, Santo Domingo, Azores Islands, and shore bases in Africa may not be counted as "oversea service" in computing the adjusted service credit under the provisions of the aforesaid act (File 29460–5:1 J:AC, September 10, 1924).

WORLD WAR ADJUSTED COMPENSATION ACT: INTERPRETATION OF "UNDER OTHER THAN HONORABLE CONDITIONS."

When may an individual be considered as having been separated from the naval service under other than honorable conditions within the meaning of the provisions of section 2 of the World War Adjusted Compensation Act?

Held: So much of section 2 as refers to separations from the military or naval service under other than honorable conditions [P. 10] refers only to separations from said force due to his own misconduct, such as separations pursuant to the sentence of a court martial, and said act does not require that said individual must have received an "honorable discharge" which, in the naval service, may be received only in the case of a discharge at expiration of enlistment or when otherwise provided by Congress in particular cases. The words "such as separations pursuant to the sentence of a court martial" are intended to convey the meaning that the term "under other than honorable conditions," as used in the World War Adjusted Compensation Act, refers only to separations from the naval forces due to the individual's own misconduct, for which he has been found guilty by a regularly constituted court martial and discharged or dismissed from the service pursuant to the sentence thereof (File 29460–12:3J:AC, September 9, 1924).

WORLD WAR ADJUSTED COMPENSATION ACT: NAMING OF BENEFICIARY UNDER.

When a legal guardian of an incompetent makes an application, what authority has the guardian for naming the beneficiary?

Held: In all cases arising under the World War Adjusted Compensation Act where mental incapacity prevents a veteran making a personal application the guardian should designate the estate of the veteran as the beneficiary, and no other, for the reason that should the veteran in the course of time recover from his incapacity he could ultimately dispose of his adjusted compensation by gift or devise, and in the event of his death prior to his recovery, said compensation would be disposed of in due course as a part of his estate (File 29460–22J:AC, September 17, 1924).

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[P. 3] COURT OF INQUIRY: RULING OF.

In a recent court of inquiry, during the examination of Ensign J. P. G_____ as a witness and after he had given considerable testimony, the court was cleared, and later was opened, and the court then informed the witness that at that stage of the proceedings it appeared that he was a defendant. Ensign G_____ then introduced counsel who requested that certain previous testimony given by Ensign G_____ be stricken from the record. The court overruled this request, whereupon counsel for Commander H. E. K_____, one of the other defendants, stated that he desired to cross-examine the witness on the testimony previously given. Ensign G_____ stated that he did not desire to again take the witness stand. The counsel for Commander K_____ stated that the testimony

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which had already been given would militate materially against his interests unless he be permitted to cross-examine Ensign G_____ as a witness. The court overruled this request.

Held: The ruling of the court in both cases was correct. The evidence given by Ensign G_____ before he was made a defendant was competent to be used against him, and for that purpose should be left in the record. Such evidence, however, could not be made the basis of disciplinary action, other than court martial proceedings, against other defendants who were not permitted the right of cross-examination, and should general court martial proceedings result such evidence would not be admissible against such other defendants (File 26835–2638: 2D, October 4, 1924).

EVIDENCE: HEARSAY.

In a recent general court-martial case a witness for the prosecution testified that the accused was arrested by civil authorities and charged with larceny. On cross-examination the witness admitted that he did not know whether the accused surrendered himself to the civil authorities or not. Whereupon the counsel for the accused properly moved that all reference made by the witness to the alleged fact that the accused was held by the civil authorities for larceny be stricken from the record as such testimony by the witness was entirely hearsay. The court failed to sustain the accused's objection.

Held: This ruling was erroneous as the testimony was clearly hearsay and does not come under any exception to the hearsay rule. However, it appears that the accused was absent over leave at the time of the arrest on the alleged charge, and since arrest and detention by civil authorities while on unauthorized absence is not a good defense to the charge of "Desertion," the only jeopardy in which the accused was placed was that of a more severe sentence by reason of the possible unfavorable [P. 4] impression aroused in the minds of the court. Since the sentence adjudged was twelve months' confinement when the limit of punishment in such cases is eighteen months, the interests of the accused were not injured thereby (File 26251–33455A, October 7, 1924).

EVIDENCE: HEARSAY.

In a recent general court-martial case, it is noted that in several instances the court allowed a witness for the prosecution to testify as to what other persons had stated during an investigation conducted by the commanding officer of the irregularities out of which grew the trial, the accused not having been present at such investigation. The objection of the counsel for the accused was overruled, and in one instance, the court by reason of its action, announced that the "objection was not sustained" and stated further that "the witness, acting in his capacity as commanding officer of the barracks, had a right to investigate the matter before making any reports and it was his official duty to do so and the testimony regarding his investigation was admissible before the court."

Held: The testimony objected to was clearly hearsay and should have been excluded. The fallacy of the court's idea in respect to such evidence as this has been pointed out by the Department so many times in the past that further comment is not deemed necessary at this time (Naval Courts and Boards, sec. 350, C. M. O. 1, 1922, 11 and 12; C. M. O. 6, 1924, 3; File 26251–33341A, G. C. M. Rec. No. 61286, October 3, 1924).

SPECIFICATIONS: EVIDENCE ADDUCED DOES NOT PROVE ALLEGATIONS CONTAINED IN.

An accused was recently tried and convicted by general court martial on several charges, specification 1, under charge III, alleging in effect that he, in violation of a lawful ship's order, had "in his possession" one camera, the property of a shipmate. To establish the existence of the ship's order and contents thereof, the judge advocate called to the stand the executive officer of the ship on which the irregularities occurred. The testimony of this officer bearing on the order and in fact the only evidence adduced in respect thereto was that "it is prohibited for anyone aboard this ship to borrow or loan, or to sell or buy personal property without obtaining permission from proper authority."

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Held: Inasmuch as there was no evidence adduced to indicate that the accused borrowed or loaned, or sold or bought the camera described in the specifications, but that on the contrary it was merely found in his possession after having disappeared from the bag of its owner, it is apparent that the evidence failed to show that the accused violated the ship's order brought out by the evidence.

[P. 5] It may also be remarked that the testimony of the executive officer mentioned above was objectionable in that its effect was to give secondary evidence as to the contents of a document which should itself have been introduced in evidence (Naval Courts and Boards, sec. 381).

In view of the foregoing, the Department set aside the finding on specification 1 of charge III as illegal (File 26262–11261, G. C. M. Rec. No. 61226, October 24, 1924).

CYLINDERS: LEASE OF HYDROGEN GAS.

The question involved concerns the authority of the Secretary of the Navy to lend hydrogen gas cylinders. Hydrogen-gas cylinders not being real property cannot be leased under the provisions of the Act of August 29, 1916 (39 Stat. 559). In several instances the Secretary of the Navy has authorized the loan of public property under his control to private interests where there was some express consideration moving to the Government or where the Government was to be a beneficiary either solely or jointly with the borrower from the lending of the property. In such cases while the lending of the property was without express sanction of statute it is to be said that the Secretary of the Navy did not thereby, in the absence of an inhibiting statute violate the law, as it is well accepted that the head of an executive department does and must necessarily under his general powers do, many things that are not specially authorized but at the same time not forbidden by law, and where the Government's interests are to be served, the head of a department must necessarily be the judge as to what action shall be taken in particular instances.

Therefore, the question to be decided with reference to the lending of the gas cylinders in question is whether the Government would be thereby advantaged. As to this matter there is no information at hand showing that the use of said cylinders by the proposed borrower would yield results of commensurate advantage to the Government (J. A. G. Memo, July 16, 1924).

DESERTERS: TRIAL OF.

Held: In the case of individuals deserting from the naval service in time of war, which is governed by article 61 of the Articles for the Government of the Navy, the statute of limitations [P. 6] begins to run from the date that the offender absented himself without leave and with the intention of permanently abandoning the service. But he is amenable to trial by court martial after the end of the term for which he enlisted provided such trial is not barred by the statute of limitations (Op. Atty. Gen. February 27, 1922; Case of construction articles 61 and 62, sec. 1624 R. S.; File 26516–447:2 J:AC, October 29, 1924).

MEDAL OF HONOR.

An officer while a seaman was recommended for promotion to warrant officer on account of extraordinary heroism in the line of his profession, which recommendation was approved by the Flag Officer and the Secretary of the Navy. The question involved is whether it is compulsory upon the Department to award the above-named officer a medal of honor.

Held: In accordance with the provisions of section 1407 of the Revised Statutes, the Department is required to award the medal of honor in question (File 9644–669J, October 24, 1924).

OFFICER: MENTALLY INCAPACITATED, RETIRED NAVAL.

A retired naval officer after having been duly committed to St. Elizabeths Hospital because of insanity, escaped from said hospital. The question involved is what is the status of the officer, and what action if any can be taken by the naval authorities to return him to St. Elizabeths Hospital?

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Held: The aforesaid officer having been placed in St. Elizabeths Hospital pursuant to the direction of the Secretary of the Navy on account of insanity is required to remain in said hospital until he is cured or removed by the authority of the Secretary of the Navy. The above-named officer having escaped from St. Elizabeths Hospital is obviously in the status of a mentally incapacitated retired naval officer, a fugitive from an institution for the insane in which he had been placed by proper authority. The Secretary of the Navy may order his apprehension and return to the hospital, and may direct naval personnel to carry out his orders for that purpose (File 8528–503, 17J, November 7, 1924).

OFFICER: RIGHT OF ACTING WARRANT OFFICER TO DECLINE TO ACCEPT WARRANT.

Held: It is a well-established principle of law that an individual in the naval service may not be required to accept an appointment and that an appointment to become effective must be accepted (12 Op. Atty. Gen. 229; 15 Ct. of Cl. 31). Moreover, an acting warrant officer declining an appointment [P. 7] under such circumstances would automatically revert to his former enlisted status of chief petty officer, permanent appointment, provided that was his status at the time of his appointment as an acting warrant officer (R. S. sec. 1409). In the event his enlistment has expired prior to the termination of his status as an acting warrant officer, he will nevertheless resume his enlisted status; but since his enlistment has expired, he should be immediately discharged therefrom. If otherwise eligible, he may be reenlisted.

Under the provisions of the act of June 10, 1922 (42 Stat. 630), his service as an acting warrant officer may not be counted for the purpose of continuous service pay. His service as an acting warrant officer would count toward transfer to the Fleet Naval Reserve (act of Aug. 29, 1916, 39 Stat. 589).

The only right or benefit now accorded by law to a chief petty officer or other enlisted man which would be lost to an acting warrant officer declining to accept a permanent warrant would be the right to continuous service pay under the act of June 10, 1922, supra, for the period he served as an acting warrant officer (File 17789–111J: AC, October 14, 1924).

OFFICERS IN NAVAL RESERVE: TRAINING OF IN EDUCATIONAL INSTITUTIONS.

Preliminary arrangements having been made with George Washington University, Washington, D. C., and St. Johns College, Annapolis, Md., for enrolling about fifty suitable students as reserve midshipmen in each of these institutions for a four years' course, certain questions have arisen as to whether the carrying out of the proposed plan would violate any provisions of existing law.

Held: Naval Reserve midshipmen enrolled in the Naval Reserve Force in class 6 for training purposes cannot be enrolled below 18 years of age. The value of the issue of clothing to Reserve midshipmen is limited by law to $50. A commissioned or retired officer on duty at the Navy Department may be assigned additional duty for the purpose of instructing Naval Reserve officers matriculated at the George Washington University. If, however, said officers are to be detailed to duty on the faculty of George Washington University, the requirements outlined in the decision of November 30, 1923, File No. 26509–454: 11–1, must be followed. The detailing of officers on duty at the Naval Academy for additional duty in connection with the training of Naval Reserve officers at St. Johns College, Annapolis, is governed by the same laws pertaining to the detailing of officers on duty in Washington, at George Washington University (File 27317–46J: AC, September 23, 1924).

[P. 8] RETIREMENT.

An enlisted man was retired upon completion of thirty years' naval service, occupying on the date of retirement the dual status of a machinist, class 1, Fleet Naval Reserve, and chief water tender, class 1–D, Fleet Naval Reserve. What effect has his retirement upon his status as a warrant officer, class 1, Fleet Naval Reserve?

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Held: When his status as a transferred member of the Fleet Naval Reserve has been terminated by his transfer to the retired list of enlisted men of the Navy after thirty years' service his warrant in the Fleet Naval Reserve as a machinist likewise terminates (File 28550–1790J : AC, October 16, 1924).

SERVICES: CONTINUOUS OF CIVIL-SERVICE EMPLOYEE.

A civil-service employee was retired November 5, 1923, on account of having reached the age of retirement, 65 years, in accordance with a ruling of the Civil Service Commission in effect at that time. Subsequently, the Civil Service Commission reconsidered its prior ruling and held that the particular class to which the above mentioned employee belonged was not retirable at 65 years of age but at 70 years of age. Accordingly the employee was reappointed to his former position, effective July 24, 1924. The question involved is whether the employee may be considered as being in the status of "on leave without pay" from November 6, 1923, to July 24, 1924, thus entitling him to continuous service for leave purposes from April 8, 1912, the beginning of his first year of service.

Held: An examination of the records in this case discloses that the retirement of the above-named employee was accomplished November 5, 1923, under the law and regulations in force at that time, and accordingly that his retirement was legal in all respects. This being the case, the subsequent act on the part of the Civil Service Commission changing its rules relating to retirement was without effect upon retirements already accomplished. It is accordingly the opinion of the Department that the appointment effective July 24, 1924, reinstating him in his former position was a new appointment, and that it will be necessary for him to serve twelve consecutive months from the date of said appointment before he is entitled to leave with pay under the act of August 29, 1916 (39 Stat. 617), granting leave of absence to employees of navy yards and naval stations (File 4488–1257J : AC, October 25, 1924).

VIRGIN ISLANDS: APPROPRIATION AVAILABLE TO GRANT RELIEF IN.

The question involved is whether there is any appropriation available which would enable the Government to grant relief [P. 9] sought for the amelioration of the havoc wrought by the hurricane in the Virgin Islands, August 28 and 29, 1924.

Held: Unexpended part of the funds appropriated for said islands by the Act of January 22, 1923 (42 Stat. 1134), are available, subject to the direction of the President (File 26509–483 : 18–13J, October 22, 1924).

WORLD WAR ADJUSTED COMPENSATION ACT: INTERPRETATION OF SECTION 202, SUBPARAGRAPH (D).

The questions involved are whether the provisions of section 202, subparagraph (d), of the World War Adjusted Compensation Act apply to service rendered after November 11, 1918, and prior to July 1, 1919, in the following cases:

> "(*a*) An enlisted man who after November 11, 1918, and prior to July 1, 1919, was honorably discharged from an enlistment entered into prior to November 11, 1918, and in order to accept temporary commission or warrant and did accept such commission or warrant and served thereunder on active duty prior to July 1, 1919.
>
> "(*b*) An enlisted man who after November 11, 1918, and prior to July 1, 1919, was honorably discharged from an enlistment entered into prior to November 11, 1918, and reenlisted the next day, or within the reenlistment period, or at any time prior to July 1, 1919; or who in lieu of being honorably discharged extended his enlistment prior to July 1, 1919."

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Section 202, subparagraph (d), provides relative to this subject as follows:

"SEC. 202. In computing the adjusted-service credit no allowance shall be made to ------

* * * * *

"(d) Any individual entering the military or naval forces after November 11, 1918—for any period after such entrance";

Held: The exception contained in section 202, subparagraph (d), applies only to the case of an original entry into the military or naval forces after November 12, 1918, and does not apply to a reentry therein subsequent to said date (File 29460–25J: AC; September 9, 1924).

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[P. 2] PRECEPT: COURT OF INQUIRY.

It is noted that the precept of a court of inquiry contained as enclosures two letters, one of which contained an endorsement thereon. Section 1076, note 24 thereunder, Naval Courts and Boards, 1923, reads in part as follows:

"The precept of a court of inquiry shall * * * state clearly and concisely the matter that is to be inquired into * * * nor papers of any kind shall be attached to or made a part of the precept of a court of inquiry."

[P. 3] The letters of enclosure in this particular case contained some eight closely typewritten pages containing charges and countercharges which it was necessary to have investigated in their entirety. They could best be investigated in their original form. In order to comply with the above-quoted section of Naval Courts and Boards, it would have been necessary for the precept to have practically quoted the enclosures verbatim in order that the precept might contain the entire matter which the convening authority desired to have inquired into.

Held: In view of the fact that it was the evident intent of the convening authority in this case to have the whole of the letters, made enclosures in this precept, containing as they did charges and countercharges, investigated in detail, it would appear that no harm resulted in the convening authority taking this means of placing the enclosures before the court of inquiry as a part of the precept. This method while not in accordance with the strict letter of Naval Courts and Boards, is in substantial compliance with the spirit and evident intent of Naval Courts and Boards.

In view of the above, the proceedings, findings, and opinion in this case are legal (File 26283–5470D, October 13, 1924).

DISABILITY: IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

M. F------, CBM, FNR 1–D, attempted to commit suicide by cutting his throat with a razor. The board of medical survey subsequently convened in his case concurred in a diagnosis of psychosis, manic, depressive, origin in the line of duty, and further found that he was unfit for service; probable duration of disability permanent.

Held: In the absence of facts showing that his insanity was due to conditions outside the naval service, or to his own misconduct, his insanity should be held to have been incurred in the line of duty. It follows therefore that his self-inflicted injury which was undoubtedly due to the fact that he was insane at the time, should likewise be held to have been incurred in the line of duty, and not due to his own misconduct (File 29472–297J:AC, November 24, 1924).

[P. 4] DISABILITY: NOT IN THE LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

An enlisted man was admitted to the field hospital, Santo Domingo, Dominican Republic, August 24, 1916, with a simple fracture of his right femur which was

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received while under the influence of intoxicating liquor, and not in the line of duty, said injury probably resulting from being kicked by a horse.

Held: Since the disability complained of in this case is an injury resulting from the intemperate use of alcoholic liquors prior to August 29, 1916, the said disability must be held to have been incurred not in the line of duty and not due to his own misconduct for the reason that neither the act of July 1, 1918, nor the act of August 29, 1916, is applicable thereto (File 29372–295J, December 6, 1924).

DISCHARGE: OF ENLISTED MEN BY SPECIAL ORDERS OF THE SECRETARY OF THE NAVY.

Are enlisted men of the Navy discharged in accordance with article 1687 (1), Navy Regulations 1920, to be considered as having been discharged by a special order of the Secretary of the Navy within the meaning of the provisions of the act of August 29, 1916 (39 Stat. 590), which provides in part as follows—"That for all purposes of this act a complete enlistment during minority and any enlistment terminated within three months prior to the expiration of the term of enlistment by special order of the Secretary of the Navy shall be considered as four years' service"?

Held: So much of the act of August 29, 1916, above quoted as refers to discharges by special order of the Secretary of the Navy applies only to discharges within three months of expiration of the term of enlistment given for the convenience of the man, and under the provisions of said act enlistments so terminated for the convenience of the man shall be considered as a full four-year term of enlistment, and said provision does not require that individuals discharged as provided in the act of August 22, 1912, and regulations made pursuant thereto (art. 1686, Navy Regulations 1920), shall have been discharged "by special order of the Secretary of the Navy" in order that the enlistment from which thus discharged may be counted as a full four-year term of enlistment for the purpose of transfer to the Fleet Naval Reserve (File 28550–1675:1J:AC, October 28, 1924).

ENLISTMENT: RETENTION OF ENLISTED MAN BEYOND EXPIRATION OF.

Held: An enlisted man sentenced by his commanding officer on the last day of his term of service to five days' confinement for an offense committed on that day may legally be held beyond the expiration of his term of service for the purpose of serving out the punishment imposed (File 7657–1669:J:AC, November 20, 1924).

[P. 5] EXPENSES: REIMBURSEMENT FOR MEDICAL.

A midshipman while on duly authorized leave of absence from the Naval Academy incurred certain expenses for medical attendance and hospital treatment at Salt Lake City, Utah, for which he requested reimbursement.

Held: In view of section 1586 of the Revised Statutes which provides in part that "expenses incurred by ay officer of the Navy for medicine and medical attendance shall not be allowed unless they were incurred while he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had," and of the fact that the aforesaid midshipman was not on duty but was on leave of absence, his case comes within the purview of section 1586 of the Revised Statutes, which specifically prohibits reimbursement for expenses incurred under such circumstances (File 9438–199J:AC, November 24, 1924).

GRATUITY, DEATH.

W. B. B_____, in September 1917, designated G. D. B_____ as his beneficiary; in November 1917, designated L. C. D_____ as his beneficiary, and in June 1919, designated M. M. L_____ as his beneficiary. He was married to the last named at the time of his death on October 16, 1924.

Held: In view of the fact that the above-named officer was legally divorced from his first wife, G. I. B_____, that he was never married to L. C. D_____

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and that he was duly married to M. M. L_____, the six months' death gratuity in this case should be paid to his present widow, M. M. B_____ nee M. M. L_____ (File 26543–403J: AC, November 24, 1924).

MACHINERY: TRANSFER OF.

Held: Certain machinery at the Naval Gun Factory no longer required for ordnance uses, having been purchased prior to July 12, 1921, does not fall within the prohibitions imposed by the act of that date, and may therefore be transferred to the Naval Training Station, Hampton Roads, Va. (File 28808–455P, November 24, 1924).

OFFICER, CONSULAR: IN GUAM AND AMERICAN SAMOA.

The Department of State having requested that the Navy Department signify what officer in Guam and in American Samoa it is desired to have designated by the President in an Executive order to perform the duties contemplated in section 28 (e) of the Immigration Act of 1924, the question arises as to whether such designation as consular officer would jeopardize [P. 6] their commissions in the Navy by reason of the provisions of Section 1440 of the Revised Statutes of the United States which is couched in the following language:

> "Sec. 1440. If any officer of the Navy accepts or holds an appointment in the diplomatic or consular service of the Government, he shall be considered as having resigned his place in the Navy, and it shall be filled as a vacancy."

The Constitution of the United States, article 2, section 2, provides for the appointment of consuls as follows:

> "he (The President) shall nominate, and by and with the consent of the Senate, shall appoint * * * Consuls * * *."

Held: The term "consular officer" as employed in section 28 (e) Immigration Act of 1924, is applicable to that act alone, and any officer designated under section 28 (e) by the President, or by his authority, for the sole purpose of issuing immigration visas in Guam or American Samoa, insular possessions, would not be an appointee to the consular service within the meaning of the provision of the Constitution quoted above. Therefore, the designation by the President, or by his authority, of the Governor of Guam or the Governor of American Samoa to perform the sole and special duty of issuing immigration visas in the insular possession under his governance would not jeopardize the commission of such Governor as an officer of the Navy under the inhibiting provisions of section 1440, Revised Statutes (File 8114–122 H, November 28, 1924).

PRECEDENCE: ON THE RETIRED LIST OF OFFICER OF THE NAVY.

An officer was appointed a temporary lieutenant with July 1, 1918, as his date of precedence, and was subsequently appointed a permanent lieutenant with July 1, 1920, as his date of precedence, in which grade he was serving at the time of his retirement on March 3, 1922. He requests to be given as his date of rank on the retired list, July 1, 1918, instead of July 1, 1920.

Held: Since his appointment as a temporary officer had ceased by operation of law prior to his retirement, he had reverted to his permanent status and his retirement as a lieutenant was controlled by his status in his permanent grade of lieutenant. It follows therefore, that sec. 1457 of the Revised Statutes fixes July 1, 1920, the date of his precedence in the permanent grade of lieutenant, which was the only commission held by him at the time of his retirement as the date of his precedence on the retired list (File 11130–96J: AC, November 20, 1924).

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[P. 7] RESIGNATION: WITHDRAWAL OF.

A medical officer of the Navy tendered his resignation to take effect on a certain future date. The resignation was accepted by direction of the President to take effect on November 25, 1924. On November 11, 1924, the aforesaid officer requested that the acceptance of his resignation be revoked as he wished to return to duty. The question involved is whether the resignation may be withdrawn.

Held: In Judge Advocate General letter No. 26262-2146:4 dated October 30, 1915, the following extract from *Biddle* v. *Willard* (10 Ind. 62), was quoted with approval:

> "Hence, a prospective resignation may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and for the reason that it is not accompanied by a giving up of the office—possession is still retained, and may not necessarily be surrendered until the expiration of the legal term of the office, because the officer may recall his resignation—may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted, he may make the withdrawal by the consent of the authority accepting, where no new rights have intervened." (See also *State* v. *House*, 43 Ind. 107.)

In 1 Comp. Dec. 68 it was held:

> "A resignation to take effect at a future date may, with the consent of the appointing power, provided no new rights have intervened, be withdrawn before the time when the resignation was to take effect, and the officer will continue to be an officer de jure thereafter."

In view of the foregoing, the Secretary of the Navy, by direction of the President may revoke the acceptance of the aforesaid medical officer's resignation at any time before the effective date thereof (File 26505–136, November 18, 1924).

TIME: LOST IN THE NAVAL SERVICE FOR A DISABILITY INCURRED PRIOR TO ENLISTMENT.

The question involved is whether or not an individual in the naval service who is absent from duty due to a disease contracted prior to enlistment, which, if contracted subsequent to enlistment, would be held to be due to his own misconduct, comes within the provisions of the act of August 29, 1916, which provide that, after that date, no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence.

[P. 8] *Held:* The Navy Department has no jurisdiction over acts committed by an individual prior to his entry in the naval service, and accordingly, it is without authority to determine whether or not such acts were or were not due to his own misconduct. Consideration of the act of August 29, 1916, discloses that the provisions of this act relative to the matter under discussion apply only to officers and enlisted men as such in the Navy or Marine Corps, and only to absence from duty on account of sickness or disability resulting from own intemperate use of drugs or alcoholic liquors or other misconduct. It follows, therefore, that if the intemperate use of drugs or alcoholic liquors or other misconduct occurred prior to the entry of the individual into the Navy or Marine Corps as an officer or enlisted man, the Navy is without jurisdiction to determine whether or not the incident from which the disability resulted did in fact constitute misconduct at the time and place where committed (File 29370–290J:AC, November 24, 1924).

VISION: DEFECTIVE.

Held: It is apparent that Lieutenant G. W. W——, U. S. Naval Reserve Force, class 2, had a marked defective vision in both eyes at the time of his enrollment in the Naval Reserve Force. In view of the fact that the disability

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noted at the time of his enrollment was progressive in character, and that conditions of the service were not responsible for aggravating said disability, the increase in said disability in the case of the above-named officer should be held to have been incurred not in line of duty and not due to own misconduct (File 29372–260JAC, November 24, 1924).

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[P. 3] CHARGE: NOT SUPPORTED BY SPECIFICATION FOUND PROVED.

Buel E. Slaughter, fireman third class, U, S. Navy, was tried under two charges: (I) "Absence from station and duty without leave" and (II) "Forging a naval pass issued by the authority of the United States." It is noted that the specification in support of charge II reads as follows:

> "In that Buel Eugene Slaughter, now a fireman third class, U. S. Navy, while so serving on board the U. S. S. *Pittsburgh*, did, on or about September 6, 1924, on board said ship, upon a regular liberty card pass of said ship, in tenor as follows: 'N. Nav. 493 U. S. S. *Pittsburgh*, No. 6145. B. E. Slaughter Rate F3rd. This entitles bearer to leave ship on liberty, and if ship is at a navy yard, to pass through gates, to be shown to O. O. D. when leaving and dropped in check box on return to ship. Logan, U. S. N., Executive Officer. P. T. R.,' willfully, without proper authority, and with intent thereby to deceive for the purpose of obtaining unauthorized leave of absence from his station and duty on board said ship, make and forge the name 'Logan' as the person authorizing said leave of absence, the executive officer of the said ship being then and there George C. Logan, then a Commander, U. S. Navy."

The findings of the court were:

> "The specification of the second charge proved in part, proved except the words 'Upon' (fourth line), and 'make and forge' (seventeenth and eighteenth line), which words are not proved, and for which the court substitutes the words 'used' and 'upon which had been made and forged,' respectively, which words are proved."

In the opinion of the Department the specification found proved does not allege an offense supporting the charge under which it appears. The charge is for the offense of "Forgery." The specification as found proved is for "uttering" a forgery. The elements of the two offenses are entirely distinct (Naval Courts and Boards, secs 277–285). It follows that a specification alleging the uttering of a forged instrument cannot support a charge of forgery. In the opinion of the Department on the evidence adduced the court would have been justified in finding both the charge and specification proved as originally set forth. The finding on charge II is set aside.

Inasmuch as the discharge provided in the limitations of punishment for the remaining offense of "Absence from station and duty without leave" is a bad-conduct discharge, the discharge in this case is reduced thereto.

Subject to the above remarks, it is the opinion of the Department that the proceedings, findings, and sentence in the foregoing case, are legal (File 26262–11408A, G. C. M. Rec. No. 61738, December 12, 1924).

[P. 4] DESERTION: MANNER OF PROVING.

Charles Dodd, private, U. S. Marine Corps, was tried by general court martial at the Marine Barracks, Quantico, Va., and convicted of "Desertion," the specification of the charge alleging that the accused "did, on or about September 5, 1924, while so serving with the service company, first medical battalion, U. S. Marine Corps, expeditionary force at Sharpsburg, Md., desert from said force and from the U. S. Navy and did remain a deserter until he was delivered at the U. S. Marine Corps recruiting station, St. Louis, Mo., on or about October 6, 1924."

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The only evidence offered by the prosecution to establish the commission of the above offense consisted of entries from the service record book of the accused as follows:

"From page 11: AOL. fr. 10 p. m., Sept. 5, 1924, at Sharpsburg, Md., with MCEF. Has not disposed of his effects, and nothing was known of his intention to desert. He was not undergoing punishment, and plain clothes were not procured. It is not known if he took passage for a distant point. A reward of $50 has been offered for his apprehension.

(S.) B. A. BONE."

"From page 6, line 34: Service Co., 1st Medical Battalion. Deserted 5 Sept. 24. Pvt. 0 0 5 1.7

(S.) B. A. BONE."

No evidence was presented by the prosecution to establish the place and date the accused returned to naval jurisdiction. The accused testified as a witness in his own behalf and admitted that he turned himself in at St. Louis, Mo., but did not testify as to the date.

The offense of desertion is not a continuing offense but is completely consummated the moment unauthorized absence is coupled with intent to permanently abandon the naval service (33 Op. Atty. Gen. 126). Therefore the duration of the unauthorized absence need not be proved where other evidence is presented from which desertion can be inferred. However, the duration of unauthorized absence when proved is one of the facts from which intent to desert may be inferred as a long period of unauthorized absence raises a presumption of intent to desert (Naval Digest, Desertion, 63) and in most cases this is the only evidence which the prosecution can offer to establish the offense.

In the present case the only evidence which it appears was available to the prosecution to offer which would have justified conviction of the accused was the duration of his unauthorized absence. The mere entry from Dodd's service record book that he had deserted was not sufficient to establish that he had in fact deserted (Naval Courts and Boards, sec. 392). There was included among the papers furnished the judge advocate by the [P. 5] Department for use at this trial an official letter from the officer in charge of the Marine Corps recruiting office, St. Louis, Mo., reporting the delivery of the accused by the civil authorities at that station on October 6, 1924, the date alleged in the specification. This report is required to be submitted by article 707 of the Marine Corps Manual, 1921, and is admissible in evidence under a charge of desertion as a "report of deserter received on board." (See sec. 390, Naval Courts and Boards.) Had the judge advocate offered this report there would have been evidence before the court which would have established the duration of the unauthorized absence of the accused and raised a prima facie case of desertion.

Had a prima facie case of desertion been otherwise established it would still be the duty of the judge advocate to prove the place and date of the return of the accused to naval jurisdiction in this case in order to establish all of the averments contained in the specification of the charge, one of which is that the accused "did remain a deserter until he was delivered at the U. S. Marine Corps recruiting station, St. Louis, Mo., on or about October 6, 1924."

In view of the foregoing it is the opinion of the Department that there was insufficient evidence before the court to sustain its finding. The finding and sentence are therefore disapproved (File 26251–33780A, G. C. M. Rec. No. 61729, December 9, 1924).

FINDING: NOT SUPPORTED BY EVIDENCE ADDUCED.

Lieutenant Albert B. Dayton (Supply Corps), U. S. Navy, was tried by general court martial at the Navy Yard, Washington, D. C., on the charges: (I) "Embezzlement of money of the United States intended for the naval service thereof" (7 specifications) and (II) "Embezzlement of property of the United States intended for the naval service thereof" (1 specification). He was convicted of all of the offenses charged against him except that set out in specification 6 of charge I, of which offense he was acquitted. The court sentenced

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Lieutenant Dayton "to be dismissed from the United States naval service and to be imprisoned at hard labor in such prison or penitentiary as the convening authority may designate for a period of thirty-six (36) months."

Specifications 3, 4, and 5 of charge I allege, respectively, that the accused, while serving as a member of the Board of Survey, Appraisal, and Sale, Navy Yard, Washington, D. C., having received into his possession sums of money amounting to $76.10, $40.50, and $631, as proceeds of the sale of certain condemned and surplus Navy material, did feloniously embezzle and convert said funds to his own use.

It appears from the evidence that the accused was accounting officer of the Board of Survey, Appraisal, and Sale and in this [P. 6] capacity was responsible for the safekeeping of and accounting for all funds received in the board in connection with the sale of condemned and surplus Navy material. Evidence was offered by the prosecution which tended to establish the receipt by the accused of the funds referred to above but it appears that no record of the receipt of these funds was made on the books of the board, and no accounting therefor has ever been made by the accused. The evidence further shows that very large sums of money were constantly being handled in the office of the board over which the accused had supervision and for which he was responsible. It appears that these funds were not locked in a safe during office hours and were handled by and were available to other persons in the office. Therefore, it was possible that the funds in question could have been abstracted and appropriated by persons other than the accused and without his knowledge before entry of their receipt was made in the books of the board in the usual manner. Because of the conditions existing in the office of the board relative to the custody of the money the Department is of the opinion that in the absence of showing false entries made by the accused in the books of the board relative to the funds referred to in specifications 3, 4, and 5, or of some other specific evidence of conversion, by the accused, the evidence is insufficient to warrant a finding of the guilt of the accused.

It is the opinion of the Department that the proceedings, findings on charge I, and specifications 1, 2, 6, and 7 thereunder, charge II and its supporting specification, and the sentence in the foregoing case are legal, and they are therefore approved (File 26251–33202A, G. C. M. Rec. No. 61429, December 20, 1924).

PUNISHMENT: EXCESSIVE.

Walter Fred Frass, boatswain's mate second class, U. S. Navy, was tried by general court martial and convicted of "Absence from station and duty without leave." The court sentenced Frass to be reduced to the rating of apprentice seaman, to be confined for a period of twelve (12) months, dishonorable discharge and accessories. Under date of September 24, 1924, the Commander, Naval Forces, Europe, approved the proceedings, findings, and sentence, but held the execution of the sentence in abeyance with a view to withholding its execution entirely upon the successful completion of a probationary period of twelve (12) months. It was provided that during this period the commanding officer of the accused may order the execution of the sentence in accordance with the provisions of section 752, Naval Courts and Boards.

The table set-out in section 720, Naval Courts and Boards, establishes a limitation of punishment for the offense of absence [P. 7] without leave of six (6) months' confinement plus a period equal to the time absent, and bad conduct discharge. Inasmuch as the accused in this case was absent but two (2) days and ten (10) hours, it follows that the maximum period of confinement which could legally be adjudged in his case is six (6) months and two (2) days. In view of the above, it is recommended that so much of the sentence as pertains to confinement and discharge be reduced respectively to six (6) months and bad conduct discharge, which sentence is remitted in accordance with the provision of the convening authority's action.

In adjudging sentences courts should be very careful to consult the limitations of punishment set out in Naval Courts and Boards in order that sentences may not exceed those lawfully prescribed.

It is the opinion of the Department that the proceedings and findings in the foregoing case, are legal (File 26262–11409A, G. C. M. Rec. No. 61744, December 15, 1924).

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SENTENCE: MITIGATION OF LOSS OF PAY IN SUMMARY COURT MARTIAL.

Held: A reviewing authority may direct that the checkage of a lump-sum fine as adjudged by sentence of summary court martial be checked at a certain specified amount per month for a certain number of months (File 26806–131:114 C, January 26, 1925).

SENTENCE: UNDULY LIGHT.

Willard R. Blackmer, gunner's mate first class, U. S. Navy, was tried by general court martial on the charge of "Desertion" and convicted of "Absence from station and duty after leave had expired." The specification of the charge as found proved reads as follows:

> "In that Willard R. Blackmer, now a gunner's mate first class, U. S. Navy, did, on or about July 21, 1923, while so serving on board the U. S. S. *Seattle*, absent himself without leave from proper authority after his leave had expired from said ship and from the U. S. Navy and did remain so absent until he surrendered himself on board the U. S. receiving ship at Puget Sound, Washington, on or about October 20, 1924."

The court sentenced the accused to be reduced to the rating of gunner's mate third class.

The prosecution produced evidence at the trial which established that the accused failed to return to his station and duty on board the *Seattle* upon the expiration of authorized leave on July 21, 1923, and remained absent without authority until he surrendered on board the receiving ship at Puget Sound, Washington, on October 20, 1924. The defense offered no [P. 8] evidence but the accused made a statement in his own behalf in which he explained his reasons for leaving the *Seattle* and remaining away from the naval service.

It is evident from the very light sentence adjudged in this case that the court gave great weight to the statement of the accused. Section 665, Naval Courts and Boards, provides in part as follows with reference to the making of a statement by the accused:

> "An accused may, in any case where he so desires, make a statement not under oath. Such statement of the accused is a personal defense or declaration and cannot legally be acted upon as evidence by the court, nor can it be a vehicle of evidence, nor properly embrace documents or other writings or even averments of material facts, which, if duly introduced, would be evidence; and if through inadvertence or other cause such things be improperly embraced in a statement, they are entitled to no evidential weight.
>
> "A statement may operate in three ways: (1) to modify the plea of the accused when inconsistent therewith; (2) as a summary and argument for the defense, which may be considered by the court; and (3) as a plea for leniency, which may not be considered by the court except in recommending the accused to the clemency of the reviewing authority."

It is evident from the foregoing that the matters referred to by the accused in his statement could not properly be given evidentiary effect by the court and could be used only as the basis for a recommendation to clemency.

The duration of the unauthorized absence of the accused in this case clearly called for a more severe sentence than that adjudged by the court. Article 51 of the Articles for the Government of the Navy, provides that "It shall be the duty of a court martial, in all cases of conviction, to adjudge a punishment adequate to the nature of the offense; but the members thereof may recommend the person convicted as deserving of clemency and state on the record their reasons for so doing." It was therefore the duty of the court in this case to adjudge a sentence commensurate with the offense found proved, not considering the statement made by the accused. If the court was of the opinion, as it apparently was, that the matters contained in the statement justified the granting of clemency, it could have made a recommendation to clemency based thereon. By adjudging the sentence it did in this case the court invaded the province of the convening authority in whom is vested the power to grant clemency.

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Subject to the foregoing comment it is the opinion of the Department that the proceedings, findings, and sentence in the foregoing case are legal (File 26251–33825A, G. C. M. Rec. No. 61774, December 8, 1924).

[P. 9] SPECIFICATION: FATALLY DEFECTIVE.

Mateo Sitson, mess attendant third class, U. S. Navy, the accused in this case, was recently tried by general court martial on the following charges: (I) "Theft" (2 specifications), (II) "Absence from station and duty without leave" and (III) "Conduct to the prejudice of good order and discipline."

It is noted that charge I "Theft" was supported by two specifications which read as follows:

> "In that Mateo Sitson, now a mess attendant third class, U. S. Navy, while so serving on board the U. S. S. *Simpson*, did, on or about July 20, 1924, on board said ship, feloniously take, steal, and carry away from the safe of one James P. Clay, then an ensign, U. S. Navy, a sum of about ninety-nine dollars ($99) in lawful money of the United States, and did then and there appropriate the same to his own use.
>
> "In that Mateo Sitson, now a mess attendant third class, U. S. Navy, while so serving on board the U. S. S. *Simpson*, did, on or about July 20, 1924, on board said ship, feloniously take, steal, and carry away from the safe of one Pleasant D. Gold, Jr., then an ensign, U. S. Navy, a sum of about two hundred seventy-six dollars and sixty-seven cents ($276.67) in lawful money of the United States, one check for the amount and value of four dollars and eighty-eight cents ($4.88), and one check for the amount and value of thirty-three dollars and fifty cents ($33.50), and did then and there appropriate the same to his own use."

In the opinion of the Department, both the above-quoted specifications are fatally defective in that no allegation of ownership of the stolen money was alleged. The court said in *U. S.* v. *Thompson* (256 Fed. 616), that, "It is elementary that, to constitute a good indictment for larceny, it is necessary at common law that the thing stolen should be charged to be the property of the actual owner or of a person having special property as a bailee, and from whose possession it was stolen, although an indictment charging ownership in one to the grand jurors unknown is sufficient at common law." This does not mean that in drawing the specification (or indictment) that the specification must allege the person who actually had a legal title to be the owner, if the fact that the owner is unknown and this properly explained for "The actual condition of the legal title of the alleged stolen property is immaterial to the thief, and, so far as he is concerned, the one may be taken as the owner whose personal possession is unlawfully disturbed by the taking and such possessor may be properly described as the owner in the indictment" (*Little* v. *State*, 204 Pac. 305). But it is necessary to name some owner other than the accused in order to negative any right of possession on the part of the accused and to describe the property as definitely as possible so as to effectually protect the accused against a second prosecution based on [P. 10] the same transaction. "An indictment for larceny alleging that the accused stole certain property from a person named without alleging that person (some person other than the accused) was the owner is fatally defective." In this connection see C. M. O. 60–16, 1920. For the reasons set forth above, the Department set aside the proceedings and findings on charge I, and supporting specifications.

It is the opinion of the Department that the proceedings, findings on charges II and III and specifications thereunder and sentence in the foregoing case, are legal (File 26262–11384A, G. C. M. Rec. No. 61619, January 12, 1925).

CREDIT: ADJUSTED SERVICE.

On January 17, 1925, the Secretary of the Navy concurred with the Secretary of War in a joint regulation extending to mentally incapacitated veterans who are patients in State hospitals the same or similar facilities for making application for adjusted service credit as is extended to mentally incapacitated veterans in hospitals under the control of the U. S. Veterans' Bureau, or in any other Government hospitals (File 29460–22: 4 J: AC, January 17, 1925).

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DESERTION: REMOVAL OF CHARGE OF.

Held: The Department is empowered to remove the charge of desertion standing on the records only in cases coming under the provisions of the act of August 14, 1868 (25 Stat. 442), as amended by the act of May 24, 1900 (31 Stat. 183) which provisions apply to certain persons who served during the Civil War, or, when such charge is conclusively shown to have been erroneously entered or retained on the records (File 26539–847, January 13, 1925).

DISABILITY: IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

Held: Since R. R. D_____ was on authorized liberty at the time the accident occurred, and since the evidence shows that he was in no wise connected with the management of the automobile in which he was riding, or in any way responsible for the accident which must be held to have been the immediate cause [P. 11] of the injury, the disability complained of is held to have originated in the line of duty, and not due to own misconduct (File 29372–300J, January 14, 1925).

DISCHARGE: ISSUE OF NEW CERTIFICATE.

Held: In accordance with the provisions of the act of August 22, 1912 (37 Stat. 324), the Secretary of the Navy is authorized to issue a new discharge certificate to an individual who served in the naval service under an assumed name in any war between the United States and any other nation or people subsequent to the date of the act (File 7657–1678 J: AC, January 12, 1925).

DUTY: SEA.

Held: An officer is in a sea-duty status while on board a vessel of the Navy under orders which require him to report to the commanding officer for duty on board whether or not he be in excess of the usual complement of the vessel, and therefore cannot lawfully be paid mileage on the theory that he was merely a passenger on board said vessel (File 26254–3644: 141 AD/3, January 3, 1925).

NAVAL RESERVE FORCE: ELIGIBILITY OF OFFICERS OF FOR HOSPITALIZATION.

Held: An examination of the laws relating to the Naval Reserve Force fails to disclose any provisions thereof which authorize the recalling of a member of said force to active duty in time of war or at any other time for the purpose of hospitalization. In the other hand, the provisions of the act of May 28, 1924, making appropriations for the Navy Department and the naval service for the fiscal year ending June 30, 1925, and for other purposes, only provides for the pay and allowances of officers and enrolled men of the Naval Reserve Force other than class 1, while in active duty for training or when ordered to active duty in connection with the instruction, training, and drilling of the Naval Reserve Force. Therefore, there is no authority of law for ordering a reenrolled member of class 6 of the Naval Reserve Force to active duty for hospitalization (File 28550–1819: 1 J: AC, February 2, 1925).

PAY: OFFICER'S RIGHT TO.

Held: The decision of the District Court of the United States for the Northern District of Florida, May 1924, in the case of a certain officer (299 Fed. 851) where no appeal was taken, is accepted by the Department as a final determination of the aforesaid officer's right to receive his current monthly pay, without deduction on account of his alleged indebtedness to the United States for commutation of quarters, no matter where he [P. 12] may be on duty or what individual disbursing officer may carry his account (File 26254–2668: 366–12 AD/3, January 3, 1925).

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RESERVE: TRANSFERS TO CLASS 1–C, FLEET NAVAL.

Held: An enlisted man who, on July 1, 1922, has served more than twelve but less than sixteen years in the naval service, and has completed sixteen years' service must be transferred by the Department to Class 1–C of the Fleet Naval Reserve immediately upon receipt of his application for such transfer. From a careful consideration of the provisions of the act of July 1, 1922, the Department is of the opinion that Congress clearly intended to require that the Department transfer such enlisted man who had completed sixteen years' service immediately upon the receipt of his request for such transfer, and that it was not the intent of Congress that the Department should exercise any discretion in the matter.

But, if an enlisted man, who, on July 1, 1922, had served more than twelve but less than sixteen years in the Navy, has completed sixteen years' naval service and does not apply for transfer to the Fleet Naval Reserve prior to the expiration of the enlistment in which serving, and is reenlisted, the Secretary of the Navy may exercise his discretion upon any voluntary application for transfer to the Fleet Naval Reserve thereafter made by said enlisted man (File 28550–1808 J : AC, December 17, 1924).

TIME: CREDIT FOT DOUBLE.

Held: An enlisted man of the Marine Corps who enlisted therein prior to August 24, 1912, and extended said enlistment after that date, is entitled to receive credit for double time for the purpose of retirement for foreign service performed while serving under extension of his original enlistment (File 27231–242 : 4 J : AC, December 23, 1924).

TRANSPORTATION: TO DEPENDENTS OF OFFICERS.

Held: An officer detached from duty and ordered to his home to await further orders has been ordered to make a permanent change of station within the meaning of the act of May 18, 1920, and transportation of the officer's wife and child, or children, must be furnished in kind or in money from the station last occupied by said officer to the place to which he has been directed to proceed (Op. Atty. Gen. 29199–9 : 92–6 of December 24, 1924).

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[P. 3] CONVENING AUTHORITY: INCONSISTENT ACTION OF.

Guy R. Slaughter, motor machinist's mate second class, U. S. Navy, was convicted of "Disobeying the lawful order of his superior officer" and sentenced by the court to be reduced to the rating of fireman third class, confinement for six (6) months, to lose $18 per month of his pay for a period of twelve (12) months and then to be dishonorably discharged from the naval service. The action of the convening authority in the foregoing case reads as follows:

> "The proceedings, findings, and sentence of the general court martial in the foregoing case of Guy Randolph Slaughter, motor machinist's mate second class, U. S. Navy, are approved, but the loss of pay is remitted. The reduction in rating, confinement, and dishonorable discharge are remitted on condition that Guy Randolph Slaughter during a period of six (6) months conducts himself in such a manner as in the opinion of his commanding officer warrants his further retention in the service; otherwise, he is to be dishonorably discharged in accordance with the provisions of section 752, Naval Courts and Boards."

The provisions of the foregoing action are somewhat inconsistent in that the reduction in rating, confinement and dishonorable discharge are remitted subject to six months' probation and if the conduct of the accused is unsatisfactory during this period he is to be dishonorably discharged. There is no provision for carrying out the reduction in rating and confinement in case of unsatisfactory conduct on the part of the accused. The effect of the convening authority's action therefore is to remit outright the loss of pay, reduction in

rating, and confinement adjudged and to place the accused on probation only insofar as the dishonorable discharge is concerned.

It is the opinion of the Department that the proceedings, findings in revision, and sentence in the foregoing case are legal and they are therefore approved (File 26262–11403A, G. C. M. Rec. No. 61739, December 5, 1924).

COURT: CONTEMPT OF.

William C. Holland, apprentice seaman, U. S. Navy, was tried by general court martial at the Marine Barracks, Parris Island, S. C., and convicted of, I: "Breaking arrest" and II, "Desertion." He was sentenced by the court to be confined for a period of two (2) years, dishonorable discharge, and accessories.

The accused did not desire counsel and none was assigned him. When asked by the judge advocate as to whether or not he had any objection to the charges and specifications the accused stood mute. The record then shows that "the court cautioned the accused that he should reply to the question put [P. 4] to him by the judge advocate, and warned the accused of the consequences of contempt in so refusing, and for displaying a contemptuous attitude toward the court." The judge advocate repeated the question and the accused remained mute. The court then announced that it deemed the accused guilty of contempt of court in that he has persistently refused to give a verbal reply to the questions put to him by the judge advocate after being duly warned by the court of the consequences of contempt in so refusing, and he has in his manner and bearing, persistently displayed a contemptuous attitude toward the court. Upon the accused standing mute when given an opportunity to show cause why he should not be adjudged guilty of contempt the court sentenced him to be confined for a period of two (2) months.

The principal basis of the court's action in adjudging Holland guilty of contempt of court appears to be his failure to answer when interrogated by the judge advocate relative to the charges and specifications under which he was being tried. It occasionally happens, as in the present case, that an accused will remain mute when arraigned, etc. The procedure to be followed when the accused declines to plead is to proceed as though a plea of not guilty had been entered (sec. 656, Naval Courts and Boards), and upon declining to state whether he has any objection to the charges and specifications under which he is being tried the court should proceed in the same manner as though he stated that he had no objections. The Department can find no precedent for holding an accused guilty of contempt of court for either declining to plead or declining to state whether or not he has any objection to the charges and specifications under which tried, and is of the opinion that such procedure would be improper. The sentence adjudged for the alleged contempt on the part of the accused is therefore disapproved.

It being the opinion of the Department, subject to the foregoing, that the proceedings, findings, and sentence in this case are legal, they are therefore approved. The dishonorable discharge adjudged in the general court-martial case of Holland, which was approved May 24, 1924, is remitted in order that the sentence in the present case may be executed upon the expiration of the former sentence, the total period of confinement with corresponding accessories to be three (3) years and six (6) months from May 24, 1924 (File 26251–33195A, G. C. M. Rec. No. 61243, November 19, 1924).

DESERTION: MANNER OF PROVING.

Harold M. Mooney, private, U. S. Marine Corps, was tried by general court martial convened by the Secretary of the Navy on the charge of "Desertion." The court convicted the accused and sentenced him to twelve (12) months' confinement, dishonorable discharge and accessories. The specification under which the accused was tried was the ordinary routine specification [P. 5] used in such cases, and alleged in effect that the accused deserted from the Marine Barracks, Quantico, Va., June 4, 1924, and remained a deserter until he was delivered at the Marine Corps Recruiting Station, St. Louis, Mo., on October 9, 1924. The accused pleaded not guilty to the charge and specification preferred against him.

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The only evidence presented to the court during the trial was the service record of the accused, which service record was introduced by the judge advocate, and extracts therefrom received in evidence. The entries referred to were to the effect that the accused "deserted" June 4, 1924, from the Marine Barracks, Quantico, and were properly signed by the commanding officer of the accused. No other evidence was offered to the court. It is, therefore, apparent that while the prosecution established the fact that the accused absented himself on the day in question, there was no evidence adduced to show the duration of the unauthorized absence or the manner of the return of the accused to naval jurisdiction.

In the course of his closing argument the judge advocate remarked that, "No evidence was introduced as to the delivery of the accused, as there was none available, but the charge of desertion has been established clearly by the service record book and has not been rebutted in any manner by the defense." As explained in section 392, Naval Courts and Boards, a mere entry of desertion in his (the accused) service record, with entries of attendant circumstances, is not sufficient to prove the gravamen of the offense. The entries shown in the case now under consideration merely establish the fact that the accused absented himself without authority from the Marine Barracks, Quantico, on the day in question.

The judge advocate was further in error in stating that no evidence was available to show the conditions surrounding the delivery of the accused. Among the papers sent by the Department to the judge advocate for his use in connection with the trial was an official letter from the officer in charge of the Marine Corps Recruiting Station, St. Louis, Mo., to the Major General Commandant showing the delivery of the accused to that station by civil authorities on October 9, 1924. This letter was admissible to establish the termination of the unauthorized absence and the fact of the delivery of the accused by civil authorities (Naval Courts and Boards, 392; Naval Digest 1916, p. 527 under "Reports of deserters received on board" par. 2). Had this evidence been introduced and the delivery of the accused, after an unauthorized absence of four months, established, a prima facie case for the prosecution would have been made.

It is further noted that the court found "the specification proved except for the word 'delivered,' which word is not proved" and that the court made no substitution for the word excepted. Striking the word "delivered" from the specification [P. 6] leaves a grammatically incomplete sentence. In this connection see section 681, Naval Courts and Boards, which provides that "in making exceptions and substitutions the court must see that the specification as found proved is grammatically complete."

In view of the above, it is the opinion of the Department that the conviction is illegal, and that the proceedings are legal. Accordingly, the proceedings are approved but the findings and sentence are disapproved (File 26251–33766A, G. C. M. Rec. No. 61643, November 24, 1924).

EXCEPTIONS AND SUBSTITUTIONS: IN FINDING OF COURT.

Leonard L. Cadmus, fireman third class, U. S. Navy, was tried and convicted by general court martial convened by order of the Commander Control Force, United States Fleet, on the charge "Absence from station and duty after leave had expired." He was sentenced by the court to be confined for a period of four (4) months, bad-conduct discharge and accessories. On December 31, 1924, the convening authority approved the proceedings, findings, and sentence but withheld all action on the sentence with a view to withholding action entirely provided Cadmus completes a satisfactory probationary perior of six (6) months. The specification preferred against the accused alleged in effect that he was absent overleave "for a period of about thirty-eight days and ten hours." The record shows that before the accused was arraigned, the judge advocate "called the attention of the court to the fact that the words 'thirty-eight' in the ninth line of the specification were incorrect in that the accused was absent for a period of thirty-seven days and ten hours." The record further shows that the court "found the charge and specification in due form and technically correct" and the accused pleaded guilty thereto as originally preferred. No evidence was offered by either the prosecution or the defense. The court found the

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specification proved except for the words "thirty-eight" and substituted therefor the words "thirty-seven," and convicted the accused of the charge.

The procedure followed in this instance by the court and the judge advocate was irregular. Where a judge advocate is of the opinion that the charge and specification contains an error, other than clerical, he should communicate with the convening authority before the trial is commenced in order that the error may be corrected. Naval Courts and Boards, sec. 184. In the present case, however, it is noted that the specification alleged an absence of "about" thirty-eight days and inasmuch as the gist of the offense was the unauthorized absence and not the duration thereof (C. M. O. 8, 1924, 3), the allegations of the specification would have been satisfied by the prosecution showing an absence of only one day less. Naval Courts and Boards, sec. 206. In any event, however, if the accused had pleaded [P. 7] not guilty and the evidence had shown an absence for a period of time other than that alleged in the specification, the court could properly have made exceptions and substitutions in its findings, Naval Courts and Boards, sec. 681, and the judge advocate should have proceeded with this end in view.

Inasmuch as the accused pleaded guilty to the charge and specification as preferred against him and there was no evidence adduced, the findings of the court on the specification should have been merely specification proved by plea. The court's action in excepting certain words from the specification and substituting others therefore was in error, inasmuch as the mere statement of the judge advocate referred to in paragraph one above, was not evidence and could not be treated as such by the court.

In view of the fact that the irregularities pointed out in the foregoing paragraphs of this opinion were errors in procedure and did not tend in any way to prejudice the rights of the accused, it is the opinion of the Department that they were not of sufficient gravity to invalidate the proceedings. Accordingly, it is the opinion of the Department, that subject to the foregoing remarks, the proceedings, findings, and sentence, are legal (File 26262–11481A, G. C. M. Rec. No. 61999, January 15, 1925).

GUILT: REASONABLE DOUBT OF.

First Lieutenant Frederick D. Harbaugh, U. S. Marine Corps, was tried and convicted by general court martial convened by the Secretary of the Navy on charges: (I) "Absence from station and duty without leave" and (II) "Drunkenness." The court sentenced him to the loss of twenty-five (25) numbers, and to lose pay amounting to $100 per month for six (6) months, total loss of pay to be $600.

The evidence adduced during the progress of the trial may be briefly summarized as follows: The accused was attached to the marine barracks at the Navy Yard, Boston, Mass., and lived outside the navy yard in the city of Boston. On October 28, 1924, he was restored to duty after having been under arrest awaiting the result of a previous general court martial, and on that day was informed by the post adjutant that he, the accused, would have the duty of officer of the day the following day, the 28th, for twenty-four hours beginning at about 9 a. m. On the afternoon of the 28th the accused, in accordance with general permission and routine, left the barracks and went to his home in Boston. He did not again appear at the barracks until the forenoon of the 30th when he reported for duty and at which time was, according to the prosecution's witnesses, under the influence of intoxicating liquor. It was for this absence from station and duty on the 29th and the alleged drunkenness on the forenoon of the 30th that the accused was brought to trial under the charges hereinbefore enumerated.

[P. 8] The accused contended and introduced evidence tending to show that some two or three weeks before this occurrence he had been run over by a taxicab on the streets of Boston, that due to his previous general court martial and the attendant notoriety connected therewith he elected not to call upon the naval authorities for medical treatment, but instead called upon a civilian physician of Boston, Dr. Spaulding; Dr. Spaulding visited the accused several times subsequent to the accident and prior to the events out of which grew the present trial; on the 29th of October, the day of the alleged unauthorized absence, the accused, according to his testimony, was suffering great pain

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as result of the injuries sustained in the accident hereinbefore referred to, and accordingly, early in the morning of the date in question, summoned Dr. Spaulding, who answered the call promptly and directed the accused to remain in bed; under the advice of his doctor the accused remained in bed until the following morning, the morning of the 30th, at which time he arose and determined to proceed to the barracks, but in view of the fact that he was suffering great pain, decided to visit the office of Dr. Spaulding on his way to the barracks; upon visiting the doctor's office, he was examined by Dr. Spaulding and the doctor observing that the accused was becoming very faint gave him a glass containing some liquid and instructed him to drink it; the accused afterward realized that it was whisky; the accused testified that this was the only intoxicating liquor he had had to drink in several days. The testimony of the accused as outlined in this paragraph was substantiated by the testimony of Dr. Spaulding. Also an extract from the police blotter of the city of Boston showed that a man giving the name of the accused had been run over by a taxicab on the date corresponding to the date mentioned by the accused. It was further shown that the accused actually during the period in question was suffering from several fractured ribs. In reference to his failure to inform his commanding officer on the 29th of his inability to report to the barracks, the accused testified that he had requested the husband of his landlady to telephone, but that this man had forgotten to do so; this was substantiated by the testimony of the man in question.

From the above it will be observed that the accused testified under oath himself and also offered sworn testimony of apparently reliable witnesses to the effect that he was physically unable to leave his room on the 29th, and that his apparent intoxicated condition was caused by a single drink of whisky given him by his physician. Inasmuch as the story of the accused was substantiated in part by witnesses in that it was definitely shown that during the time in question he was suffering from several fractured ribs, and further in view of the fact that his witnesses were in no wise impeached, it is the opinion of the Department that a reasonable doubt was created as to his guilt under the charges and specifications preferred against him.

[P. 9] In view of the above, the proceedings are approved but the findings and sentence which in the opinion of the Department are illegal, are set aside (File 26251–33796A, G. C. M. Rec. No. 61998, January 23, 1925).

JUDGE ADVOCATES: APPOINTMENT OF TWO FOR A COURT.

In reviewing the record of proceedings in the foregoing case of Ensign Frederick K. McElroy, U. S. Navy, it is noted that the precept named "Captain Robert L. Montague, U. S. Marine Corps, and First Lieutenant Julian P. Brown, U. S. Marine Corps, as judge advocates, either of whom is authorized to act in any case referred to this court." During the trial of the case now under consideration, however, the record indicates that both of these officers acted and signed the record as judge advocate.

The action of the convening authority in appointing two judge advocates for the court, either one of whom being authorized to act was unobjectionable, and is authorized by Naval Courts and Boards, sec. 803. However, it was clearly the intent of the precept that only one of these officers should act during any one trial. Where it is deemed desirable that a judge advocate be afforded assistance in the conduct of a case, Naval Courts and Boards, sec. 586, provides that a counsel may be appointed but it is not contemplated in general courts-martial procedure that there be more than one judge advocate to act at any one time. This irregularity, however, was, in the opinion of the Department, one of procedure which did not adversely affect the rights of the accused.

It is further noted that during the progress of the trial, the court received in evidence over the objection of counsel for the accused what purported to be a certified copy of the ship's quarterly report of secret and confidential publications (exhibit No. 1). According to the testimony of Commander Courts, the commanding officer of the ship in question and on which the accused was serving as communication officer, the original report was prepared by the accused for the signature of the said Courts and the copy which was received as exhibit

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No. 1, was a "Copy certified to be a true copy of the file copy" (Record p. 6). The ruling of the court was erroneous in that it was a violation of the "Best evidence" rule. In order to render admissible the copy in question, it would have been necessary to show that the original was unavailable by reason of having been lost or destroyed through no fault of the prosecution, Naval Courts and Boards, sec. 381. Inasmuch, however, as there was sufficient evidence to establish the allegations of the specifications found proved by the court without the use of this paper erroneously admitted, it is the opinion of the Department that the error was not of sufficient gravity to invalidate the proceedings.

Subject to the foregoing remarks, it is the opinion of the Department that the proceedings, findings and sentence in this [P. 10] case are legal, and they are therefore approved (File 26262–11467A, G. C. M. Rec. No. 61971, January 15, 1925).

SENTENCE: MITIGATION OF ON ACCOUNT OF EXPIRATION OF ENLISTMENT.

The accused in this case, Andrew Michniewicz, seaman second class, U. S. Navy, was convicted of "Absence from station and duty after leave had expired" and sentenced to be reduced to the rating of apprentice seaman, confinement for nine (9) months, bad-conduct discharge, and accessories. The convening authority on December 10, 1924, approved the proceedings, findings, and sentence in this case, but reduced the period of confinement to six (6) months; all the other accessories of said sentence, except loss of pay, were remitted, and loss of pay was reduced to loss of all his pay for a period of six (6) months, less the sum of $5 per month during said period. The bad-conduct discharge was remitted provided Michniewicz maintains a record satisfactory to his commanding officer during a period of six (6) months; otherwise, he will be discharged with a bad-conduct discharge in accordance with the provisions of section 752, Naval Courts and Boards. The U. S. S. *Wyoming* was designated as the place of confinement.

An examination of the record reveals that the accused enlisted March 21, 1921, for a period of four (4) years and his enlistment therefore expires March 21, 1925. As the sentence as mitigated by the convening authority extends beyond the date of the expiration of the enlistment of the accused and as it is not considered desirable to retain a man in the service after expiration of enlistment to complete the sentence of a court martial which sentence is not to be executed at a naval prison, the period of confinement will extend only until March 20, 1925, the date the enlistment of the accused expires, and the period of probation with reference to the bad-conduct discharge will be similarly reduced. That portion of the convening authority's action which refers to loss of all pay for six (6) months less $5 per month cannot be executed after the enlistment of the accused expires as he thereafter draws no pay.

It is the opinion of the Department that the proceedings, findings, and sentence in the foregoing case are legal (File 26262–11434A, G. C. M. Rec. No. 61882, January 22, 1925).

SPECIFICATION: AS PROVED DOES NOT ALLEGE AN OFFENSE.

Ford Turk, seaman first class, U. S. Navy, was tried by general court martial and convicted of "Scandalous conduct tending to the destruction of good morals." The specification under which Turk was tried reads as follows:

> "In that Ford Turk, now a seaman first class, U. S. Navy, while so serving on board the U. S. S. *Maryland*, did, on or about September 10, 1924, at the Navy Young Men's [P. 11] Christian Association in the city of Bremerton, Wash., knowingly, willfully, and fraudulently obtain and receive into his possession from the said Navy Young Men's Christian Association, one suitcase of the value of about seven dollars ($7), one suit of civilian clothing of the value of about seventy dollars ($70), one civilian cap of the value of about four dollars and fifty cents ($4.50), one sweater vest of the value of about seven dollars and fifty cents ($7.50), three civilian shirts of the value of about ten dollars and fifty cents ($10.50), one straw hat of the value of about two dollars and fifty cents ($2.50), one pair of civilian shoes of the value of about fifteen dollars ($15), one belt of the value

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of about one dollar and fifty cents ($1.50), six collars of the value of about two dollars and twenty cents ($2.20), two neckties of the value of about two dollars and seventy-five cents ($2.75), one pair of socks of the value of about one dollar ($1), and one pair of cuff buttons of the value of about four dollars ($4), said articles of the quantities and values aforesaid, being the property of one Douglass Schelin, then a seaman, second-class, U. S. Navy, attached to and serving on board the U. S. S. *Maryland*, by falsely and fraudulently representing that he, the said Turk, was the said Schelin, and did then and there appropriate the same to his own use."

In its findings the court excepted the words "by falsely and fraudulently representing that he, the said Turk, was the said Schelin" and made no substitutions.

The acts alleged in the above specification as found proved if authorized would clearly have constituted lawful acts. The specification does not allege that the accused acted without authority and the only allegation in the specification which in any way indicates wrongfulness is the word "fraudulently." With reference to the use of this word in an indictment the court stated in the case of *Martin* v. *U. S.* (168 Fed. 205), that "the averment that an act innocent in itself, but criminal if fraudulently done, was done "fraudulently" or with intent to defraud, is but a bald conclusion of law and is futile. A crime is made up of acts and intent and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." In the case cited the court held that the indictment was fatally defective because it set forth no facts or acts which indicated any attempt or intent on the part of the defendant to injure or alter the rights or interests of anyone by the acts charged against him. (See also *U. S.* v. *Hess*, 124 U. S. 483.)

The specification as originally preferred in this case against the accused, although poorly drawn, was legally sufficient because the acts described by the words excepted in the finding of the court, if proved, would have shown that the acquisition and appropriation of Schelin's property by the accused was unauthorized and fraudulent, but the elimination of these allegations [P. 12] leaves the specification setting forth no acts in themselves fraudulent. Inasmuch as it is not deemed practicable to now return this record to the court for a reconsideration of its finding, the findings and sentence in this case are to be set aside. As separate and distinct action Turk will be discharged from the naval service as undesirable (File 26262–11358A, G. C. M. Rec. 61559, November 21, 1924).

SPECIFICATIONS: TWO, ALLEGING, THE SAME OVERT ACT.

Jose Espejo, mess attendant, second-class, U. S. Navy, was tried by general court martial and convicted of I, "Assaulting another person in the naval service," and II, "Striking another person in the naval service," and sentenced to be reduced to the rating of mess attendant, third-class, confinement for a period of eighteen (18) months, dishonorable discharge, and accessories. The convening authority on December 20, 1924, reduced the period of confinement with corresponding accessories to six (6) months, and designated the naval prison, Mare Island, Calif., as the place of confinement.

The evidence indicates that the assault covered by the first charge constituted a part of the offense set out under charge II, the first charge evidently being preferred in order to provide for exigencies in the proof. Inasmuch as every battery which is the actual striking includes an assault it is unnecessary to prefer a separate charge of assault to provide for exigencies in the proof of the more serious charge for if the assault only is proved the court can properly find the accused guilty of the greater offense in a lesser degree than charged. The assault and the striking do not constitute separate and distinct offenses but the assault is a constituent part of the striking and the intention of the law is fully carried out in convicting of the greater offense. Therefore the finding of the court on charge I is set aside (File 26262–11460A, G. C. M. Rec. No. 61962, January 15, 1925).

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TESTIMONY: ADMISSION OF EXPERT.

Braulio Javier, musician, second-class, U. S. Navy, was tried and convicted by general court martial convened by Commander in Chief, Battle Fleet, on the charge of "Assault with intent to commit murder" and sentenced to reduction to the rating of apprentice seaman, confinement for a period of fifteen (15) years, dishonorable discharge and accessories.

The record (p. 16) shows that the judge advocate stated to the court "that he desired to call the medical officer as a witness in order to show to the court that the blow which was struck by the accused was of such a serious nature as to have produced death." The counsel for the accused immediately objected to the reception of the proffered evidence. The court announced that the objection of the accused was sustained. In accordance with the procedure generally followed in criminal proceedings and the procedure laid down in Naval Courts and Boards, the [P. 13] better practice would have been for the judge advocate to actually call to the stand the medical officer in question and proceed with the examination, and then counsel for the accused would have been free to object to definite questions being answered, which objections could then have been ruled upon by the court.

In the case of *Scotland County* v. *Hill*, 112 U. S. 183, however, the court remarked in reference to an assignment of error based upon the court's action in sustaining an objection of the nature referred to above where the witness was not actually called to the stand; that error cannot be assigned on the ruling rejecting an offer of testimony, unless it appears that the offer was made in good faith, and that "if the trial court has doubts about the good faith of the offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof before it rejects the offer; but if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, and appellate court must assume that the proof could have been made, and governed itself accordingly." Accordingly, in the present case it is assumed that the court acted upon the offer of the evidence and objection thereto as if the witness had actually been on the stand, and therefore, the Department will proceed to determine whether or not the evidence was competent.

In reference to expert testimony of this nature Jones on Evidence, 3d edition, par. 378, has the following to say: "The opinions of physicians and surgeons may be admitted to show the physical condition of a person, * * * the effect of disease or of physical injuries upon the body or mind, as well as in what manner or by what kind of instruments they were made, or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death, the cause, symptoms, nature, and peculiarities of a disease, or whether it would be likely to cause death, the probable future consequence of an injury" (to the same effect is 1 Greenleaf on Evidence 15th edition, par. 440). In the case now under consideration the prosecution showed that the accused threatened to kill the master at arms and did actually strike and wound him in the region of the kidneys with a pocket knife. Accordingly, it is the opinion of the Department that in view of the law as referred to above the proffered evidence was clearly admissible and the rejection thereof by the court was erroneous. In view of the fact, however, that the evidence was rejected upon the motion of counsel for the accused after being offered by the prosecution, it is the opinion of the Department that the action of the court was not prejudicial to the accused and that the error was not sufficient to invalidate the proceedings.

Subject to the foregoing remarks, it is the opinion of the Department that the proceedings, findings, and sentence in the foregoing case of Braulio Javier, musician second class, U. S. Navy, are legal (File 26262–11419A, G. C. M. Rec. No. 61794, January 15, 1925).

[P. 14] CONFINEMENT: TEMPORARY, OF ENLISTED PERSONS OF THE COAST GUARD.

The Department is requested to permit the temporary confinement of enlisted persons of the Coast Guard awaiting trial by Coast Guard court in the brigs of Navy receiving ships which are located in the immediate vicinity of the Coast Guard.

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Held: On November 13, 1916, File No. 7018–487, the Department stated that a similar recommendation was not concurred in for the reason that it was not considered to be "for the best interests of the naval service" (File 28762–636: 9 J: AC, January 31, 1925).

DEATH: NOT IN LINE OF DUTY, AND NOT RESULT OF OWN MISCONDUCT.

C. O. F., torpedoman, first class, U. S. Navy, took his own life. Just prior to the time of taking his life he was in a depressed state of mind, which state was brought about by reason of his domestic relations.

Held: There are types of insanity which do not present symptoms of the disease in a form which would be recognized by the casual observer, some of which types cause the subject to desire to take his own life. In the absence of all evidence indicating the existence of an adequate or reasonable motive for taking one's own life, the Department treats the act itself as overcoming the presumption of sanity. There appears to have been no reasonable or adequate motive for the deceased in this case to take his own life. It should be held that at the time of taking his life, the late C. O. F. was not of sound mind. Since there is no evidence to indicate that his insanity was brought about by any act of misconduct on his part, his death should be held to have occurred not as the result of his own misconduct. It does not necessarily follow, however, that his death was incurred in the line of duty. If his insanity was not incurred in the line of duty, then it would follow that his death did not occur in the line of duty. All the evidence that is disclosed in this case indicates that the mental disturbance of the deceased was due to his domestic relations, and not to his service in the Navy. In view of these facts, his death should be held to have occurred not in the line of duty (File 26250–3561 & 26250–3561: 3D, December 31, 1924).

[P. 15] DISABILITY: IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

Held: In view of the fact that the disability complained of resulted from an unprovoked battery committed upon him by one E. E. C., said disability should be held to have been incurred in line of duty and not due to his own misconduct (File 29372–317 J: AC, February 5, 1925).

FLEET NAVAL RESERVE: TRANSFER TO WITH COAST GUARD SERVICE.

Held: Consideration of the provisions of the act of August 29, 1916 (39 Stat. 589) discloses that the only service which may be counted for the purpose of transferring to the Fleet Naval Reserve is "naval service." Therefore, service in the Coast Guard or the former Revenue Cutter Service while not operating under the jurisdiction of the Navy Department is not naval service, and accordingly, may not be counted as such for the purpose of transfer to the Fleet Naval Reserve (File 27231–268: 1 J: AC, February 13, 1925).

OFFICER: STATUS OF ON THE RETIRED LIST.

Lieutenant (j. g.) E. W. Craig (C. C.), U. S. N., retired, retains on the retired list the grade of assistant naval constructor in which he was serving at the time of retirement, the effect of the provisions of section 1481 of the Revised Statutes being to give him the rank of commodore on the retired list without changing the grade of assistant naval constructor, in which serving at the time of retirement. In view of the provisions of the act of March 4, 1911 (36 Stat. 1354) a new commission is not required to be issued to him (File 27231–141: 9–1 J: AC, February 21, 1925).

PAY: RETIRED.

Held: The retired pay of a naval officer is earned income. (*Franklin* v. *U. S.*, 29 Ct. Cls. 6; Case of Rear Admiral Staunton, U. S. N., retired; File 28472–57: 2 J: AC, February 6, 1925).

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REWARD: TERMINATION OF OFFER FOR APPREHENSION AND DELIVERY OF DESERTER.

C. A. B., mess attendant third class, U. S. N., was declared a deserter on February 5, 1920, at which time a reward of $50 was offered for his apprehension and delivery to naval jurisdiction. On March 30, 1920, he was delivered to the receiving station at Philadelphia, Pa., and on April 12, 1920, was discharged with a bad-conduct discharge pursuant to a [P. 16] sentence of a summary court martial. A representative of the Surigao Police Department on September 8, 1924, delivered B_____ on board the receiving ship at Cavite, P. I., and claimed the above-mentioned reward in view of the fact that no cancelation of same had been received by him.

Held: When the above-mentioned man was delivered to the receiving station at Philadelphia, March 30, 1920, the conditions under which the reward of $50 had been offered for his apprehension and delivery to naval jurisdiction had been removed and said offer of reward terminated (26516–519 J: AC, February 25, 1925).

SERVICE: IN COAST GUARD, COUNTING FOR RETIREMENT.

Held: The provisions of the act of June 4, 1920 (41 Stat. 835) clearly authorizes the counting of service in the Coast Guard and former Revenue Cutter Service for purposes of computing longevity pay and retirement privileges regardless of whether or not the Coast Guard and former Revenue Cutter Service were operating under the jurisdiction of the Navy Department while said service was being rendered (File 27231-268: 1 J: AC, February 13, 1925).

WORLD WAR ADJUSTED COMPENSATION ACT: SERVICE AFLOAT UNDER.

Held: All service "afloat" from the date of embarkation to the date of disembarkation, both dates included, shall be counted as "oversea service" for the purpose of the World War Adjusted Compensation Act regardless of whether the veteran rendered said service as a member of the crew of a vessel of war, transport, or any other vessel, except a receiving ship, or whether he was in transit afloat to any station to which he has been ordered to duty (File 29460-5: 2 J: AC, February 26, 1925).

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[P. 3] ACQUITTAL: FORM OF.

A pay clerk, U. S. Navy, was tried by general court martial convened by the Secretary of the Navy on the following charges: (I) "Scandalous conduct tending to the destruction of good morals"; (II) "Conduct to the prejudice of good order and discipline" (2 specifications); and (III) "Falsehood." The court most fully and honorably acquitted the accused of charges I and III and acquitted him of charge II.

In reference to the use of the "most fully and honorably" form of acquittal, Naval Courts and Boards, section 686, provides that:

> "This form should be used only in extreme cases in which not only have the requirements of a 'full' and 'honorable' acquittal been fulfilled, but in which the court wishes to place the highest stamp of approval upon the actions of the accused in connection with matters covered by the specifications. The use of this form of acquittal might, for example, be justified in the case of an officer charged with unbecoming conduct in battle if the court wished to make it a matter of record that, far from considering the conduct of such officer censurable, it both approved and commended his conduct."

In the case now under consideration, the Department is unable to find any established acts of the accused in connection with the charges and specifications which merited the placing of "the highest stamp of approval" thereon by the court. From the testimony of the accused, himself, it was shown that he took to his room a strange enlisted man whom he had encountered on the streets of New York about midnight of the night in question, that he invited this enlisted

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man to occupy his room and bed for the night, the accused, according to his testimony, occupying a vacant room in the same house, and that as a matter of fact this enlisted man who subsequently brought the charge of scandalous conduct against the accused did actually so occupy the room of the accused. By thus associating intimately with an enlisted man of unknown moral character, the accused, an officer of the Navy, placed himself in a position to be made the ready target of an attack of this nature, malicious and untrue though it might be.

As stated in the citation from Naval Courts and Boards, above, this form of acquittal should only be used in extreme cases, as, for instance, the case of an officer tried for unbecoming conduct in battle where the court considers the conduct of the officer commendable rather than censurable. In the present case there was considerable conflict between the testimony of the accused and certain of the prosecution's witnesses. The court saw fit to believe the accused and accept his version of the affair as being [P. 4] correct, and in so doing the Department feels that the court acted reasonably. Had the court, therefore, merely acquitted the accused the Department would have had no adverse comment to make thereon, but in view of the evidence adduced as indicated above, the Department does not feel that the use of the form of acquittal, "most fully and honorably," was justified. (In this connection see C. M. O. 224 of 1919.)

Subject to the foregoing remarks, it is the opinion of the Department that the proceedings, findings, and acquittal in the aforegoing case are legal (File 26251–33046A, G. C. M. Rec. No. 61439, January 7, 1925).

CHARGES: TWO, ALLEGING IN EFFECT THE SAME ACT.

In reviewing the record of proceedings in the foregoing case of M. H., mess attendant second class U. S. Navy, it is noted that the accused was convicted under charge IV of "Knowingly and willfully applying to his own use property of the United States intended for the naval service thereof," the property in question being the same for the stealing of which he was convicted under charge III. The purpose of the pleader was obviously to provide for exigencies of proof and such pleading is legally unobjectionable, but a conviction on both charges could not be allowed to stand. In view of the above, the findings on charge IV and specification thereunder are set aside.

It is the opinion of the Department that the proceedings, findings on charges I, II, III, and V and specifications thereunder, and sentence in the foregoing case, are legal (File 26262–11469A, January 21, 1925; G. C. M. Rec. No. 61972).

CONFESSION: ADMISSIBILITY OF.

G. E. W., hospital apprentice second class, U. S. Navy, was tried and convicted by general court martial convened by the Commander Battleship Divisions, Battle Fleet, on the following charges: I, "Wrongfully and knowingly disposing of property of the United States intended for the naval service thereof," and II, "Unlawfully giving away a derivative of opium." The accused was sentenced to confinement for two (2) years, dishonorable discharge and accessories. The convening authority on November 4, 1924, approved the proceedings, findings, and sentence, but reduced the confinement with corresponding accessories to one (1) year.

In reviewing the record of proceedings in the foregoing case, it is noted that the only evidence introduced by the prosecution tending directly to fasten the responsibility for the loss of the morphine mentioned in the specifications upon the accused [P. 5] was an alleged extrajudicial confession made to the ship's medical officer, which confession was subsequently reduced to writing by the accused and delivered to the ship's chief police petty officer.

From the evidence adduced at the trial it appears that the narcotics were found to be missing from a storeroom, the key of which was in the possession of the accused, and that suspicion fell upon the accused and one L., pharmacist's mate, third class. The acting head of the medical department aboard the ship, Lieutenant (j. g.) B. (M. C.), then sent for the accused and told him that L. had made a complete confession and that it wouldn't profit him

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to do otherwise." At this time there was also present Chief Pharmacist's Mate B. and Pharmacist's Mate First Class H. According to the testimony of Chief Pharmacist's Mate B, "No promises were made, but he (the accused) was told that we knew he had taken the narcotics and that it would go easier with him if he confessed." The accused thereupon, according to the testimony of the witnesses hereinbefore mentioned, testified that he had taken the narcotics in question and had delivered them to L. to be sold ashore. Subsequently the accused was called to the room of the chief police petty officer and signed a statement substantially the same as made orally to the medical officer.

In 3 Russell on Crimes (6th ed. 478) it is stated as follows: "But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertions of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." This summary of the law is in harmony with the determination of the law as expressed by other writes although the form in which they couch its statement may be different. (1 Greenleaf 219; Wharton Criminal Evidence 631; 1 Bishop New Criminal Procedure, par. 1217.) The foregoing statement of the law on this subject is also in accord with the decisions of the United States Supreme Court, *Bram* v. *U. S.*, 168 U. S. 532, and cases cited therein, and has been reaffirmed in the latest expression of the court on this subject in the case of *Wan* v. *U. S.*, decided October 13, 1924. In *Bram* v. *U. S.*, 168 U. S. 532, the following statement made to the accused by police detective: "Now look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown, but * * * some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders," [P. 6] was held to engender the hope of benefit, sufficient to render the confession inadmissible. In this connection attention is also invited to Naval Courts and Boards, 352, in which it is pointed out that a confession made by an enlisted man to a superior must be regarded with great caution, and that where there has been even slight assurance of relief or benefit by the superior the confession should not in general be admitted.

In view of the law as pointed out above it is the opinion of the Department that the alleged confession in the case now under consideration was not voluntary and accordingly should not have been received in evidence. It appears that the statement of the accused was made to the head of his department, a commissioned officer, and his, the accused's, immediate superior, the chief pharmacist's mate, after being questioned by these persons and after having been told that "It would go easier with him if he confessed." Nor in the opinion of the Department, is it material that the accused subsequently signed a written confession when called before the chief police petty officer. The law on this latter feature of the case is stated by the court in *Mangum* v. *U. S.*, 289 Fed. 213, as follows: "If a confession is induced by threats of violence or any undue influence, a subsequent confession is not admissible, unless it appears to the satisfaction of the court that the prior influences had ceased to operate on defendant's mind to bring about the latter confession." It is apparent that if the accused was led to make his prior confession in the hope that things would be easier for him, this hope would reasonably have continued and would have been present at the time he was called to the room of the chief police petty officer.

In view of the above, the proceedings, findings, and sentence, which in the opinion of the Department are illegal are set aside (File 26262–11380A, G. C. M. Rec. No. 61614, December 18, 1924).

CONFINEMENT: RUNNING OF, SENTENCE OF.

An enlisted man was confined in accordance with the terms of the sentence of a summary court martial on January 21, 1925. On January 27 he was removed to the sick bay at the place of confinement, and on or about January 31 was transferred to the nearest naval hospital for further treatment. Ques-

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tion involved is whether the sentence of a court martial runs continuously from the date of first confinement.

Held: A sentence of confinement adjudged by summary court martial runs continuously from date of first confinement so long as the prisoner remains under naval control, and any intermediate period spent in a hospital is to be counted as part of the time of confinement, and should a sentence of this character terminate while the prisoner is a patient in a hospital such sentence shall be deemed to have been served (File 26287–10391C, March 31, 1925).

[P. 7] COURT: MEMBERS OF, JUDGE ADVOCATE AND REPORTER NOT SWORN.

The record in this case fails to indicate that the members of the court, judge advocate, or reporter were sworn. Section 629, Naval Courts and Boards, provides that until a court is duly sworn (organized) according to law it is incompetent to perform any judicial act except to hear and determine challenges against its members. The Department on August 22, 1924, returned the record to the convening authority for the purpose of having the court reconvene and indicate on the record in revision whether or not the absence of this entry was a clerical error, or whether as a matter of fact, the court was not sworn. The convening authority subsequently informed the Department that it was impossible to reconvene the court but forwarded to the Department a statement of the judge advocate to the effect that the absence of the entry showing the court to have been sworn was a clerical error. In C. M. O. 7, 1922, 9, which referred to a situation similar to that presented in the present case, it was pointed out that the only way the record of a general court martial can be corrected is to reconvene the court before which the case was tried and have it authorize the necessary corrections in its proceedings in revision and that no individual member or members of the court or any other persons can do so (Citing 23 Op. Atty. Gen. 23).

In view of the above, it is the opinion of the Department that the proceedings in the foregoing case are illegal (File 26262–11146A, G. C. M. Rec. No. 60838, November 18, 1924).

COURT OF INQUIRY: IRREGULARITIES IN.

Held: In view of the many errors in a certain court of inquiry, it is the opinion of the Department that the record itself may not be legally made the basis of disciplinary action, other than court martial proceedings. A judicial proceeding not conducted substantially in accordance with the rules of procedure laid down for conducting such a proceeding should not in justice be made the basis of any final disciplinary action. The rules have been prescribed in order to provide that the different parties may receive the benefits of all rights which are accorded them by law. These rules are those which have been found by long experience to be best adapted for securing this end. If a court of inquiry violates these rules at numerous stages of its proceedings, it would seem that full reliance should not be placed upon its record. There would be no assurance that a gross injustice might not be done by permitting such a record to be made the basis of final disciplinary action. Statements voluntarily made by a witness may be used in evidence against him. Accordingly a letter of reprimand may be awarded this officer based entirely upon evidence as given by himself (File 12479–424: 33–4D, February 17, 1925).

[P. 8] SPECIFICATION: DOES NOT ALLEGE AN OFFENSE.

In reviewing the record of proceedings in the foregoing case of V. F. P., aviation carpenter's mate second class, U. S. Navy, it is noted that the accused was tried on two charges: (I) "Unlawfully having a derivative of coca leaves in his possession," and (II) "Absence from station and duty without leave."

The specification under charge I reads as follows:

> "In that V. F. P., now an aviation carpenter's mate second class, U. S. Navy, while so serving at the U. S. Naval Air Station, Coco Solo, C. Z., did, on or about 24 August, 1924, in or near the city of Colon, Republic of

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Panama, knowingly and unlawfully have in his possession and under his control, cocaine, exact quantity thereof to the relator unknown, he, the said P., at the time and place aforesaid, not being registered under the provisions of the act of Congress approved December 17, 1914."

This specification does not set forth a cause of action. A specification must on its face allege the facts which constitute a violation of some law, regulation, or custom of the service in order to charge an offense of which judicial notice can be taken (sec. 198, Naval Courts and Boards).

The alleged offense is not such as to be actionable under the statutory provision against the possession, traffic, etc., of drugs, contained in the act of Congress approved December 17, 1914, which act of Congress applies only to the possession, etc., of the drug in "any State or Territory, or District of Columbia, or any insular possession of the United States," and in the present case the possession is alleged to have been in the city of Colon, Republic of Panama.

The offense as alleged is not contrary to any Navy regulation, article 118, U. S. Navy Regulations, 1920, provides that "No person in the naval service shall take or keep * * * narcotic substances on board ships in the Navy or within the limits of naval stations, marine barracks, or any place under the exclusive jurisdiction of the Navy Department, except as authorized for medical purposes." The place of possession under this regulation is one of the elements of the offense and the accused clearly is not punishable under this regulation.

In the opinion of the Department, the accused might have been charged under the general article for violation of a Panamanian statute, properly alleged in the specification (sec. 198, Naval Courts and Boards), if there be in fact such a statute.

In view of the reasons set forth above, charge I and specification thereunder are set aside. That portion of the confinement in excess of seven (7) months and four (4) days, which is in excess of the legal limitation of punishment for the remaining charge, is remitted, and the dishonorable discharge is mitigated to a bad-conduct discharge. Subject to the above, the proceedings, findings, and sentence are, in the opinion of the Department, legal (File 26262–11362A, G. C. M. Rec. No. 61568, January 27, 1925).

[P. 9] BOARD OF SELECTION: INFORMATION CONCERNING PROCEDURE OF.

The Secretary of the Navy advised Commander G_____ that the only way in which he could obtain evidence in connection with his case was for him to have the individuals who were members of the selection board passing upon his qualifications for selection for promotion subpenaed by the court having jurisdiction in the premises (File 12475–657:2 J:AC, March 16, 1925).

OATHS: OFFICERS EMPOWERED TO ADMINISTER.

The question involved is whether an officer ordered to duty to a naval district as district communication superintendent with additional duty as commanding officer of the naval radio stations within that district is empowered under the act of March 4, 1917 (39 Stat. 1086), to administer oaths for the purposes of naval administration.

Held: Consideration of the provisions of the aforesaid act discloses that the commandant of a naval station is authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration, and that such other officers of the Navy as may be designated by the Secretary of the Navy, have such authority. The Department has held that a naval radio station is not a naval station within the meaning of article 26 of the Articles for the Government of the Navy, as amended by the act of August 29, 1916, (39 Stat. 586), and that the officers in question were not empowered to convene summary courts martial except when specifically empowered by the Secretary of the Navy to do so (File 26287–3552:51). Therefore, a naval radio station is not a naval station within the meaning of the act of March 4, 1917, and an officer ordered to duty to a naval district as district communications superintendent with additional duty as commanding officer of the naval radio stations within that district is not empowered under the

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act of March 4, 1917, to administer oaths for the purposes of naval administration unless such officer is specifically authorized by the Secretary of the Navy to do so (File 19037–181–NRP, March 23, 1925).

[P. 10] OFFICERS: EXCHANGE OF BETWEEN ARMY AND NAVY.

The Joint Board of the Army and Navy having approved certain recommendations relating to the exchange of officers between the Army and the Navy, the Attorney General was requested by the War and Navy Departments to render an opinion on certain questions involved in the exchange. The Attorney General in an opinion dated March 23, 1925, stated that he "respectfully must decline to review the question or to state any opinion for the reason that apparently the board intends to submit certain regulations covering these recommendations to the President for his approval" and that "as long as the proposed regulations are under consideration and have not been drafted or adopted any question affecting their legality is a moot one" (File 16438–9:1J, March 26, 1925).

PURCHASES: NAVAL, MADE FROM RETIRED ENLISTED MEN, ETC.

The question involved concerns the scope of article 1450, Manual of the Supply Corps, which reads as follows:

> "*Persons in naval service forbidden to have interest in contracts.*—No person belonging to or employed in the naval service shall be admitted to any share or part of a contract, or to any benefit arising therefrom, except as a member of an incorporated company."

Held: Retired enlisted men of the Navy, enlisted members of the Fleet Naval Reserve, and civilian employees in the naval service, or the wife of an enlisted man or of any member of any one of these groups, may legally contract to furnish supplies to the Navy and receive any share or part of a contract with the Navy, or the benefits arising therefrom, regardless of the provisions of article 1450, Manual of the Supply Corps (File 3937–215:8–1 J:AC, March 19, 1925).

RATION: VALUE OF HOSPITAL; CHECKING OF COMMUTED.

A joint letter of the Bureau of Medicine and Surgery and the Bureau of Supplies and Accounts approved by the Acting Secretary of the Navy stated that the value of a hospital ration for the fiscal year 1925 has been fixed as 75 cents per diem and that this amount shall be checked against an officer's account for each day he has subsisted at a hospital.

Held: In view of section 4812 of the Revised Statutes which provides "For every Navy officer, seaman, or marine, admitted into a Navy hospital, the institution shall be allowed one ration per day during his continuance therein, to be deducted from the account of the United States with such officer, seaman, or [P. 11] marine," and of the provisions of the act of May 28, 1924, establishing the value of a ration, and the manner of checking it, the Department is of the opinion that there is not authority at law to fix the value of a hospital ration at 75 cents per diem so as to require that sum to be checked against the accounts of officers for each day they are subsisted in a hospital The Department is further of the opinion that it is illegal to check an officer more than the value of a commuted ration, 50 cents, for each day he is subsisted at the hospital (File 9047–1297: 1–K, March 17, 1925).

SLANDER: OFFICER SUBJECTED TO CIVIL SUIT FOR, AS RESULT OF OFFICIAL ACTION.

On March 25, 1925, the Secretary of the Navy wrote to the Attorney General requesting him to provide counsel for the defense of a naval officer who was being subjected to civil suit for damages for slander in consequence of his action in a matter under his official cognizance, and concerning which he was required to proceed according to his judgment (File 26287–10350:3 AD/3 Du, March 25, 1925).

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WORLD WAR ADJUSTED COMPENSATION ACT: RECEIPT OF APPLICATION FROM DEPENDENT OF VETERAN ALLEGED TO BE DEAD.

Held: It will not be possible in all cases where the veteran is dead for the dependent to furnish a death certificate. In such cases the affidavit of an individual who viewed the body of the veteran after his death may be accepted in the place of the death certificate. In those cases where the records of the Department show that the veteran is dead no certificate of death should be required. In those cases, however, where the records of the Department show that the veteran is missing and unaccounted for, and that the dependents are without any information as to his whereabouts, or, in similar cases, where the veteran has disappeared after being mustered out of the service, all facts relative to the death or disappearance of such individual should be referred to the office of the Judge Advocate General for consideration and opinion for the purpose of determining whether or not the facts submitted are sufficient to warrant a finding that the veteran is deceased (File 29460–45 J: AC, March 12, 1925).

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[P. 3] ARREST: BREAKING.

In reviewing the general court-martial record of F. T., Private, U. S. Marine Corps, it is noted that the accused was charged with "Breaking arrest" and "Desertion." The accused was acquitted on the first charge, and found guilty of the second.

The prosecution submitted in evidence to prove the first charge an extract from the current service record of the accused, which entry was as follows:

> "While serving with Barracks Det. M. B. Quantico, Va. from January 1, 1924, to April 5, 1924, AWOL fr. 10 p. m., April 5, 1924 (While a P. A. L. A. T. D. C. M.) when deserted M. B. Quantico, Va.
>
> (S.) "E. G. R.,
> *"Captain, U. S. Marine Corps."*

The above testimony was given by the judge advocate, the legal custodian of the service record of the accused. On examination by the court the following question was put to the witness:

> "7. Q. Is there any entry in the service record book to the effect that the accused was notified of the fact that he was, or had been made, a prisoner at large awaiting trial by deck court martial? A. No Sir."

No other evidence was introduced by either party.

From the above it is apparent that the theory of the court on which the acquittal was had, was that the prosecution failed to show that the accused was cognizant of his status as a prisoner at large. In this connection the Department has held (C. M. O. 2, 1922, 7) that the statement in a service record that a man is a prisoner at large is a statement of fact, which necessarily includes within it the constituent fact that the man had been informed of his status, for otherwise he would not be a prisoner at large. Such entries in service records are made contemporaneously with the facts recorded, and are made in the regular course of official duty, by an officer having personal knowledge of them and constitute prima facie evidence of the facts stated therein.

Therefore it is the opinion of the Department that a prima facie case was made by the prosecution and, as it was unrebutted, that the court erred in acquitting the accused on the first charge, and accordingly the finding and acquittal on the first charge are disapproved.

The proceedings and findings on charges II, and the sentence in the foregoing case are, in the opinion of the Department, legal and they are therefore approved (File 26251–34198A, G. C. M. Rec. No. 62292, March 13, 1925).

CHARGE: NOT SUPPORTED BY ALLEGATIONS CONTAINED IN SPECIFICATION.

F. J. M., chief storekeeper, U. S. Navy, was tried by general court martial on board the U. S. S. T., on charges of: (I) "Scandalous [P. 4] conduct tending to the destruction of good morals" (4 specifications), (II) "Falsehood" (2 specifications, (III) "Culpable inefficiency in the performance of duty," and (IV)

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"Neglect of duty." The accused pleaded guilty to specifications 1, 2, and 3 of charge I and not guilty to specification 4 and the charge, not guilty to charge II and the specifications thereunder, and guilty to charges III and IV and their supporting specifications. He was acquitted of specification 4 of charge I and specification 2 of charge II and convicted of the alleged offenses in the remaining specifications. The court sentenced the accused to be reduced to the rating of apprentice seaman, to be confined for a period of twenty-four (24) months, dishonorable discharge and accessories. On November 18, 1924, the convening authority approved the proceedings, findings, and sentence, but reduced the period of confinement with corresponding accessories to twelve (12) months and designated the naval prison, Parris Island, S. C., as the place of confinement.

The first specification of charge I reads as follows:

> "In that F. J. M., now a chief storekeeper, U. S. Navy, while so serving on board the U. S. S. T., having been duly designated to perform the duties of the treasurer of the chief petty officers' mess on board said ship, and, as such, being the custodian of certain moneys, and charged with the duty of disbursing such moneys for the benefit of the chief petty officers of said mess, from time to time, as occasion might require, and it being as he well knew a part of his duty as treasurer of the chief petty officers' mess aforesaid, to report to the executive officer of said ship each month the condition of the said mess, and in making such statement to state correctly and truly the total amounts of all receipts in cash and the value of commuted rations due the chief petty officers of said mess, as well as a correct and true statement of the total amounts of all disbursements from and out of the money of said mess by him as custodian thereof during the period which had elapsed since the date of the last previous report, as well as a correct and true statement of all assets and liabilities of the said chief petty officers' mess on the last day of the period for which the report was submitted, did, under date of January 31, 1924, make and submit to the executive officer of said ship, a report of the financial condition of the said chief petty officers' mess for the month ending January 31, 1924, on which he, the said F. J. M., pretended and claimed in effect that on January 31, 1924, there were no liabilities against the chief petty officers' mess of said ship, whereas, in fact the said chief petty officers' mess was indebted to Lees and Finke of San Pedro, Calif., in the amount of about two hundred ninety-seven dollars and sixty-four cents ($297.64), or thereabouts."

In the opinion of the Department the above specification is fatally defective in that it fails to allege that the accused knew [P. 5] that the chief petty officers' mess was indebted to Lees and Finke in the amount stated and that the report in question was submitted with intent to deceive. This specification in substance merely alleges that the accused having the duty to submit a correct report of the condition of the chief petty officers' mess submitted an incorrect report. Inasmuch as no averments of intentional wrongdoing involving moral turpitude are contained in the specification it does not, in the opinion of the Department, support the charge of "Scandalous conduct tending to the destruction of good morals."

The second specification of charge I reads as follows:

> "In that F. J. M., now a chief storekeeper, U. S. Navy, while so serving on board the U. S. S. T., having been duly designated to perform the duties of the treasurer of the chief petty officers' mess on board said ship, and, as such, being the custodian of certain moneys, and charged with the duty of disbursing such moneys for the benefit of the chief petty officers of said mess, from time to time, as occasion might require, and it being as he well knew a part of his duty as treasurer of the chief petty officers' mess aforesaid, to report to the executive officer of said ship each month the condition of the said mess, and in making such statement to state correctly and truly the total amounts of all receipts in cash and the values of commuted rations due the chief petty officers of said mess, as well as a correct and true statement of the total amounts of all disbursements from and out of the money of said mess by him as custodian thereof during the period which had elapsed since the date of the last previous report, as well as a correct and true statement of all assets and liabilities of the said chief petty officers' mess on the last day of the period for which the report was submitted, did,

under date of January 31, 1924, make and submit to the executive officer of said ship, a report of the financial condition of the said chief petty officers' mess for the month ending January 31, 1924, in which he, the said F. J. M., pretended and claimed in effect that during the period ending January 31, 1924, he had received in cash fifteen dollars and fifty-nine cents ($15.59), as a balance forward from last statement, and eight hundred twenty-eight dollars ($828) in commuted rations (per voucher), making the total receipts amount to eight hundred forty-three dollars and fifty-nine cents ($843.59), whereas, in fact, the said F. J. M. had borrowed during the month of January 1924, three hundred dollars ($300), to be applied to the use of the said chief petty officers' mess, to wit: From S. D. C., chief water tender, U. S. Navy, serving on board said ship, two hundred dollars ($200), and from A. La P., chief boatswain's mate, U. S. Navy, serving on board said ship, one hundred dollars ($100), and the total [P. 6] receipts should have read eleven hundred forty-three dollars and fifty-nine cents ($1,143.59), instead of eight hundred forty-three dollars and fifty-nine cents ($843.59), and, the said F. J. M., was, in fact, properly chargeable with a balance of cash on hand on January 31, 1924, as treasurer of the chief petty officers' mess aforesaid, amounting to four hundred one dollars and fifty-six cents ($401.56), instead of one hundred one dollars and fifty-six cents ($101.56)."

No allegations are included in this specification that the accused knowingly submitted a false return or that in submitting an incorrect return it was done for the purpose of deceiving the executive officer or to cover a fraudulent act. The facts as set out in this specification would sustain the charge of "Culpable inefficiency in the performance of duty" or perhaps "Neglect of duty" but in the absence of allegations imputing to the accused knowledge of the falsity of the report and that it was submitted for a wrongful purpose the charge of "Scandalous conduct tending to the destruction of good morals" does not apply. This charge should be used only in the case of offenses which give offense to the conscience or moral feelings; call out condemnation; involve scandal or disgrace to reputation; bring shame or infamy; or which, because of their evil nature, are malum in se. The act of the accused in this case in submitting an incorrect report to the executive officer of the T. does not fall within any of the above definitions. To support the charge of "Scandalous conduct tending to the destruction of good morals" the specification should contain allegations imputing to the accused knowledge that the report in question was false and that it was submitted for the purpose of deceiving the executive officer or any other party concerned. In view of the foregoing comment the proceedings and findings on specification 2 of charge I are set aside.

Specification 3 of charge I alleges that the accused submitted to the executive officer of the U. S. S. T. on January 31, 1924, a report of the financial condition of the chief petty officers' mess of said ship, in which he pretended and claimed in effect that on January 31, 1924, there were no liabilities against the chief petty officers' mess of said ship, whereas, in fact, the said chief petty officers' mess was indebted, to S. D. C., chief water tender, U. S. Navy, in the amount of two hundred dollars ($200), or thereabouts, and to A. La P., chief boatswain's mate, U. S. Navy, in the amount of one hundred dollars ($100) or thereabouts. As in the previous specifications under charge I this specification fails to allege that the accused submitted the report in question well knowing that it was false and for the purpose of deceiving. The comment set out above relative to specification 2 applies equally to this specification, and therefore the finding of the court on this specification is set aside.

It is the opinion of the Department that the proceedings and findings on specification 4 of charge I, charges II, III and IV [P. 7] and the specifications thereunder, and the sentence, as mitigated by the convening authority, are legal (File 26262–11401A, G. C. M. Rec. No. 61693, December 8, 1924).

CONFINEMENT: IN NAVAL PRISON AGAINST POLICY OF THE DEPARTMENT WHERE DISCHARGE OTHER THAN HONORABLE NOT INVOLVED.

In a recent general court-martial case the sentence as approved by the convening authority provided for reduction in rating, and confinement, with corresponding accessories, for six months. The naval prison, Mare Island, Calif., was designated as the place of confinement.

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Held: Inasmuch as it is contrary to the Department's policy to have men serving sentences in a naval prison who were not to be discharged upon completion thereof in other than an honorable status, all accessories of the sentence, except loss of pay, are remitted. The loss of pay is reduced to loss of $15 a month for six months, and the place of duty of the accused is designated as the place of confinement. Subject to the foregoing, the accused will be transferred to the nearest receiving ship for general detail (File 26262–11564A, G. C. M. Rec. No. 62405, March 12, 1925).

COURT OF INQUIRY: INTRODUCTION OF EXTRACTS FROM RECORD OF IN TRIAL BY GENERAL COURT MARTIAL.

A judge advocate sought to introduce into evidence for a general court martial the record of a court of inquiry which inquired into the same subject matter and before which the accused was in the status of a defendant. The record was offered for the purpose only of reading into evidence the testimony of the accused. The court rejected this evidence on the ground that "as the court understands the law, the acceptance of the record of the court of inquiry would automatically limit the court in the punishment which may be assigned, which limitation the court does not deem proper to accept at this time."

Held: The former testimony of the accused was offered in the nature of an admission against interest as provided for by section 414 (c), Naval Courts and Boards, and such evidence is clearly competent without reference to article 60 of the Articles for the Government of the Navy. The provision in section 415, Naval Courts and Boards, that "In time of peace the punishment which may be imposed upon conviction in such cases in which the proceedings of a court of inquiry are used in evidence against an officer on trial by court martial is limited to loss of one hundred numbers in rank," has reference to instances where such court of inquiry proceedings are used in accordance with the provisions of that same section of Naval Courts and Boards (Naval Courts and Boards, sec. 713, and [P. 8] note 8 thereunder). Accordingly, the action of the court in rejecting the evidence was erroneous. (See also Naval Digest, 1921, p. 70, par. 1; Naval Digest 1916, p. 50, par. 5–6; File 26251–33359A, G. C. M. Rec. No. 61550, February 4, 1925).

DESERTION: UNDESIRABLE PROCEDURE FOLLOWED IN PROVING CASE OF.

The only evidence introduced by the prosecution in a recent general court martial case to prove the specification alleging desertion consisted in a service record book entry showing that the accused was declared a deserter October 7, 1924, having been absent from station and duty without leave from September 27, 1924. The prosecution then rested. Thereupon the accused took the stand at his own request and among other things testified that he surrendered aboard the *H.*, on December 7, 1924. The court convicted the accused under this charge of "Absence from station and duty without leave" and made exceptions and substitutions in the specification to show that the accused "surrendered."

Held: From the above, it is apparent that the judge advocate made no attempt to establish a material averment in the specification indispensable to the conviction of the accused and that the deficiency in proof, namely, the surrender of the accused to naval jurisdiction and date thereof was supplied by the accused himself. The evidence thus presented by both the prosecution and defense made out a prima facie case against the accused and while the conviction can be legally sustained, the procedure followed is undesirable (File 26251–34269A, G. C. M. Rec. No. 62431, March 17, 1925).

EMBEZZLEMENT: UNDER SECTION 90 OF THE CRIMINAL CODE.

An officer of the Supply Corps was tried by a general court martial convened by the Commander Battleship Divisions, Battle Fleet, on the charges: (I) "Embezzlement of money of the United States intended for the naval service thereof" (2 specifications), (II) "Culpable inefficiency in the performance of duty" (1 specification), and (III) "Neglect of duty" (1 specification). The court convicted the accused on charge I and the second specification thereunder and charge III and acquited him of the offenses alleged in specification 1 of

charge I, and charge II. He was sentenced to be placed at the foot of the list of pay inspectors with the rank of commander, and to there remain until he shall have lost fifty (50) numbers in his grade. The convening authority on July 11, 1924, approved the proceedings and sentence and so much of the findings as relates to the conviction of the accused, but disapproved the action of the court in acquitting the accused under specification 1 of charge I and charge II.

[P. 9] Specification 2 under charge I, which specification was found proved by the court, was as follows:

> "In that I. T. H., now a pay inspector, Supply Corps, U. S. Navy, with the rank of commander, while so serving on board the U. S. S. *I.*, as supply officer of said ship, having during the period from April 1, 1923, to December 31, 1923, received into his possession and under his control in the execution and under color of his office as aforesaid, a sum of about four hundred thirty-six dollars ($436), in lawful money of the United States, property of the United States intended for the naval service thereof, with the accounting for which he, the said H., was charged, did fail to account for the same as provided by law, in that he did during said period, without authority, fail and has ever since failed to render account for said sum of money received into his possession and under his control as aforesaid, which said sum of money he was not authorized to retain, either in whole or in part, as salary, pay, or emolument, and he, the said H, did, therein and thereby, then and there embezzle the said sum of money."

Specification 1, which was found not proved, was identical with the above-quoted specification, except that the amount of money involved was $2,361.10, and the period covered was April 4, 1923, to December 12, 1923. The specification under charge II alleged in effect that the accused, having caused to be purchased for the ship's store certain merchandise, to wit, ice cream, cake, and fresh milk, did fail to keep and cause to be kept the proper account of the proceeds of the sale of this merchandise. The specification under charge III alleged in effect that the accused neglected and failed to take inventory of the ship's store during the period September 30, 1923, to January 1, 1924, as required by the Bureau of Supplies and Accounts Manual.

A naval general court martial is given jurisdiction of the crime of embezzlement by article 14, clause 8, of the Articles for the Government of the Navy, Revised Statutes 1624. Embezzlement is a statutory crime and is not defined in the Articles for the Government of the Navy. Where the word embezzlement is used in a Federal Statute without being defined, as in sections 47 and 97 of the U. S. Criminal Code, it is necessary to look to the decided cases in the Federal courts for a definition of the offense, which is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come" (*Moore* v. *U. S.*, 160 U. S. 268; *U. S.* v. *Harper*, 33 Fed. 474; Naval Courts and Boards, sec. 363). Congress has also declared that certain other acts of public officials, not falling within the above definition, shall constitute embezzlement. These sections of the Penal Code to which reference is made are 87 to 92 and are quoted in Naval Digest 1916, page 204.

[P. 10] The specifications used in this case were obviously modeled upon the sample specification for technical embezzlement given in Naval Courts and Boards, section 263 (last specification of that section), based upon section 90 of the Criminal Code, which is as follows:

> "Every officer or agent of the United States who having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years."

Disbursing officers of the Government charged with the handling of public funds are required by law to make periodical returns showing the disposition and status of those funds (Revised Statutes 3622; act of July 31, 1894, 28 Stat. 209; and act of March 2, 1895, 28 Stat. 807), and it is to the failure to render these returns, as required by law, that the above-quoted section of the Penal Code refers, and makes such failure to act in compliance with the law the offense of embezzlement. (Naval Courts and Boards, sec. 263, note 60; 28 Op.

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Atty. Gen. 290). It is to be understood that the failure to render accounts as provided for by section 90 is by no means the same offense as the failure safely to keep referred to in section 88, the two offenses being entirely distinct, the former referring to the failure of an officer to render his accounts (returns) as required by law, and the latter referring to any failure of such officer safely to keep Government funds entrusted to his care.

The evidence relating to charges I and II adduced during the progress of the trial may be briefly summarized as follows: For the calendar year 1923, the accused was supply officer of the U. S. S. *I.*, being relieved by Commander J. I. (S. C.), U. S. Navy, December 31, 1923. During this period a ship's store was conducted on the U. S. S. *I*, under the cognizance of the supply officer. It appears that Chief Pay Clerk G had general supervision of this activity of the Supply Department under the accused, and that P. E. P., storekeeper second class, U. S. Navy, was in immediate charge and had the actual running of the ship's store. It further appears that it was customary for the Supply Department to sell to the crew ice cream, cake, pies, and milk which were obtained from a shore contractor, and sold to the crew at a gross profit of 10 percent. This feature of the ship's service was also under the supervision of Pay Clerk G.

The evidence further shows that Commander I. reported aboard the *I.* and relieved the accused as supply officer December 31, 1923. Although notice had been received by the accused of the prospective arrival of his relief, no invoices were prepared for the proper turn-over of the department (Bureau [P. 11] of Supplies and Accounts Manual, section 111, 1990, 1850), nor were the proper returns submitted by him to the Bureau of Supplies and Accounts and due to the fact that the ship sailed on the southern cruise January 2, 1924, the accused left the ship without presenting such invoices to the officer relieving him. Immediately after the new year, inventories were taken by Commander I. and Pay Clerk H., and also by a board appointed by the commanding officer, U. S. S. *I.*, and on the basis of that final inventory, which showed a shortage in the ship's store of approximately $9,000, Commander I. assumed responsibility of the supply department. As a result of this inventory, Pay Clerk H. made out the proper invoices and submitted the returns, signing them for, and in the absence of Commander H., the accused. Pay Clerk H. testified in this connection, that he had not been directed by the accused to make these returns, but had done so in the course of his duty.

During the course of this inventory, it developed that there were contained in the cash drawer of the ship's store chits and pay receipts to the value of approximately $438 signed by the accused. It appeared that he, the accused, had from time to time taken money from the drawer, leaving in lieu thereof, the chits and pay receipts referred to. The system used in handling the cash of the ship's store was as follows: The yeoman in charge, P., had in his possession a book in which was entered the items of cash turned over by him to his superior, Chief Pay Clerk G. The latter officer also had a book in which were entered the items of cash turned over by him to the disbursing officer, Lieutenant D. (Supply Corps). The cash turned over was receipted for in the book by the officer to whom the money was delivered. It appeared that the entries in these books showed that Pay Clerk G. had receipted for approximately $2,360 more than he had turned over to the disbursing officer.

From the above, therefore, it appears that the accused left the ship after the arrival of his relief without making the required returns in accordance with the Bureau of Supplies and Accounts Manual or making proper provision therefor. But this by no means establishes the guilt of the accused of failing to render his accounts under a charge of embezzlement. Section 90 of the Criminal Code upon which the specification of failing to render accounts is based, refers to the failure of an officer to render accounts as required by law. There is no provision of law that requires a supply officer who is not a disbursing officer to submit returns for property or money over which he may exercise control. However, certain returns are required by the Bureau of Supplies and Accounts Manual. But while the Bureau of Supplies and Accounts Manual is approved by the Secretary of the Navy and accordingly has the force of orders, such orders are not "law" within the meaning of section 90 of the Criminal Code. It is apparent, therefore, that since the accused was not required [P. 12] by law to render accounts he cannot be held criminally liable under section 90 of the Criminal Code quoted above.

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In reference to specification 1, it was not shown that the $2,361 referred to had ever come into the custody of the accused, and while the accused might be guilty of some form of neglect in this regard, it is the opinion of the Department that the acquittal under the provisions of section 90, U. S. Criminal Code, under which the accused was tried, was proper.

In reference to charge II and specification thereunder, it is noted that the offense alleged is the failure to keep a "proper" account of the proceeds of the sale of certain merchandise, namely, ice cream, milk, pies, and cakes. In view of the indefinite nature of this specification in failing to point out with particularity the shortcomings of the accused and the failure to indicate the procedure that should have been followed by him, the Department cannot attempt to determine whether the method used by the accused in the conduct of this feature of his department was a proper one or not. However, it is noted that the court acquitted the accused and accordingly must have been of the opinion that no derelictions in this regard were established, which finding, in the opinion of the Department, would seem to be a legal one. Inasmuch, therefore, as questions of fact are for the determination of the court, the Department does not concur with the action of the convening authority in disapproving the acquittal on this charge and specification.

Subject to the foregoing remarks, it is the opinion of the Department that the proceedings, finding on specification 1 of charge I and charges II and III and specifications thereunder, and sentence in the foregoing case of I. T. H., pay inspector (Supply Corps), U. S. Navy, are legal. In view of the remarks contained in the foregoing paragraphs of this opinion the finding on specification 2 of charge I and charge I are hereby set aside (File 26262–1140A, G. C. M. Rec. No. 60799, September 19, 1924).

EVIDENCE: FAILURE OF TO IDENTIFY CERTAIN DELIVERY SLIPS.

J. H. C., chief commissary steward, U. S. Navy, was tried by general court martial at the Naval Operating Base, Hampton Roads, Va., on the charges of: (I) "Scandalous conduct tending to the destruction of good morals" and (II) "Perjury." He was acquitted of the offense alleged under the first charge and found guilty of that set out under charge II. The court sentenced the accused to be reduced to the rating of apprentice seaman, confinement for three (3) years, dishonorable discharge and accessories.

The specification of charge II reads as follows:

> "In that J. H. C., now a chief commissary steward, U. S. Navy, while so serving on board the U. S. S. *G.*, [P. 13] having on June 23, 1924, been duly sworn as a witness before a court of inquiry by the president thereof, said court of inquiry having been then and there lawfully convened by order of the commander train squadron one, base force, U. S. Fleet, 'to inquire into the irregularities alleged to exist in the commissary accounts of the U. S. S. *G.*,' did, then and there, wilfully, falsely, corruptly, and contrary to said oath, in answer to the question asked him, the said C., by the judge advocate of said court of inquiry, '6 Q. I have here a number of delivery slips that have been formally admitted as evidence and apparently bear your signature. Please examine them and state to the court whether or not the signature appearing thereon, is yours or written by you,' he, the said judge advocate meaning and intending by the words 'delivery slips' to refer to the delivery slips by which certain provisions were billed by the Spicuzza Fruit Company of Norfolk, Va., to the U. S. S. *G.*, during the period from March 1, 1924, to May 15, 1924, and which contained the signature 'J. H. C.,' testify as follows: 'No; it is not,' which said testimony, namely, the testimony, 'No; it is not,' was false; whereas in truth and in fact, the said signatures had been written by the said C.; and the said false testimony was known by the said C. to be false, was material to the issue then and there being inquired into by the said court of inquiry, and was given with intent to deceive the said court of inquiry."

The evidence introduced for the purpose of establishing this offense consisted of numerous delivery slips containing the signature "J. H. C.," the testimony of the commissary officer of the U. S. S. *G.*, that the signatures in question were

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in the handwriting of the accused, the signature of the accused in his service record book and an extract from the record of the court of inquiry before which the alleged perjury took place. This extract is as follows:

> "J. H. C., a defendant, requested that he be sworn as a witness.
> "His request was granted and he was duly sworn, having been informed by the court that his examination would be governed by the same rules as govern the examination of an accused who takes the stand at his own request in a trial by court martial.
> "6. Q. I have here a number of delivery slips that have been formally admitted as evidence and apparently bear your signature. Please examine them and state to the court whether or not the signature appearing thereon is yours or written by you.
> "A. No; it is not."

No further evidence was offered.

[P. 14] The only delivery slips which were before the court containing the signature "J. H. C." were those which had been introduced in connection with charge I and it was evidently these slips which the court found that the accused had signed and which were referred to in the specification of charge II and the extracts from the court of inquiry referred to above. However, it is to be noted that no evidence whatever appears in the record to connect the slip mentioned in the court of inquiry with those introduced before this court martial. It was absolutely necessary to show that the slips which the accused denied having signed before the court of inquiry were the same slips which the court martial had before it otherwise no comparison of handwriting could have been made and it could not therefore have been determined whether or not the accused had in fact signed the slips referred to in the specification and the record of the court of inquiry.

In view of the foregoing the findings of the court on charge II and the sentence are disapproved. The proceedings and finding on charge I are legal and are therefore approved (File 26251–33554A, G. C. M. Rec. No. 61813, January 23, 1925).

EVIDENCE: FAILURE TO INTRODUCE AFTER CHANGE OF PLEA.

A. E. V., seaman second class, U. S. Navy, was tried by general court martial at the Navy Yard, Puget Sound, Wash., and convicted of (I) "Neglect of duty," (II) "Conduct to the prejudice of good order and discipline" (2 specifications), and (III) "Adultery." He was sentenced by the court to be reduced to the rating of apprentice seaman, to be confined for a period of three (3) years, dishonorable discharge and accessories. On August 15, 1924, the Commander Battleship Divisions, Battle Fleet, United States Fleet, approved the proceedings, findings, and sentence and designated the naval prison, Portsmouth, N. H., as the place of confinement.

The accused originally pleaded not guilty to all charges and specifications thereunder but subsequently and near the beginning of the trial he substituted pleas of guilty to charges I and II and the specifications thereunder. After the prosecution had presented its case the accused took the stand and gave testimony which was inconsistent with his pleas of guilty to charge II and the specifications thereunder. The judge advocate then recommeded to the court that the accused change his plea to this charge and specifications and also to charge I and the specification thereunder to pleas of not guilty. The accused, after consultation with counsel, decided to adhere to his pleas of guilty and the court thereupon rejected these pleas and directed that pleas of not guilty be entered to charges I and II and the specifications thereunder. No evidence was introduced by the prosecution after the pleas of not guilty had been entered by the court, **[P. 15]** the judge advocate stating that "the prosecution rests in the belief that they have sufficient evidence now before the court to prove charges one and two and the specifications thereunder." The accused then continued to testify but did not touch upon the offenses alleged in charges I and II.

Paragraph 2 of section 661, Naval Courts and Boards, provides as follows:

> "A change of plea is, in effect, a recommencement of the trial on the specifications to which it relates, as a new plea has been put in issue. At whatever stage in the trial such change of plea is made it vitiates all prior

proceedings on the specifications to which it relates, and the trial as to them must commence de novo. It is improper for the court, under such circumstances, to direct that the trial continue from the point where the plea was made."

In view of this provision of Naval Courts and Boards the failure of the prosecution to present evidence tending to establish the offenses alleged under charges I and II after the change of plea resulted in no evidence being adduced relative to these charges. Accordingly, the findings of the court on charges I and II, and the specifications thereunder are hereby set aside.

In the opinion of the Department and court erred in rejecting the plea of guilty to charge I and its supporting specification and substituting therefor pleas of not guilty. The specification of charge I alleges that the accused neglected his duty in that "well knowing, during the period from on or about March 13, 1924, to on or about April 12, 1924, of the unauthorized presence of a female stowaway on board said ship, did fail and neglect to report said knowledge to his superior officer, as it was his duty to do." A careful consideration of his testimony fails to reveal that he denied knowledge of the presence of the stowaway on board or that he in fact reported her presence to his superior officer. His testimony was not therefore, inconsistent with his plea of guilty to this charge and the plea of guilty should not have been rejected.

The findings on charge III and the specification thereunder and the sentence in the foregoing case are legal (File 26262–11211A, G. C. M. Rec. No. 61050, February 21, 1925).

ORDER: VIOLATION OF BRIGADE, CHARGE UNDER WHICH PROPERLY LAID.

A specification alleging a violation of a brigade order should be laid under the general charge "Conduct to the prejudice of good order and discipline" rather than under the charge "Disobeying the lawful order of his superior officer." (See Naval Courts and Boards, sec. 219; also G. C. M. Record No. 26262–10938, dated April 19, 1924).

[P. 16] PLEA: IN BAR OF TRIAL ON GROUND OF FORMER JEOPARDY.

In reviewing the record of proceedings in the foregoing case of T. A. C., pay clerk, U. S. Navy, it is noted that before arraigning the accused, the judge advocate propounded the following question to him: "Mr. C., do you consent to a retrial," to which question the accused answered: "The accused refuses a new trial on the ground of former jeopardy, and refers the court to section 649, Naval Courts and Boards." The accused then introduced in evidence the record of proceedings in the former trial, showing the finding of guilty by the court and the action of the Secretary of the Navy in disapproving the proceedings, findings, and sentence. The court then announced that "the plea in bar of trial on the ground of former jeopardy is sustained."

It is true that the accused was tried before a general court martial convened by the Secretary of the Navy on charge and specifications identical with those upon which he was brought to trial in the present instance. The former trial resulted in a conviction and a sentence adjudged by the court, but on account of error occurring in the trial, the nature of which it is not necessary to discuss in this opinion, the Department addressed a letter to the accused informing him of the irregularity hereinbefore referred to and further advising him that in view thereof a request by him for a new trial would be considered by the Department should he care to submit such request. The accused thereupon in writing requested a new trial, the Department approved that request, and in view thereof, the Department disapproved the proceedings, findings, and sentence in the former trial, and ordered a new trial for the accused before a court composed of officers having no connection with the former case.

From the above, it will be noted that the accused having by his own request caused a new trial to be ordered in his case after a former trial resulting in a finding of guilty by the court, made a plea in bar of trial on the ground of former jeopardy and that this plea was sustained by the court before which he was ordered for the new trial.

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The grounds relied upon by the accused to support his plea and apparently on which the court based its action in sustaining the plea was section 649, Naval Courts and Boards, which states in part that "* * * after the proceedings in a former trial have been carried to an acquittal or conviction, the jeopardy is complete and it matters not whether any action, or, if any, what action has been taken upon the proceedings by the reviewing authority" (Citing C. M. O. 10, 1921, 11–20). The section of Naval Courts and Boards referred to is merely a reaffirmance of the common law principle which is also incorporated in the United States Constitution that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, from which it follows that no person shall be tried a [P. 17] second time for the same offense. This principle of Anglo Saxon justice is too well recognized to require further comment. But it is equally well recognized that if an accused seeks a new trial, or appeals from the judgment against him and asks for its reversal he cannot thereafter plead former jeopardy, if he is successful in obtaining a reversal of the judgment. By seeking a new trial the accused waives his right to the plea of former jeopardy (*Trono* v. *U. S.*, 199 U. S. 521; *U. S.* v. *Ball*, 163 U. S. 662).

That the practice obtaining in civil courts of ordering a new trial in case of erroneous rulings in the trial court is also proper in the case of an Army general court martial was held by Attorney General Wirt (1 Op. Atty. Gen. 233), who in the course of his opinion remarked, in reference to the power of the President to order a new trial, "that the power, so far from being dangerous to the Army is a salutary power; that it is indispensably necessary to the well being of the Army, and that the only danger which can be rationally conceived in the case would arise, not from the existence, but from the nonexistence of such a power." The legality of ordering a new trial for an accused upon his request therefor, and after disapproving the proceedings in the former trial has always been recognized in military law (1 Winthrop's Military Law and Precedents 693; Davis Military Law 1913, page 102; Winthrop's Digest of Opinions of the Judge Advocate General of the Army, page 536 and C. M. Orders cited therein; Howland's Digest Op. J. A. G. Army Discipline XIV K1). The Navy Department has recognized the propriety of this procedure and has followed it in numerous instances in the past (C. M. O. 141 of 1919; C. M. O. 275 of 1919; G. C. M. case of Cecil G. Hyre, Sea2c, U. S. N., File 26251–32999 of Aug. 21, 1924; G. C. M. case of Herman A. Bauchot, Lt. (T) U. S. N., File 26251–25496 of Apr. 4, 1921; G. C. M. case of Trigg M. Smith, Lt. (j. g.) (S. C.), File 26251–31011 of Jan. 31, 1924).

In reference to the excerpt from Naval Courts and Boards read to the court by the accused, which excerpt is quoted in paragraph 4 of this opinion, as pointed out above, this is a general statement of the law and is based upon C. M. O. 10, 1921, 11–20, in which the question was presented as to whether an accused could legally be brought to trial a second time after a former trial which had proceeded to a conviction but the record of proceedings of the court could not be made up due to the loss of stenographic notes. The question there presented was in no wise analogous to that presented in the present case, inasmuch as the accused in that case did not make request for a new trial.

In view of the law as pointed out above, the ruling of the court in sustaining the plea of the accused was erroneous. The judge advocate was also in error in asking the question of the [P. 18] accused as to whether he, the accused consented to the new trial. It is noted that the judge advocate properly opposed the contention of the accused and cited authority to support his position, but better practice would have been for the judge advocate not to have invited the objection of the accused to being tried but rather to have proceeded in accordance with regular procedure and let any move in this direction come from the accused himself.

The Department is unable to understand by what process of reasoning the court arrived at its decision. By disapproving the proceedigs, findings, and sentence in the former case and ordering the accused before the present court for a new trial, the Department went on record as holding that such procedure was legal and unobjectionable, and in arriving at a finding at complete variance therewith the court must feel either that the Department has been unmindful of certain provisions of Naval Courts and Boards or if conversant therewith has failed to be guided thereby. In either event, it would seem that the more desirable procedure on the part of the court would have been to reserve its

actual decision on the question raised by the plea in order that it might inform itself as to the law on the subject, either through the medium of independent research or by communicating with the Department.

In view of the foregoing paragraphs of this opinion, the proceedings in this case are illegal and they are consequently disapproved (File 26251-33357A, G. C. M. Rec. No. 61300, February 5, 1925).

SPECIFICATION: DOES NOT ALLEGE AN OFFENSE.

A. T., corporal, U. S. Marine Corps, was tried and convicted by general court martial convened by the Commandant, Naval Station, Guam, of charges: (I) "Conduct to the prejudice of good order and discipline" and (II) "Drunkenness." The court sentenced the accused to reduction to the next inferior rank and to solitary confinement on bread and water for thirty days with full ration every third day. On January 22, 1925, the convening authority approved the proceedings, findings, and sentence.

The specification under charge I is as follows:

> "In that A. T., now a corporal, U. S. Marine Corps, while so serving at the U. S. Marine Barracks, Agana, Guam, did, on January 6, 1925, by the unlawful use of some intoxicant willfully and wantonly violate article 118, U. S. Navy Regulations, 1920."

This specification merely states, in effect, that the accused violated a navy regulation without setting forth sufficient facts upon which to base this statement. A specification must on its face allege facts which constitute a violation of some law, [P. 19] regulation, or custom of the service in order to charge an offense of which judicial notice can be taken. (See par. 192, N. C. & B.) The only statement of fact in this specification are the words "did, on January 6, 1925, by the unlawful use of some intoxicant." These words do not set forth that the alleged use of the intoxicant was for drinking purposes or that it happened on board any navy vessel or within any navy yard or station as specified by article 118 of navy regulations, the article under which this specification is laid. It is the aforementioned use of alcoholic liquors that is forbidden by the regulation, and it was therefore essential that such use be alleged. (See sample specification 6, sec. 249 N. C. & B.)

The remaining part of the specification to the effect that the accused did wilfully and wantonly violate article 118 Navy Regulations, 1920, is a mere conclusion of law and does not aid in curing the aforementioned defect. A statement of a mere conclusion of law instead of facts will not make a good specification. (See sec. 196 N. C. & B.) Furthermore, it is unnecessary to allege in a specification that an offense is in violation of navy regulations. (See sec. 195 N. C. & B.)

It is further noted that the specification in question was laid under the general charge "Conduct to the prejudice of good order and discipline." A violation of article 118 of Navy Regulations is one coming under the specific charge of "Violation of a lawful regulation issued by the Secretary of the Navy," and the specification in this case should have been alleged thereunder. (See sec. 195 N. C. & B.)

In view of the foregoing the proceedings and findings on charge I are hereby set aside (File 26262-11600A, G. C. M. Rec. No. 62536, April 4, 1925).

SPECIFICATION: FAILURE TO PROVE ALLEGATIONS CONTAINED IN.

Second Lieutenant M. L. L., U. S. Marine Corps, was tried by general court martial at the Marine Barracks, Quantico, Va., and convicted of (I) "Conduct to the prejudice of good order and discipline" (3 specifications), (II) "Disobeying the lawful order of his superior officer," (III) "Neglect of duty," and (IV) "Drunkenness." He was sentenced by the court to be dismissed from the U. S. Marine Corps and from the naval service.

Specification 1 of charge I reads as follows:

> "In that M. L. L., now a second lieutenant, U. S. Marine Corps, while so serving at the U. S. marine barracks, Quantico, Va., did, on or about May 20, 1924, at said barracks, induce the post exchange officer at said

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barracks, to cash a check drawn by him, the said L., upon the First National Bank of Quantico, Va., in the sum of five [P. 20] dollars ($5), and he, the said L., well knowing that he did not have at the time of drawing said check sufficient funds on deposit in said bank to provide for its payment, did thereafter wholly neglect and fail to provide therefor and did allow said check upon presentation at said bank to be dishonored because of the fact that he, the said L., had at that time insufficient funds on deposit in said bank to provide for its payment."

Specifications 2 and 3 are identical except as to dates and amounts of checks which are May 22, 1924, and May 24, 1924, and $5 and $15, respectively.

One of the main facts to be established in the case of an offense of the character set out in the above specification is that the checks were drawn by the party charged with the offense. This fact is usually established by the production of the checks with proof of the signature of the accused which may be shown by the testimony of persons who identify his signature or by testimony showing that he presented the checks containing his signatures to others for the purpose of being cashed. In the present case it appears that it was impossible to procure the checks as evidence inasmuch as they were in the possession of the accused and it thereupon became the duty of the prosecution to establish by secondary evidence the contents of the checks and the fact that they were drawn by the accused.

At no time during the trial was evidence presented to prove that the accused actually drew the checks referred to in the specifications of charge I. An attempt was made by the judge advocate to establish this point from the following examination of the post exchange officer at the Marine Barracks, Quantico:

"Q. What duty were you performing, major, during the month of May, 1924?

"A. Post exchange officer, Marine Barracks, Quantico, Va.

"Q. During that month did you cash any checks at the post exchange for the accused?

"A. I did not in person. They were cashed in the stores.

"Q. Do you know whether or not any of these checks that were cashed through the stores of the post exchange, were refused payment by the banks upon which drawn?

"A. I do not."

No connection is shown to exist between the checks alleged to have been drawn by the accused and those cashed by the post exchange on this testimony, and therefore, the testimony of this witness as related above is of no value in proving that the checks referred to in his testimony are those in connection with which the accused is being tried in this case.

The cashier of the Quantico National Bank, upon which the checks under consideration were alleged to have been drawn, was the only other witness to testify concerning charge I. [P. 21] His testimony was very ambiguous relative to the drawer of the checks in that he stated in reply to the question:

"Will you state to the court what you personally know, if anything, concerning certain personal checks alleged to have been drawn on your bank by the accused, and made payable to the post exchange officer at this post, the latter part of May 1924."

that

"I have a record of three checks drawn the latter part of May 1924, by the post exchange officer at Quantico. Checks for $5, $5, and $15, dated May 20th, 22d, and 24th."

Later on in his testimony in referring to these checks the witness stated that they were made payable to the post exchange officer. Thus, according to his specific testimony, the checks in question were drawn by and made payable to the post exchange officer and the accused was not involved.

In view of the foregoing, the findings of the court on charge I and the specifications thereunder are hereby disapproved (File 26251–33328A, G. C. M. Rec. No. 61897, January 23, 1925).

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SPECIFICATIONS: TWO, ONE ALLEGING THE CONSTITUENT ELEMENT OF THE OTHER.

L. G., private, U. S. Marine Corps, pleaded guilty to: (I) "Theft" and (II) "Conduct to the prejudice of good order and discipline" and was sentenced to be confined for a period of twelve (12) months, dishonorable discharge and accessories. On February 18, 1925, the convening authority approved the proceedings, findings, and sentence and designated the naval prison, Portsmouth, N. H., as the place of confinement.

The specification of charge I alleged that the accused while serving on board the U. S. S. *P.*, "did, on or about January 11, 1925, take, steal, and carry away from the possession of one W. V. H., * * * one (1) gold watch of the value of about forty-eight dollars ($48), the said watch of the value aforesaid being the property of the said H., and did then and there appropriate the same to his own use."

The specification of charge II read as follows:

> "In that L. G., now a private, U. S. Marine Corps, while so serving on board the U. S. S. *P.*, having come into the unauthorized possession of one (1) gold watch of the value of about forty-eight ($48), said watch being the lawful property of one W. V. H., then a private, first class, U. S. Marine Corps, attached to said ship, did, on or about January 12, 1925, knowingly and wrongfully convert the said watch to his own use."

It is evident from a consideration of the foregoing specifications that the same identical property is referred to in each. [P. 22] Inasmuch as the offense of theft includes the conversion of the property alleged to have been stolen as expressed in the specification of charge I by the use of the words "and did then and there appropriate the same to his own use," it is apparent that the specification of Charge II alleges merely a constituent element of the offense of theft set-out in the specification charge I. It was therefore the duty of the convening authority to have disapproved the finding on the less serious charge upon his taking action in this case.

In view of the foregoing the finding of the court on charge II and the specification thereunder is hereby set aside (File 26262–11605A, G. C. M. Rec. No. 62522, April 8, 1925).

SUMMARY COURT MARTIAL: AUTHORITY TO CONVENE.

The question involved is whether the District Communication Superintendent and Senior Naval Officer, and the officer in charge at the Naval Radio Station, San Juan, P. R., are authorized to convene summary courts martial under article 26 of the Articles for the Government of the Navy.

Held: A naval radio station is not a naval station within the meaning of article 26 of the Articles for the Government of the Navy. It is the opinion of the Department that the District Communication Superintendent, San Juan, P. R., and the officer in charge at the Naval Radio Station, San Juan, P. R., are not in command of separate or detached commands for the purpose of convening summary courts martial under the provisions of the act of August 29, 1916, upon enlisted men in the naval service under their command, except when specifically empowered by the Secretary of the Navy to do so (File 26287–3552: 51–1C, September 22, 1923).

THEFT: SPECIFICATION ALLEGING FATALLY DEFECTIVE.

T. H., Seaman first class, U. S. Navy, the accused in this case, was recently tried by general court martial on the following charge: "Theft."

It is noted that this charge was supported by the following specification:

> "In that T. H., now a seaman first class, U. S. Navy, while so serving at the Navy Yard, Mare Island, Calif., on fifteen days authorized leave, and while on said leave in the city of Seattle, Wash., did, on or about July 17, 1924, feloniously take, steal, and carry away from the possession of one G. J. LeB., chief machinist's mate, U. S. Navy, of the U. S. S. *C.*, who was then a resident at the Palace Hotel, 912 First Street, Seattle, Wash., one gold watch, of the value of about sixty-two dollars ($62) one gold chain, of the value of about eleven dollars ($11) and did then and there appropriate the same to his own use."

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[P. 23] In the opinion of the Department, the above-quoted specification is fatally defective in that no allegation of ownership of the stolen property was alleged. The court said in *U. S.* v. *Thompson*, 256 Fed. 616, that, "It is elementary that, to constitute a good indictment for larceny, it is necessary at common law that the thing stolen should be charged to be the property of the actual owner or of a person having special property as a bailee, and from whose possession it was stolen, although an indictment charging ownership in one to the grand jurors unknown is sufficient at common law." This does not mean that in drawing the specification (or indictment) that the specification must allege the person who actually had a legal title to be the owner, if the fact that the owner is unknown and this properly explained for. "The actual condition of the legal title of the alleged stolen property is immaterial to the thief, and, so far as he is concerned, the one may be taken as the owner whose personal possession is unlawfully disturbed by the taking and such possession may be properly described as the owner in the indictment" (*Little* v. *State*, 204 Pac. 305). But it is necessary to name some owner other than the accused in order to negative any right of possession on the part of the accused and to describe the property as definitely as possible so as to effectually protect the accused against a second prosecution based on the same transaction. "An indictment for larceny alleging that the accused stole certain property from a person named without alleging that person (some person other than the accused) was the owner is fatally defective" (*State* v. *Ellis*, 119 Mo. 437). In this connection see C. M. O. 60–16, 1920. For the reasons set forth above, the proceedings, findings, and sentence in this case are hereby set aside.

As a separate and distinct action the accused will be discharged from the U. S. Naval Service with an undesirable discharge (File 26262–11318A, G. C. M. Rec. No. 61382, March 13, 1925).

WITNESS: MEMBER OF COURT AS, FOR PROSECUTION.

The record of proceedings in this case shows that a member took the stand and testified for the prosecution but the record does not indicate as required by sec. 624 Naval Courts and Boards, that at the completion of his testimony the accused requested that he be not considered challenged. Accordingly, the Department, on February 11, 1925, returned the record to the court for revision and directed the court to indicate on the record in revision whether the error was clerical or otherwise.

The court met in revision on February 16, 1925. The record shows that the member who had previously testified was recalled to the stand, his testimony read over to him, and in answer to a question by the court found it correct. The accused then stated that "he wished Lieutenant F. (the witness) not to be considered challenged." The court then revoked its former findings and made substitutions therefor.

[P. 24] From the procedure carried out by the court in revision, the Department assumes that the failure of the original record to contain the entry required by sec. 624 Naval Courts and Boards, that the accused did not wish this member to be considered challenged, was not a clerical error but that in fact the accused did not so express himself. Therefore, in view of the mandatory provision of this section of Naval Courts and Boards, which disqualifies a member of a court testifying for the prosecution from further sitting in the court unless the accused specifically requests that he be not considered challenged, it is the opinion of the Department that the failure of the court to carry out the proper procedure in this instance invalidated the proceedings (C. M. O. 4, 1924, 7).

In view of the above, it is the opinion of the Department that the proceedings, findings, and sentence in this case are illegal, and they are therefore disapproved (File 26251–34094A, G. C. M. Rec. No. 62186, April 9, 1925).

COLOR BLINDNESS.

Held: Paragraph 1024, Naval Courts and Boards, 1923, correctly states the principle of law to be applied in cases where there is a medical presumption that a disability existed prior to entry into the service. The Department's view on the situation where the disability complained of is presumed to be

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congenital in origin, but was not discovered until after the individual had been accepted in the naval service, is expressed in the following opinion approved December 10, 1921, File No. 29372–4, in part as follows:

"A careful examination of the facts in the cases referred to will disclose that there was a strong presumption in each case that the disability complained of had its origin prior to the entry of the claimant into the naval service, but in the absence of affirmative facts showing that the claimant in each case did in fact have the disability complained of prior to his acceptance into the naval service it was held that said disability shall be considered as having had its origin subsequent to the entrance of the claimant into the naval service, and in view of the other circumstances presented in the case, in the line of duty."

(File 27231–278 J:AC; April 22, 1925).

[P. 25] DESERTION: REMOVAL OF THE CHARGE OF.

The act of March 4, 1925, section 2, naval omnibus bill, provides as follows:

"That in all cases where it shall be made to appear to the satisfaction of the President that a commissioned or warrant officer or an enlisted man with the charge of desertion now standing against him on the rolls and records of the Army, Navy, or Marine Corps has since such charge was entered served honorably in the World War, either in the Military or Naval Forces of the Allies or in the Army, Navy, or Marine Corps or in other branches of the military service of the United States prior to November 11, 1918, the President is hereby authorized, in his discretion, to cause an entry to be made on said rolls and records of the Army, Navy, or Marine Corps, relieving said officer or enlisted man of all the disabilities which he has heretofore or would hereafter suffer by virtue of said charge of desertion thus appearing against him; and upon such action being taken by the President, such officer or enlisted man shall be regarded as having been honorably discharged on the date the charge of desertion was entered against him: *Provided*, That nothing contained in this section shall operate to entitle any officer or enlisted man to back pay or allowances of any kind or to a pension for any service rendered prior to the World War."

Held: This section applies to all commissioned officers, warrant officers and enlisted men now in the service and also to such persons who may have been discharged or have resigned or whose status is that of a deserter at large. It will be necessary to refer each such case to the President for approval. It will not be necessary to issue an honorable discharge in cases covered by this section; a correction of the records will be sufficient (File 26539–850–N RP, March 19, 1925).

DISABILITY: IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

An enlisted man in 1917 fell through a hatch to the deck below, a distance of about 45 feet, while in the performance of duty, and as the result of this fall was found to be suffering from a rupture of the left kidney. Later on he was readmitted to the hospital with a diagnosis of "sprain, left hip," origin not in line of duty. The board of medical survey convened in this case found him to be suffering from atrophy of muscle, origin not in line of duty, not the result of his own misconduct, and stated that the condition existed prior to his enlistment.

Held: In view of the fact, however, that the records in this case do not show that any physical defects were noted at the time of his enlistment, the Department is of the opinion that the presumption [P. 26] that this disability existed prior to enlistment cannot be sustained. Therefore, the disability complained of should be held to have been incurred in the line of duty and not due to own misconduct (File 29373–337 J:AC, April 10, 1925).

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NATURALIZATION: OF NATIVE OF GUAM.

The Supreme Court of the District of Columbia having granted naturalization to a native-born Filipino, an opinion was requested relative to the possible application of that holding to the naturalization of natives of Guam.

Held: The question of naturalization is one which must be determined by courts in each instance. Consideration of the decisions of the courts in individual cases discloses a wide diversity of opinion between the several courts authorized to grant naturalization. Except in the case of Filipinos of the age of 21 years and upward who have declared their intention to become citizens and who have enlisted or may hereafter enlist in the United States Navy or Marine Corps or Naval Auxiliary Service, as provided under the act of May 16, 1918 (40 Stat. 542), there does not appear to be any authority warranting naturalization of any other individuals who owe allegiance to the United States, such as natives of Guam, except in those cases where they can show that they come within the provisions of section 30 of the act of June 29, 1906, 34 Stat. 606 (File 25252–188 J: AC, April 21, 1925).

NAVAL RESERVE ACT:

Held: All prior laws relating to the Naval Militia, with the exception of the Joint Service Pay Act of June 10, 1922 (42 Stat. 625), have been repealed by section 3 of the Naval Reserve Act approved February 28, 1925, which becomes effective July 1, 1925 (File 5438–2548: J: AC, April 17, 1925).

PAY: STATUS ON RETIRED LIST.

Held: In accordance with section 24 of the act approved March 4, 1925 (Public, No. 611, 68th Cong.), only those officers who were examined for retirement and found physically incapacitated in the line of duty while holding temporary rank, whose temporary appointments were subsequently revoked, and in whose cases the Department recalled and canceled the letter revoking such temporary appointments, should be considered as having been retired in the temporary rank held by them at the time of examination by a retiring board, and accordingly entitled to pay on the retired list computed on the pay of the temporary rank held by them on the date their retirement [P. 27] was effective. Therefore, an officer whose temporary appointment as lieutenant in the Navy was revoked by operation of law on December 31, 1921, and who on August 1, 1922, the date of his appearance before a naval retiring board, held a permanent appointment in the Navy as a chief machinist, is not entitled to have his pay on the retired list computed in accordance with the provisions of the section aforesaid (File 27231–276: 1 L, April 11, 1925).

PROMOTION: EXAMINATION OF MARINE CORPS OFFICERS UNDER THE ACT APPROVED MARCH 4, 1925.

Held: In accordance with the provisions of the act approved March 4, 1925, it will be necessary for officers who had been examined prior to March 4, 1925, in advance of becoming due for promotion and found qualified under the old law, but had not become due for promotion on March 4, 1925, to be reexamined in accordance with the provisions of Section 7 of the act approved on that date. This applies in all cases, regardless of whether or not the proceedings have been approved by the authority convening the examining board, and regardless of whether or not such officers had become due for promotion prior to March 4, 1925, but owing to the exigencies of the service had not been examined for promotion, or, if examined for promotion, had not been promoted prior to that date. Consideration of the provisions of the aforesaid act relative to the appointment of heads of departments discloses that it applies only to vacancies occurring after March 4, 1925. Accordingly, vacancies which occurred prior to that date and remain unfilled may be filled in accordance with the provisions of the law relative thereto in force prior to March 4, 1925 (File 26521–560 J: AC, April 18, 1925)

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SALARIES: SUSPENSION OF PAY TO EMPLOYEES OF BOARD OF SURVEY, APPRAISAL, AND SALE.

Held: In view of the act of May 28, 1924 (43 Stat. 195), and the Comptroller General's decision of November 4, 1924, in relation thereto, there is now no question that the disbursing officer at the Navy Yard, Washington, D. C., may legally continue payments to the employees of the board of survey, appraisal, and sale, the naval working fund being credited with the gross proceeds of sales and charged with the salaries of said employees. As to the payments heretofore made which have been suspended by the General Accounting Office, the disbursing officer should ask the Comptroller General to remove such suspensions, citing the act of May 28, 1924, and the above-mentioned decision of November 4, 1924. The Department regards [P. 28] this as legislative approval of the practice which has obtained, of paying from the gross proceeds of sales the salaries of civilian employees attached to the board of survey, appraisal, and sale. The Comptroller General having held that the salaries of the said employees are expenses of sales and properly chargeable to the naval working fund, this is equivalent to holding that the prior law authorized the payment of such expenses from the gross proceeds of sales (File 27280–24: 603–2 AD/3, March 16, 1925).

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[P. 3] BIRTH: DATE OF, NOT INCLUDED IN RECORD OF GENERAL COURT MARTIAL.

In reviewing the record of proceedings in a recent general court-martial case, it is noted that the judge advocate failed to include in the record between the findings and sentence the date of birth of the accused, and the date and period of his enlistment as required by section 882, Naval Courts and Boards.

Held: However, the proceedings, findings, and sentence not being invalidated by this omission, are legal and are therefore approved (File 26251–34416A, G. C. M. Rec. No. 62592, April 3, 1925).

CHARGE, AND SPECIFICATION THEREOF: NOT PRONOUNCED IN DUE FORM AND TECHNICALLY CORRECT.

G. S., storekeeper third class, U. S. Navy, was tried and acquitted by general court martial convened by the Commander Battleship Divisions, Battle Fleet, of charges: (I) "Neglect of duty," and (II) "Conduct to the prejudice of good order and discipline." On August 1, 1924, the convening authority disapproved the proceedings, findings, and acquittal.

In reviewing the record of proceedings in this case it is noted that on the second and subsequent days of the trial the court sat in the Navy Yard, Puget Sound, Wash. The precept under which the court met named the U. S. S. ------ as the place for the meeting of the court. The action of the court in holding its sessions at a place other than that named in the order convening the court was, in the opinion of the Department, irregular (1 Winthrop 230). If the court considered it desirable to meet at a place other than that named in the precept, a proper request should have been made to the convening authority that the precept be modified.

It is further noted, page 4 of record, that the court announced that, "it found the charges and specifications not in due form and technically correct" and directed the judge advocate to send a dispatch to the convening authority pointing out the alleged defect. The specification in question is as follows:

> "In that G. S., now a storekeeper third class, U. S. Navy, while so serving on board the U. S. S. ------, did, at various times between the dates of March 24, 1924, and April 12, 1924, without permission from proper authority, assist a female stowaway to maintain and secrete herself on board said ship."

As indicated by the dispatch sent to the convening authority by the court, the objection of the court to the above-quoted specification was based upon the court's opinion that the specification did not allege intent as required by sections 196 and 197, [P. 4] Naval Courts and Boards. The convening authority in replying to the dispatch above referred to stated that he did not

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concur as to the technical incorrectness of this specification, and directed the court to proceed with the trial. The record indicates that the court then proceeded with the trial to its completion and there is no entry contained therein as required by Naval Courts and Boards 829, showing that the court found the charge and specification in due form and technically correct.

Naval Courts and Boards, section 637, provides that the charges and specifications must be pronounced in due form and technically correct by the court. It must be assumed that the court realized that it is not within the province or authority of the convening authority to coerce a court to adopt his view upon any question arising during the progress of the trial (Naval Courts and Boards 741; C. M. O. 4, 1914, 11), and that in arraigning the accused on the charges and specifications, as drawn, and proceeding with the trial, the court must have decided that the charge and specifications were technically correct (File 26262–10988 of June 10, 1924). In the opinion of the Department, the specification should properly have contained an averment of the wilfulness of the act for which the accused was being tried. However, since the apparent clear intention of the specification in conjunction with the charge was that the accused did certain definite acts in furtherance of the unlawful presence of a stowaway on board a vessel of the Navy, the defect, if any, is technical rather than substantial in nature, and inasmuch as the accused, who was represented by counsel, made no objection thereto, further comment is not deemed necessary.

In overruling the objection of counsel for the accused to a certain witness for the prosecution testifying as to the substance of reports made to him aboard ship, the president, in explanation of the court's ruling, announced in part that "In the opinion of the court it is perfectly proper on account of the status of the witness, the witness being an officer on duty at the time, to relate to any reports made to him." (Page 9 of record.) The testimony objected to was clearly hearsay and should have been excluded. The fallacy of the court's idea in respect to such evidence as this has been pointed out by the Department so many times in the past that further comment should be unnecessary at this time (Naval Courts and Boards, sec. 350; C. M. O. 1, 1922, 11 and 12; C. M. O. 6, 1924, 3).

During the course of the trial the judge advocate offered and the court received in evidence four camera pictures taken aboard the U. S. S. _____. It appears that these pictures showed the interior of Compartment D–304, which was known as the warrant officers' storeroom, and were pictures of the alleged woman stowaway and certain enlisted men seated on the deck in that storeroom. At a later stage of the proceedings, the judge advocate called to the stand A. R. B., seaman first class, U. S. Navy, attached to and serving on board the U. S. S. _____, [P. 5] and asked him certain questions relative to the pictures, which questions the witness declined to answer on the grounds of incrimination. From the nature of the questions asked it appears that the judge advocate was attempting to show that the witness was the person who took the pictures. The court refused to allow the witness the privilege of refusing to answer the questions asked, but informed him that if he did not answer as directed he would be adjudged guilty of contempt of court. The witness persisted in the stand taken by him, whereupon the court adjudged him guilty of contempt of court and sentenced him to be confined for sixty (60) days.

In view of the circumstances of this case the Department is of the opinion that the witness was clearly within his rights in refusing to answer the questions asked. If, for the sake of argument, the witness had testified that he took the pictures, he would thereby admit that he knew of the presence of this stowaway aboard ship, and would render himself liable to prosecution for failing to report this fact to proper authority. In several instances in connection with the same incident, nonrated men were brought to trial under the charge of "Neglect of duty" for failure to report the presence of the woman aboard ship.

It is an established principle of common law, recognized and confirmed in the United States Constitution that a witness may refuse and cannot be required to answer a question, the answer of which may tend to incriminate him; or as it is expressed by Greenleaf, "Having a tendency to expose him to penal liability, or to any kind of punishment, or to a criminal charge," and this principle has been recognized in military cases where the answer to a question may

subject a witness to a military or civil prosecution (1 Winthrop 524; C. M. O. 29, 1914, 10). Indeed the act of February 16, 1909, 35 Stat. 622, contains the following priviso, which is declaratory of the common law on the subject: "No witness shall be compelled to incriminate himself or to answer any questions which may tend to criminate or degrade him."

The question of whether an answer might criminate or degrade a witness is a preliminary question of fact for the court to decide (C. M. O. 17, 1910, 13 and McKelvey, p. 380), and if the court should compel him to answer a question deemed proper by it, the answer thereto, if it should prove incriminating, cannot be given in evidence against him (*U. S.* v. *Prescott*, 27 Fed. cas. 16085). Nevertheless, and despite the fact that the witness was assured by the court that no information given by him in his answers to the questions would or could be used against him in any prosecution in any court of the United States, the witness could not be required to waive his constitutional privilege under such assurance. He had a right to stand upon his constitutional privileges, notwithstanding such assurance, and to remain silent when any question was asked, the answer to which may tend to criminate him (*Foot* v. *Buchanan*, 113 Fed. 161, [P. 6] citing *Temple* v. *Com.*, 75 Va. 892). This assurance, of course, protected him against the use of his testimony against him or his property in any criminal proceeding in a court of the United States. "But" as stated by Mr. Justice Blatchford in *Counselman* v. *Hitchcock*, 142 U. S. 564, " it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining, and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

Nor, in the opinion of the Department, is it material that in this case the court read to the witness a dispatch from the convening authority directing the release of the witness as a prisoner awaiting trial by court martial. In *Muller* v. *State*, 79 Tenn. (11 Lea) 18, it was held that on the trial of a liquor dealer for illegally selling liquor, his barkeeper, who if he had made a sale, might also have been indicted, could not be compelled to answer a question which might tend to criminate him, though the Attorney General stated in open court that he would not prefer an indictment against him; and in *Counselman* v. *U. S.*, 142 U. S. 548, it was held that no statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution. (See also *Burdick* v. *U. S.*, 236 U. S. 79, holding that a witness could refuse to answer despite the fact that he had been offered a Presidential pardon.)

Inasmuch as a witness cannot be punished for contempt for his refusal to answer questions, when such answers would incriminate him (*Counselman* v. *Hitchcock*, 142, U. S. 547; *Foot* v. *Buchanan*, 113 Fed. 156), it is the opinion of the Department, that the action of the court in ordering B to be imprisoned for sixty (60) days was without legal authority, and his release is accordingly recommended.

From a careful review of the record it appears that the only evidence adduced that would connect the accused with the presence of the stowaway on board the U. S. ------, or tend to establish the fact that he even knew she was aboard, was the group of photographs submitted in evidence showing this woman in the compartment of which the accused was in charge. On the other hand, the evidence showed that the accused was in charge of four compartments and had an assistant who, according to the testimony of the accused's division officer, was privileged to be in the compartment even though the accused was not present. Furthermore, according to the testimony of this witness, the accused would not have been guilty of neglect of duty in failing to be present in this storeroom over a period during the day of as much as three hours [P. 7] Accordingly, it is the opinion of the Department that the action of the court in acquitting the accused was not unreasonable. The Department is therefore unable to concur with the convening authority in his disapproval of the proceedings, findings, and acquittal. Inasmuch, however, as the legal effect of the convening authority's disapproval of the proceedings, findings, and acquittal was to entirely nullify the same (Naval Courts and Boards 745), no further action is necessary (File 26262–11174A, G. C. M. Rec. No. 60957, February 21, 1925).

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DESERTION: EVIDENCE ADDUCED INSUFFICIENT TO SUPPORT CHARGE OF.

J. B. K., seaman second class, U. S. Navy, was tried by general court martial at the Naval Training Station, Great Lakes, Ill., and convicted of "Desertion." He was sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of eighteen (18) months, dishonorable discharge and accessories.

The specification of the charge under which K. was tried reads as follows:

> "In that J. B. K., now a seaman second class, U. S. Navy, did, on or about April 23, 1924, while so serving on board the U. S. S. _____, desert from said ship and from the U. S. Navy, and did remain a deserter until he was delivered at the U. S. naval training station, Great Lakes, Ill., on or about July 1, 1924."

The only evidence presented by the prosecution to establish the allegations in the foregoing specification was an entry from the service record book of the accused showing that he failed to return to the U. S. S. _____ on April 23, 1924, upon the expiration of authorized liberty and a report of return of deserter and telegram, the contents of which are quoted below:

REPORT OF RETURN OF DESERTER

U. S. NAVAL TRAINING STATION,
GREAT LAKES, ILL.,
2, July, 1924.

From: Commanding Officer.
To: The Chief of the Bureau of Navigation.

I have to report that K., J. B., S2c, U. S. N., Unknown (was delivered) on board this vessel at 9 a. m., July 1, 1924, as a deserter from the U. S. S. _____, lying at the time he left her at San Diego, Calif. He states he left ship under the following circumstances: AOL from U. S. S. _____ since April 23, 1924, delivered on board in civilian clothing by Naval Guard at 9 a. m. July 1, 1924.

* * * * *

(S.) L. E. C.,
By Direction.

[P. 8] "RADIOGRAM RECEIVED AT NAVY DEPARTMENT

NR 4 H T H Z H A2M V D9Y H GR 26 ACTION: BUNAV

From: Comdt Nav Training Sta Great Lakes Ill

6502 Delivery of J. B. K. Seaman Second Class Deserter absent over leave * * * since twenty three April twenty four on one July twenty four 1030"

It is evident from the statement in the report of return of deserter that the accused was "delivered on board in civilian clothing by naval guard at 9 a. m., July 1, 1924," K_____ did not "remain a deserter until he was delivered at the U. S. Naval Training Station, Great Lakes, Ill." He was no longer a deserter after coming within the control of the naval authorities and inasmuch as he was delivered at the Naval Training Station, Great Lakes, Ill., by a naval guard, it is apparent that he was already under naval control when this delivery took place. No evidence appears in the record to show when and where the accused first came within naval jurisdiction or whether his return was by surrender or delivery. Under a charge of desertion these matters are necessary to be definitely established as the length of time absent without authority and the manner of return to naval jurisdiction are of great weight in determining guilt of innocence under such charge. The telegram reporting the return of the accused which was also introduced does not explain or amplify the report of deserter in any way.

In view of the foregoing, the finding and sentence were disapproved.

It appears from such evidence as was introduced in this case that persons who witnessed the actual return of the accused to naval jurisdiction might have been available to testify without resorting to the use of the written report of deserter received on board. In all cases where witnesses are avail-

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able who can testify of their own knowledge of the circumstances surrounding the return of a deserter their testimony should be offered rather than the written reports. These written reports should only be used where the witnesses to the return are not present in the vicinity of the place where the trial is held (File 26251–33140A, G. C. M. Rec. No. 60882, September 8, 1924).

DRUNKENNESS: AS A DEFENSE.

C. W. J., corporal, U. S. Marine Corps, was tried and convicted by general court martial convened by the Commandant, U. S. Naval Station, Guantanamo Bay, Cuba, on the following charges: (I) "Drunkenness," (II) "Resisting arrest," and (III) "Disrespectful in language to his superior officer while in the execution of his office," and sentenced to be reduced to the rank [P. 9] of private, confinement for twelve (12) months, dishonorable discharge and accessories.

The accused pleaded guilty to charge I and not guilty to charges II and III. The evidence showed clearly that the accused was under the influence of intoxicating liquor at the time of the occurrence which resulted in the present trial. All of the prosecution's witnesses testified that the accused was in an extremely drunken condition, that he was raving, and that it was necessary finally to put him in a straight jacket. The accused took the stand in his own defense and testified that he had no knowledge of anything he did at that time and this contention of the accused was supported by the prosecution's evidence hereinbefore referred to as well as the testimony of Chief Pharmacist's Mate S. who appeared for the defense and testified as to the result of an examination made by him of the accused at the time.

That drunkenness is a good defense in certain crimes requiring a specific intent or particular knowledge, where it is shown that the accused was by drink so deprived of his reason that he did not have the mental capacity to entertain the necessary specific intent required to constitute the crime; is pointed out in Naval Courts and Boards, section 327. (See also C. M. O. 4, 1924, 8) In C. M. O. 8, 1922, 12, it is held that drunkenness of such a nature is a good defense to the charge of "Disrespectful in language and deportment to his superior officer while in the execution of his office," and in C. M. O. 23, 1910, 5, the same is held with respect to the charge of "Resisting arrest."

In the case now under consideration, the Department is unable to find any evidence of a positive nature adduced during the progress of the trial that could reasonably be taken as a basis for holding that the accused was possessed of his mental faculties sufficiently to know what he was doing. It was shown that he addressed certain remarks of a disrespectful nature toward a commissioned officer, Lieutenant L., but there is no evidence to indicate that the accused either called Lieutenant L. by name or otherwise showed that he knew the identity of the officer in question. If it had been shown by the prosecution that the remark directed by the accused to Lieutenant L., "there's the hero that busted Corporal B." was applicable in any way to that officer by reason of his having been instrumental in bringing about the demotion of Corporal B., or if it had been shown that the accused called Lieutenant L by name there would have been some basis for holding that the accused was not entirely devoid of reason. But the evidence failed to establish these facts, and accordingly, in view of the law as pointed out in paragraph three above, it is the opinion of the Department that the guilt of the accused on charges II and III was not established beyond a reasonable doubt (File 26262–11500A, G. C. M. Rec. No. 62079, January 26, 1925).

[P. 10] ENLISTMENT: FRAUDULENT.

F_____ J. D_____, alias F_____ J. D_____, hospital apprentice, second class, U. S. Navy, was tried and convicted, by general court martial convened by the Secretary of the Navy, on charges (I) "Fraudulent enlistment," (II) "Desertion," and sentenced to be confined for twenty-four (24) months, dishonorable discharge and accessories.

The evidence showed that the accused enlisted in the Navy on June 5, 1922, and served therein until discharged with a bad-conduct discharge by reason of sentence of a summary court martial on September 22, 1922. The evidence further showed that the accused fraudulently enlisted in the Navy, May 16,

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1923, by falsely representing that he had never had previous service in the Navy and had never been discharged therefrom through sentence of a court martial, and served in the Navy under this enlistment until July 11, 1923, on which date he left his station and duty without leave from proper authority and remained so absent until he surrendered himself on or about November 25, 1924.

Under charge I the accused was tried for fraudulently enlisting on May 16, 1923, as above indicated, the specification alleging the receipt of pay and allowances, subsequent to that fraudulent enlistment. There was no evidence adduced during the trial to show that the accused in fact received pay and allowances during the period of this fraudulent enlistment, but nevertheless, the court found the specification proved and convicted the accused of the charge.

When an accused is not in the service at the time of procuring the fraudulent enlistment, the gist of the offense is the receipt of pay and allowances under the fraudulent enlistment which act is committed after the offender has completed a contract (binding as to himself though voidable by the Government), whereby he has submitted himself to naval jurisdiction, and not the act of making false representations prior to his acceptance (Naval Digest 1921, p. 81). Furthermore, Naval Courts and Boards sec. 278 provides in reference to this matter that "if, however, the accused has never previously been in the Navy or Marine Corps, or has been discharged therefrom, the second essential, the receipt of pay and allowances under the fraudulent enlistment is also requisite." The reason for this is that a naval court martial is given jurisdiction of the offense of fraudulent enlistment, when the man concerned is not subject to the court's jurisdiction by reason of being a member of the naval service, by the act of March 3, 1893, which provides that:

> "Fraudulent enlistment, and the receipt of pay and allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court martial under article 22 of the Articles for the Government of the Navy" (27 Stat. 716).

[P. 11] In the case now under consideration it will be noted that the accused at the time of the fraudulent enlistment on May 16, 1923, was a civilian, having completely terminated his previous connection with the naval service by reason of a bad conduct discharge. It was absolutely necessary, therefore, in order to convict him under charge I that the receipt of pay and allowances be established, and the failure of the prosecution to do so renders the conviction under this charge illegal.

It is noted that during the progress of the trial, evidence was adduced as result of a question by the court (Q. 11, p. 3) showing that the accused had received pay during his enlistment which began June 5, 1922. This evidence was irrelevant and immaterial; the fact of the receipt of pay and allowances being material only so far as the second enlistment was concerned in order that the court might have jurisdiction of the offense of "Fraudulent enlistment."

It is not to be understood from the above that there is any question as to the court's jurisdiction over the accused for the offense under charge II "Desertion" or as to the conviction thereunder. The enlistment of the accused on May 16, 1923, was a valid contract, voidable on the part of the Government, and subsequent to his acceptance into the naval service he was amenable to trial by naval general court martial for any offense committed during the period for which enlisted (C. M. O. 7, 1923, 7; *In re Grimley*, 137 U. S. 147). While, therefore, by reason of the statute quoted in paragraph 4 above, the requirements of jurisdiction for the act of fraudulent enlistment, to wit the receipt of pay and allowances thereunder, was not satisfied because the misrepresentations were made while the accused was a civilian, nevertheless the accused was bound to service by that enlistment and his offense of desertion was cognizable by a naval court martial (File 26251–34271A, G. C. M. Rec. No. 62501, March 14, 1925).

EVIDENCE: ADDUCED, DOES NOT SUPPORT CHARGE AND SPECIFICATIONS.

W. A. B. ——, seaman second class, U. S. Navy, was tried and convicted by general court martial convened by the Commandant, Fifteenth Naval District, on charges I "Conduct to the prejudice of good order and discipline" (2 specifications), II "Absence from station and duty without leave," and sentenced to

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be reduced to the rating of apprentice seaman, to be confined for a period of twelve (12) months, dishonorable discharge and accessories. On February 28, 1925, the convening authority approved the proceedings, findings, and sentence.

Specification 1 under charge I as found proved by the court alleged in effect that the accused took a Ford automobile, the property of Pay Clerk B, from the Submarine Base, Coco Solo, and damaged the said automobile to the extent of about $60. [P. 12] The second specification alleged that the accused, while entering the gate of the Submarine Base and having been ordered by a sentry to halt, did refuse to obey and did wilfully disobey the said order.

The evidence presented by the prosecution showed that the automobile in question containing the accused and another enlisted man, J, seaman second class, U. S. Navy, passed through the gate and that the order of the sentry to halt was not obeyed. It was further shown that this car was wrecked during its unauthorized trip. But the positive testimony of J, one of the prosecution's witnesses, was to the effect that he, himself, had taken the car without permission of its owner, had gone over to the barracks and invited the accused to go with him, that the accused did so accompany him, but at no time did the accused operate the car nor did the accused tell witness anything in regard to stopping at the gate.

In view of the evidence as indicated in the preceding paragraph, it would appear that the allegations of the specifications under charge I were not established. The mere fact that the accused accompanied J as an invitee did not thereby make him a principal in the crime of taking the car nor could he be considered to have disobeyed the order of the sentry merely by reason of being a passenger therein; the sentry's order to halt was necessarily addressed to the driver of the machine and it would seem that in the absence of evidence to indicate that the accused in any way encouraged him to disobey the order, the driver alone was guilty of disobedience of orders (in this connection see C. M. O. 7, 1921, 13), no matter what his degree of guilt might be had he been tried for "Neglect of Duty" or "Failing to use his utmost exertions to detect, apprehend, and bring to punishment all offenders" (File 26262–11607A, G. C. M. Rec. No. 62544, April 8, 1925).

PLEA: IN BAR, BECAUSE OF LACK OF JURISDICTION.

The charge and specification in the foregoing case of W. C. D., apprentice seaman, U. S. Navy, alleged in effect that the accused deserted from the naval service while serving at the training station, Hampton Roads, Va., and remained in desertion until delivered to the Receiving Barracks, Hampton Roads, on November 22, 1924.

The accused through his counsel made a plea in bar of trial on the grounds of lack of jurisdiction of the court. To support this plea the accused showed that on August 2, 1924, he was sentenced to the Virginia State Penitentiary for a period of two years by the corporation court of the city of Newport News, Va., following a conviction in that court for forgery, and that on November 21, 1924, he was placed on parole by that court for a period of five years. It was the contention of the [P. 13] accused that he "is still under the jurisdiction of the State of Virginia and therefore this court has no jurisdiction over him at all." The general court martial sustained the plea of the accused and announced that:

> "From the evidence adduced in the preliminary examination of counsel for the accused it is the opinion of the court that the accused, W. C. D., apprentice seaman, U. S. Navy, is on trial before this court as a deserter while on parole for a civil offense and constructively in the custody of the civil authorities. In view of this fact, it is the decision of the court that it cannot proceed with the trial, and the judge advocate is directed to forward the record of proceedings to the convening authority."

To support his contention, counsel cited page 64, Laws Relating to the Navy, Annotated, Melling, Naval Digest, 1916, page 323, paragraph 100, and index to 1916 C. M. O., page 32, Jurisdiction, paragraph 6. These citations covered past instances where enlisted men had committed offenses while on shore such as to make themselves amenable to trial by the civil authorities, and the Department in view thereof, decided from considerations of policy, to direct the discharge

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of the men concerned as undesirable rather than to try them by general court martial. There was in no case cited any question of lack of jurisdiction of a naval court martial should the Department have seen fit to direct a trial.

The ruling of the court in the case was in error. The accused was a regularly enlisted man of the Navy, having been enlisted May 20, 1924, and was thereafter subject to naval jurisdiction in accordance with the Articles for the Government of the Navy. To say that this man, who was physically before the court at the naval operating base, Hampton Roads, Va., could not be tried by that court after his trial had been directed by the Secretary of the Navy, merely because he was at the time under probation from the civil authority for an offense committed against the law of the State of Virginia, is erroneous. In view of the above, the proceedings are disapproved.

It is noted that the judge advocate made no reply to counsel's argument. In failing to point out to the court the fallacy of counsel's contention, the judge advocate was, in the opinion of the Department, derelict in his duty. Naval Courts and Boards, 640, provides:

> "While the court is in open session it is the duty of the judge advocate or recorder to advise the court in all matters of form and of law. On every occasion when the court demands his opinion he is bound to give it freely and fully; and, even when it is not requested, to caution the court against any deviation from essential form in its proceedings, or against any act or ruling in violation of law or material justice."

[P. 14] It appears that the accused was really confined by the civil authorities for most if not for all the period of his unauthorized absence, and that he was convicted in the civil court for the offense of forgery, and while this confinement is no defense to the charge of absence without or over liberty (N. C. & B. 248), it would, of course, be evidence of his lack of intent permanently to abandon the naval service. A nolle prosequi will be entered in this case and D. will be given an immediate undesirable discharge (File 26251–3396S, G. C. M. Rec. No. 62639, April 2, 1925).

SENTENCE: SUSPENSION OF, INVOLVING LOSS OF PAY.

Held: When, without express authority of the convening authority, a disbursing officer checks the pay account of a man in accordance with the original terms of an approved sentence, which sentence has been suspended conditionally by the convening authority, the Department is of the opinion that such checkage is in violation of article 1877, Naval Regulations, and is illegal. In view of the foregoing, it is directed that hereafter no action whatever shall be taken by disbursing officers on suspended sentences until an affirmative statement vacating the suspension and directing checkage in accordance with the terms of the sentence as originally approved is issued by the convening authority or his successor in command and that when such checkage is made it shall begin on the date of the revocation of the suspension (File 26806–131: 113C, April 9, 1925).

AGREEMENT: BREACH OF BY ENLISTED MAN.

In a recent general court-martial case the accused was tried on four charges, the fourth one of which alleged "Conduct to the prejudice of good order and discipline." The specification under this charge set forth in effect an agreement entered into by the accused with a civilian business concern and the breach thereof. The specification does not state an offense cognizable by naval general court martial, and accordingly does not support the charge under which it is laid. While the facts alleged in the specification, if true, would no doubt give rise to a cause of action [P. 15] for money damages or for the recovery of the property in the proper civil court by the party aggrieved, the specification does not show the accused to have been guilty of any crime, or to have committed any act bearing directly on the naval service, or prejudicial to the good order and discipline thereof. In view of the above, the proceedings and findings on the charge and specification aforesaid are set aside (File 26262–11645A, G. C. M. Rec. No. 62675, April 16, 1925).

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COMMISSION: CANCELATION OF.

An officer recently requested that his appointment as lieutenant in the Navy be canceled, and that he continue in the status of a chief gunner under the commission he thought he held in that rank for the remainder of his career in the naval service.

Held: The office of lieutenant having become vested in him by virtue of his acceptance of the appointment given pursuant to the provisions of the act of June 6, 1924 (19 Op. Att'y Gen. 283), his appointment as a lieutenant in the Navy has been completed in every respect, and is an accomplished fact. The only legal method by which his status as lieutenant in the U. S. Navy can be terminated is by resignation, sentence of a general court martial, or in commutation thereof, failure to pass a professional reexamination for promotion, or failure to pass the physical examination for promotion on account of disability due to his own misconduct. Since he has been legally appointed a lieutenant, U. S. Navy, has accepted the office, and none of the exceptions above noted apply, his appointment as a lieutenant cannot be canceled (File 26260–14899: 2 J: AC, May 7, 1925).

MIDSHIPMEN: ENROLLMENT OF, AT ST. JOHN'S COLLEGE.

Held: In accordance with the provisions of section 40, of the Naval Reserve Act approved February 28, 1925, enrollment of midshipmen between the ages of 16 and 18 years may be continued in the Naval Reserve Force until July 1, 1925. Individuals enrolled in the Naval Reserve Force as midshipmen are eligible for transfer to the Naval Reserve on July 1, 1925, regardless of the fact that they may be less than 18 years of age on that date. The provisions of the aforesaid act also permit the appointment on and after July 1, 1925, of Reserve midshipmen as such, provided they are 18 years of age on the date of appointment (File 28550–1857: AD3, April 24, 1925).

[P. 16] SUSPENSION: BY COMPTROLLER GENERAL.

The Comptroller General suspended credit in the accounts of Lieutenant A. S. F., supply officer, U. S. Navy, for payment made to J. J. M., Quartermaster, 2c, USN, of amount withheld pursuant to the sentence of a summary court martial. So much of the sentence as involved loss of pay was remitted by the Secretary of the Navy on July 10, 1924, and the reason given for the suspension was "Evidence should be furnished that the sentence was void, as distinguished from valid or voidable."

Held: The action taken by the aforesaid officer in making payment was in obedience to the Secretary of the Navy's order of June 18, 1924, which is printed in memoranda published by the Bureau of Supplies and Accounts (No. 263, p. 8483). In accordance with letter No. 26254–3477: 9, of June 2, 1924, addressed to the Comptroller General, the Department will be guided by the opinions of the Attorney General, and will accordingly decline to furnish the Comptroller General with information desired by him for the purpose of reviewing the action of the Secretary of the Navy upon the proceedings and sentences of naval courts martial. The Court of Claims has recently decided that when the Secretary of the Navy sets aside the findings and sentence of a general court martial, the accused becomes entitled to receive any pay which had previously been withheld pursuant to such sentence (*Lecorchick* v. *U. S.*, No. C–372; File 26287–10068: 1 AD/3 Du, April 27, 1925).

TIME: CIRCUMSTANCES UNDER WHICH ITS LOSS MUST BE MADE UP.

Held: The conclusion supported by law and precedents seems to be that all enlisted men regardless of the term for which enlisted are required to make up the time lost by absence on account of "injury, sickness, or disease" resulting from their own misconduct, and that no enlisted man of the Navy or Marine Corps may be required to make up any time otherwise lost (J. A. G. Memo: April 17, 1925).

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[P. 3] EMBEZZLEMENT: SPECIFICATIONS FAULTY.

L. C. DeP. Pay Clerk, U. S. Navy, was tried by general court martial at the Naval Operating Base, Pearl Harbor, T. H., and convicted of "Embezzlement of money of the United States intended for the naval service" and was sentenced "to lose twenty-four (24) months' seniority in the date of his warrant as pay clerk; to lose corresponding rank on the list of pay clerks of the Navy; and to lose twenty-five dollars ($25) per month of his pay for a period of six (6) months, total loss of pay amounting to one hundred and fifty dollars ($150)." The convening authority approved the proceedings, findings, and sentence on December 22, 1924, and directed that the accused be released from arrest and restored to duty.

The specification of the charge reads as follows:

> "In that L. C. DeP., now a pay clerk, U. S. Navy, while so serving at the U. S. Naval Operating Base at Pearl Harbor, T. H., as assistant to the officer in charge of the naval commissary store at said operating base, having, during the period from September 1, 1924, to October 17, 1924, received into his possession and under his control in the execution and under color of his office as aforesaid, from sales in said commissary store, a sum of money of about seventy-three dollars and forty-two cents ($73.42), which he, the said DeP., well knew to be the property of the United States intended for the naval service thereof, to be delivered by him, the said DeP., to the officer in charge of the said commissary store, did, during said period, without authority, fail and has ever since failed to deliver to the said officer in charge of the said commissary store the said sum of money received by him, the said DeP., into his possession and under his control as aforesaid, which said sum of money he was not authorized to retain, either in whole or in part, as salary, pay, or emolument, and he, the said DeP., did, therein and thereby, then and there embezzle the said sum of money."

A naval general court martial is given jurisdiction of the crime of embezzlement by article 14, clause 8, of the Articles for the Government of the Navy. Embezzlement is a statutory and not a common law crime (Clark and Marshall on Crimes), and the common law cannot, therefore, be resorted to for its definition. The constituent elements of the offense are generally understood, however, and the federal courts have defined its usual meaning and given it that construction in construing statutes in which the term "embezzle" only is used without specifically providing what constitutes the offense. In *U. S.* v. *Harper*, 33 Fed. 474, the court said: "The term 'embezzle' as used in this count of the indictment, and in the statute, is a word having a technical [P. 4] meaning * * * It is especially applicable to the unlawful conversion of property by clerks, agents, and servants, acting in fiduciary or trust capacities, * * *. *It involves two general ingredients or elements: First, a breach of trust or duty in respect to the moneys, properties, and effects, in the party's possession belonging to another; and secondly the wrongful appropriation thereof to his own use.*" (See also *U. S.* v. *Northway*, 120 U. S. 327; *Moore* v. *U. S.*, 160 U. S. 268, and *U. S. v. Greve*, 65 Fed. 488.)

The specification in the present case alleges the possession by the accused of money belonging to the United States but the only allegations made which it might be argued cover the elements of breach of trust and wrongful appropriation of the funds to the use of the accused are that the accused "did, during said period, without authority, fail and has ever since failed to deliver to the said officer in charge of the said commissary store, the said sum of money received by him, * * * which money he was not authorized to retain as salary, pay, or emolument." The specification also alleges that the money in question should have been delivered by the accused to the officer in charge of the commissary store.

The proper and usual method of alleging the offense of usual embezzlement as defined above is to simply allege, after setting out that the accused had received the money or property in question into his possession and the circumstances under which received, that he feloniously embezzled and converted to his own use said money or property (Naval Courts and Boards, sec. 263). If the allegations in the specification in this case that the accused "did, during said

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period, without authority, fail and has ever since failed to deliver to the said officer in charge of the said commissary store, the said sum of money received by him * * *," sufficiently allege conversion of the money received by the accused to his own use, then, in the opinion of the Department, the specification sufficiently sets out a case of usual embezzlement as defined above.

It is evident from the foregoing definition of embezzlement that the wrongful appropriation or conversion of funds must be established in order to convict of the offense. In the present case assuming that all of the allegations in the specification of this case were established a court martial would not be required to convict as mere failure to turn over money as required, which is all that the specification alleges, is not conclusive evidence of conversion but only evidence from which, in some cases, conversion may be inferred (*O'Brien* v. *U. S.*, 27 App. (D. C.) 263). The allegations in question are not, therefore, synonymous with the allegation of conversion and consequently the specification does not allege usual embezzlement as defined by the federal courts.

In addition to usual embezzlement as discussed above, Congress has from time to time enacted that certain specific acts not falling within the definition of usual embezzlement shall be deemed to be embezzlement. These acts are such as are covered by sections 87 to 91 of the Penal Code and which appear in Naval [P. 5] Digest 1916, page 203, et seq. However, the acts set out in the specification of this case do not fall within the provisions of any act of Congress making specific acts embezzlement.

It appears from a review of the record that the judge advocate based the prosecution's case upon the presumption that the specification alleged acts which are made embezzlement by section 88 of the U. S. Penal Code, and it is presumed that it was the intent of the convening authority in drawing this specification to charge the accused under this section. Section 88 of the Penal Code as extended by section 92 provides as follows:

> "Sec. 88. If the Treasurer of the United States, or any assistant treasurer, or any public depositary, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as moneys deposited by any receiver, collector, or other persons having money of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept * * *.
>
> "Sec. 92. The provisions of the five preceding sections shall be construed to apply to all persons charged with the safekeeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same."

The specification in this case does not allege that the pay clerk failed safely to keep the money referred to therein, it simply avers that he failed to deliver said money to the officer in charge of the commissary store. In the opinion of the Department there is a clear distinction between the acts with which the accused is charged and those referred to in the above-quoted statute, and section 88 of the Penal Code does not make the mere failure to turn over funds when required an act of embezzlement. Even though the acts alleged constituted the offense charged, the specification is defective in that it fails to state when the funds in the possession of the accused were required to be delivered to the officer in charge of the commissary store, such an allegation being necessary to show that it was the duty of the accused to turn over the money at a particular time.

Summarizing the foregoing it has been pointed out that the specification in this case does not allege an act of embezzlement as defined by the United States courts and no act of Congress provides that the specific acts stated constitute that offense. Therefore the specification does not support the charge under which drawn and the proceedings, findings, and sentence in this case will be set aside (File 26262–11476A, G. C. M. Rec. No. 62709, March 3, 1925).

ENLISTMENT: FRAUDULENT.

E. T., alias E. L. McG., private, U. S. Marine Corps, was tried and convicted by general court martial convened by order of the Secretary of the Navy, of the charges (I) "Fraudulent enlistment," and (II) "Desertion."

[P. 6] The evidence in this case on charge I shows that the accused enlisted in the Marine Corps on January 21, 1920, for a period of two years and that he deserted from this enlistment on January 27, 1920. On March 15, 1924, he

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enlisted in the Marine Corps, concealing from the recruiting officer his former desertion. The specification under charge I alleged the receipt of pay and allowances after the alleged fraudulent enlistment. The prosecution, however, did not offer any evidence to establish this allegation and the only evidence in the whole record relevant thereto was given by the accused who denied specifically having used any government transportation upon this latter enlistment and who further testified that he had no recollection of having been furnished any meals by the government at that time. It is therefore self-evident that the allegation in the specification of charge I relative to the receipt of pay and allowances was not established. It therefore becomes necessary to determine if this was an essential part of the specification referred to.

Naval Digest, 1920, under section III of "Fraudulent enlistment" is as follows:

> "When an accused is not in the service at the time of procuring the alleged fraudulent enlistment, the gist of the offense is the receipt of pay and allowances under the fraudulent enlistment."

In this case the first enlistment of the accused had expired on January 20, 1922, but he had not been discharged therefrom since he was in desertion from January 27, 1920, until he enlisted in the Marine Corps on March 15, 1924.

On the question as to whether or not a man whose enlistment has expired but who has not been discharged therefrom is still in the service, the Department has held that an enlisted man in the naval service may not be lawfully held in the service to make good time lost by unauthorized absence (26254–3579: 31–3 of January 27, 1923). Furthermore, in *ex parte Clark* (271 Fed. 534) the court remarked, in the case of a marine tried by general court martial for "Desertion" after the expiration of his enlistment, "While there is no obligation to serve after the period of enlistment, it does not follow that conduct during that period may go unpunished." Further the Department has consistently held that a naval prisoner whose enlistment has expired may not be tried by naval courts martial for offenses committed after the expiration of his enlistment. It therefore follows that when the enlistment contract of an enlisted man in the naval service has expired he no longer is an enlisted man in that service and accordingly the receipt of pay and allowances in this case was an essential element of the prosecution's case in the specification under charge I.

The proceedings and findings on charge I and the specification thereunder were disapproved (File 26251–34455A, G. C. M. Rec. No. 61997, April 11, 1925).

[P. 7] COMPENSATION: WORLD WAR ADJUSTED.

Held: Case of S., ex-fireman, 3c., U. S. Navy. His guardian has failed to comply with the joint regulation of the War and Navy Departments requiring a guardian to designate the estate of the veteran as the beneficiary. Before a valid claim for World War adjusted compensation can be made, it will be necessary for said guardian to conform with the joint regulation prescribed by the Secretary of War and the Secretary of the Navy (File 29460–83, J: AC, June 6, 1925).

COMPENSATION: WORLD WAR ADJUSTED, FOR AVIATORS BASED ON SHORE IN THE CONTINENTAL LIMITS OF THE UNITED STATES.

P., former ensign, U. S. N. R. F., claims credit for oversea service for the reason that as an aviator based on shore within the continental limits of the United States, he was required to make flights patrolling the seas outside the three-mile limit.

Held: An examination of section 2 (b) of the World War Adjusted Compensation Act discloses that the term "oversea service" has been defined therein as "service on shore in Europe or Asia, exclusive of China, Japan, and the Philippine Islands; and service afloat, not on receiving ships; including in either case the period from the date of embarkation for such service to the date of disembarkation on return from such service, both dates inclusive." It accordingly follows that the service of P., as an aviator from a base within

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the continental limits of the United States is not included within the meaning of the term "overseas service" as used in this act, regardless of the fact that said service included the patrolling of the seas outside the three-mile limit (File 29460–73 J : AC, June 6, 1925).

DISABILITY: LINE OF DUTY.

Held: Case of N., seaman 1c., U. S. Navy. It appears that the disability complained of occurred during a fight in which N. was the defendant. It is the opinion of the Department that this should be held to have originated in the line of duty and not due to his own misconduct (File 29372–350 J : AC, June 6, 1925).

DISABILITY: LINE OF DUTY, NOT THE RESULT OF OWN MISCONDUCT.

A. enlisted October 7, 1923, and was admitted to the sick list, Marine barracks, Quantico, Va., on March 18, 1925, with a diagnosis of sprain sacro iliac (3). A board of medical survey [P. 8] made the diagnosis of flat feet (1614) origin not line of duty, disability not the result of his own misconduct, and stated that in the opinion of the board this condition existed prior to enlistment.

Held: An examination of the record in this case fails to disclose any evidence of flat feet at the time of his enlistment on October 7, 1923. It is the opinion of the Department that in the absence of facts showing that A. was suffering from flat feet at the time of his enlistment he must be considered as having incurred this disability subsequent thereto, and in the absence of facts showing that it was due to his own misconduct, or causes not connected with the service, it must be held that it was incurred in line of duty, and not due to his own misconduct (File 29372–346, J : AC, June 6, 1925).

DISABILITY: LINE OF DUTY, NOT RESULT OF OWN MISCONDUCT.

Y. enlisted in the naval service at Atlanta, Ga., June 6, 1924, and was admitted to the sick list on board the U. S. S. *Wyoming* January 19, 1925, with a diagnosis of bronchitis, acute, which condition continued until March 24, 1925, on which date the diagnosis was changed to tuberculosis, pulmonary, chronic, incipient (slight). The board of medical survey confirmed this diagnosis and held that the disability did not originate in the line of duty and was not the result of his own misconduct.

Held: An examination of the record in this case fails to disclose any evidence followed pneumonia and influenza contracted in 1922, no evidence of this disability was detected by the medical officer who conducted the physical examination at the time of his enlistment, and Y. had been on active duty for several months before the symptoms of lung trouble became manifest. It is the opinion of the Department that before a finding of "not in line of duty" is warranted, in the absence of fraud, it must be proved that the disability existed prior to enlistment (File 29372–344 J : AC, June 6, 1925).

NAVAL RESERVE: MEMBERS OF, SERVING IN COAST GUARD.

There are at present certain members of the Naval Reserve Force who are serving in the Coast Guard. The Naval Reserve Act approved February 28, 1925, effective July 1, 1925, provides that no officer or man of the Naval Reserve Force shall be a member of any other naval or military organization except the Naval Militia. In view of this it is the opinion of the Department that it will be necessary for those members of the Naval Reserve Force now serving in the Coast Guard to resign therein prior to July 1, 1925, the date on which the Naval Reserve Act becomes effective, in order to avoid being separated from the Naval Reserve by operation of law (File 28550–1787 : 1 J, June 11, 1925).

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[P. 3] DATE IN SPECIFICATIONS: CHANGE OF, BY CONVENING AUTHORITY AFTER TRIAL HAD BEGUN IS IRREGULAR.
EVIDENCE: ADDUCED, DOES NOT SUPPORT THE FINDING OF THE COURT.

J. R., private, U. S. Marine Corps, was tried by general court martial and convicted of the charge of "Conduct to the prejudice of good order and discipline." The specification which supported the charge was as follows:

> "In that J. R., now a private U. S. Marine Corps, while so serving as an insular patrolman, Insular Patrol Force of Guam, the said Insular Patrol Force then being an integral part of the naval government of Guam, did, on or about February 3, 1925, together and in company with six native inhabitants of the Island of Guam, namely, one J. P. C., one J. C. B., one J. B. B., one C. B. D., one F. T. S., and one M. C. M., wrongfully and wilfully take and drive a vehicle, namely, a red autobus, Guam license number P–84, the property of one H. S., then a resident of the town of Agana, Guam, from the premises of the said H. S. without permission of the said H. S., and did damage the said red autobus to the extent of about two hundred thirty-five dollars and sixty cents ($235.60)."

The evidence on this specification shows that one J. C. took the autobus in question and drove it away without the consent of the owner. The accused was invited by C to take a ride in the bus, which he did. So far as the record shows this was the only participation of the accused in the alleged unauthorized use of the bus, and it was not shown that the accused knew that the bus was taken without the consent of the owner or had reason to believe that such was the situation. Inasmuch as the accused was charged with wrongfully and wilfully taking and driving the said bus, the Department ruled that the evidence adduced on this specification did not support the finding of the court thereon. The finding on this specification was set aside.

It is further noted that after the accused had been arraigned and the prosecution had offered some evidence that the court addressed a letter to the convening authority recommending that the date "February 3, 1925" appearing in all specifications be changed to "on or about February 4, 1925." This recommendation was based upon evidence adduced by the prosecution. It was approved by the convening authority and the specifications were changed accordingly. This procedure was extremely irregular and is not authorized by naval court-martial procedure. However, time was not of the essence of the offenses charged, also the accused stated affirmatively that he had no objection to make to the specification as changed, and inasmuch as he was given an opportunity thereafter to introduce whatever evidence he desired, the Department ruled that the irregularity in question did not prejudice the rights of the accused [P. 4] and was therefore not a fatal error. The proper procedure in this instance would have been for the court to have made the proper substitution in its finding (File 26262–11684A, G. C. M. Rec. No. 62827, July 2, 1925).

TECHNICAL ERROR: MUST NOT BE CORRECTED BY COURT MARTIAL WITHOUT PERMISSION OF CONVENING AUTHORITY.

R. M. S., private first class, U. S. Marine Corps, was tried and convicted by general court martial convened by the _____. He was sentenced to lose pay amounting to $85, and to be discharged with a bad-conduct discharge. On May 20, 1925, the convening authority approved the proceedings, findings, and sentence but remitted the loss of pay.

In reviewing the record in this case it is noted that the court without the permission of the convening authority changed the first name of the accused, "R," wherever it appeared in the charge and specifications, to "A." The court based its action on the service record book of the accused. Section 184, paragraph 2, of Naval Courts and Boards classifies the misspelling of the name of an accused as a technical error and specifies that such an error can be corrected only by the convening authority. However, the said section further provides that a technical error is one of form. The accused made no objection to the afore-

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mentioned procedure by the court; he also pleaded guilty to the charge and specifications thereunder and his rights clearly were not prejudiced by said irregularity.

In view of the foregoing and inasmuch as section 1025, Revised Statutes, provides that no indictment of a court of the United States "shall be deemed insufficient nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of defendant," it is the opinion of the Department that the irregularity in question is not a fatal one and that the proceedings, findings, and sentence in the foregoing case are legal (File 26262–11730A, G. C. M. Rec. No. 63023, June 15, 1925).

COMPENSATION ACT, WORLD WAR ADJUSTED: JURISDICTION OF THE SECRETARY OF THE NAVY TO DETERMINE WHO ARE VETERANS.

Section 305 of the World War Adjusted Compensation Act provides that "immediately upon the enactment of this act the [P. 5] Secretary of War and the Secretary of the Navy shall ascertain the individuals who are veterans * * * and their findings shall not be subject to review by the General Accounting Office, and payments made by disbursing officers of the U. S. Veterans' Bureau made in accordance with such findings shall be passed to their credit." In view of the foregoing, it is the opinion of the Department that the Secretary of the Navy has exclusive jurisdiction to determine whether or not a man who is now serving in, or his last service was with, the naval forces is a veteran within the meaning of the World War Adjusted Compensation Act, and is entitled to its benefits (File 29460–25:1 J:AC, July 7, 1925).

DISABILITY: LINE OF DUTY, MENTAL DISEASE.

An enlisted man of the naval service was admitted to the sick list for mental observation five months after enlistment. The man in question was on several occasions before a board of medical survey and on each occasion his case was diagnosed as "dementia precox" (mental disease), originating in line of duty and not due to own misconduct. The last board which considered the case concurred with all others in the diagnosis, but disagreed as to the recommendation, holding that the man was admitted to the hospital just five months after his enlistment, consequently the origin could not have been in line of duty.

Held: Section 300, War Risk Insurance Act, provides "That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service." The provisions of this section show conclusively the attitude of Congress and it is the opinion of the Department that when an individual has undergone the necessary physical examination for admission into the naval service and has been found qualified, that he must be presumed to have been in sound condition when so accepted (File 29372–361 J:AC, July 1, 1925).

DISABILITY: NOT LINE OF DUTY, NOT DUE TO OWN MISCONDUCT.

An enlisted man was admitted to the sick list, Naval Training Station, Hampton Roads, Va., March 27, 1924, with a diagnosis of eczema, origin—line of duty, not due to his own misconduct. The board of medical survey convened in this case May 12, 1925, concurred in said diagnosis, except so much thereof as related to its origin, which they held should have been "not in the line of duty and not the result of his own misconduct."

Held: The records in this case show that there was no entry made therein at the time of his enlistment to the effect that he was suffering from any skin disease or any other disability. In view of this fact and the further facts that no evidence was presented showing that this disability existed prior to or at the time [P. 6] of his enlistment and that one year two months and twenty-three days had elapsed between the date of his enlistment and the date of his admission to the sick list for said disability, the Department is of the opinion that it should be held to have originated in the line of duty and not the result of his own misconduct (File 29372–351 J:AC, July 27, 1925).

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DISCHARGE, BAD-CONDUCT: EXECUTION OF AUTOMATICALLY REMITS THE UNPAID PORTION OF A SENTENCE INVOLVING LOSS OF PAY.

The Department has frequently received recommendations that the unexecuted portion of a sentence involving loss of pay be remitted in order that a man might be discharged from the service with a bad-conduct discharge, pursuant to the sentence of a summary court martial. The basis of these recommendations is that a long period of time will elapse before sufficient pay is earned to fully execute the total loss of pay to which a man had been sentenced.

Held: A summary court-martial sentence imposing forfeiture of pay operates only upon pay earned under a contract of enlistment and a discharge issued before sufficient pay has been earned to satisfy the forfeiture works a remission of that portion unsatisfied at discharge (Decision of the Comptroller of the Treasury, p. 3035, S. & A. Memo., dated April 6, 1914; reaffirmed by Comptroller General April 8, 1925).

In view of this it is unnecessary for the Secretary of the Navy to remit a loss of pay still outstanding on a man's account by reason of a sentence of a court martial prior to the execution of a discharge adjudged by a court martial. The execution of the discharge in itself has the effect of remitting the unexecuted loss of pay adjudged (File 26287–10531 C, July 18, 1925).

DISHONORABLE DISCHARGE: ISSUED PURSUANT TO A SENTENCE OF A GENERAL COURT MARTIAL MAY NOT BE CHANGED EVEN THOUGH IT BE LATER DETERMINED THAT THE PERSON TO WHOM IT WAS GIVEN WAS MENTALLY INCOMPETENT.

Where an accused was mentally incompetent at the time he was tried by general court martial and as a result of which trial he was issued a dishonorable discharge, such discharge bars him from the benefits of the World War Adjusted Compensation Act.

Held: It has been repeatedly held that a dishonorable discharge issued pursuant to the sentence of a general court martial is a discharge under other than honorable conditions, and even though it is later ascertained that the individual so discharged was in fact mentally incompetent at the time he committed the offense for which he was tried, convicted, and discharged, nevertheless such discharge is an accomplished fact and its character may thereafter not be changed (File 26262–4106:7 J:AC, July 7, 1925).

[P. 7] DISCHARGE, DISHONORABLE: UNCONDITIONAL PARDON FROM DOES NOT PERMIT THE ENJOYMENT OF BENEFITS OF WORLD WAR ADJUSTED COMPENSATION ACT, NOR DOES IT CONSTITUTE A SEPARATION FROM THE SERVICE UNDER HONORABLE CONDITIONS.

An enlisted man of the Navy was discharged, pursuant to a sentence of a general court martial, with a dishonorable discharge, after which he was to serve a certain time in prison. Before the latter part of the sentence was completely executed, the President fully and unconditionally pardoned the man, who now seeks to enjoy the benefits allowed by the World War Adjusted Compensation Act.

Held: The terms of the World War Adjusted Compensation Act disallow the benefits of the act to anyone who was "separated from such forces under other than honorable conditions." A full and unconditional pardon removes from the record of the man concerned all question of guilt and all of the legal consequences thereof; however, it does not do away with the fact of conviction and in this case the fact that the man was separated from the service by a dishonorable discharge. In view of these acts, it is the opinion of the Department that the man in question is precluded from receiving the benefits of the World War Adjusted Compensation Act, as his original separation from the service was under other than honorable conditions (File 26282–411:3 J:AC, July 16, 1925).

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LEAVE WITH PAY: FOR CIVILIAN EMPLOYEE, MEMBER OF ARMY OFFICERS' RESERVE CORPS.

A civilian employee of a United States navy yard who was a member of the Army Officers' Reserve Corps, was ordered to active duty from June 5, 1925, to June 30, 1925, in view of which fact he requests leave with pay from June 13, 1925, to June 30, 1925.

Held: Since the period of 15 days' leave with pay which he requests falls within the period during which he has been ordered to active duty as a member of the Army Officers' Reserve Corps, it follows that under the provisions of the act of May 12, 1917, he is entitled to leave of absence as an employee of the United States without loss of pay, time, or efficiency rating (File 28550–1570:7 J:AC, July 1, 1925).

RELATIVE RANK: WITH WHAT GRADE IN THE ARMY DO REAR ADMIRALS OF THE NAVY RANK.

An opinion of the Attorney General was recently requested as to the question of relative rank of rear admirals of the Navy with general officers of the Army.

Held: Section 1466 of the Revised Statutes provides that rear admirals rank relatively with major generals, and commodores with brigadier generals. On March 3, 1899, the rank of commodore was abolished, except as to those on the retired list, and those then in active service were raised to the rank of [P. 8] rear admiral and placed in the lower nine numbers of that rank. The War Risk Insurance Act provided that "Brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half." However, on June 7, 1924, that portion of the act was repealed. It thus appears that since the statutory provision whereby rear admirals of the lower nine were caused to rank with brigadier generals of the Army has been expressly repealed, the situation reverts to that which existed prior to the passage of the War Risk Insurance Act, namely, that all rear admirals rank relatively with major generals (Att. Gen. let., dated July 23, 1925).

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[P. 3] Ensign Edward W. Foster, U. S. Navy, was tried by general court martial on board the U. S. S. *Camden*, San Diego, Calif., by order of the Commander, Control Force, United States Fleet, on the following charges:

Charge I. Drunkenness (one specification).

Charge II. Conduct to the prejudice of good order and discipline (two specifications).

Charge III. Scandalous conduct tending to the destruction of good morals (one specification).

The court found Ensign Foster guilty by plea of the first charge, and not guilty of the second and third charges, and sentenced him to lose ten (10) numbers in his grade. The convening authority placed the following endorsement on the record:

> "The proceedings of the general court martial in the foregoing case of Edward White Foster, Ensign, U. S. Navy, are approved; the findings on the second and third charges and specifications thereunder are disapproved as it is considered that there was sufficient evidence to warrant conviction. It also appears that the testimony of certain witnesses indicates [P. 4] an effort to minimize the offense committed, a tendency far from creditable. The findings on the first charge and specification thereunder are approved, and subject to the opinion that the court erred in awarding so lenient a sentence, the sentence is approved. He will be released from arrest and restored to duty."

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Lieutenant (j. g.) Raymond D. Sollars, U. S. Navy, was tried by general court martial on board the U. S. S. *Altair*, San Francisco, Calif., on April 8, 1925, by order of the Commander, Destroyer Squadrons, Battle Fleet, United States Fleet, and acquitted of the following charge:

Uttering a forged writing (four specifications).

The Convening Authority placed the following endorsement on the record:

"Lieutenant (junior grade) Raymond D. Sollars, U. S. Navy, was brought to trial by general court martial under eight specifications on the charge of forgery and under four specifications on the charge of uttering a forged writing.

"The accused stated that he had no objection to make to the charges and specifications, but after some testimony had been given the defense moved that the charge and specifications in relation to the charge of forgery be dismissed, for the reason that the basis of the charge against the accused occurred more than two years before the order for the trial. The court sustained the motion of the accused. The court erred in this ruling. The court should have proceeded with the trial on both charges until all evidence had been adduced.

"The court permitted the entire record of proceedings of the Court of Inquiry in the case of Lieutenant (junior grade) Raymond D. Sollars, U. S. Navy, to be admitted as evidence. The accused did not object to the introduction of this record; but the court nevertheless erred in permitting it to be introduced in toto, when the evidence desired consisted of a very limited part of that record.

"There are, in addition, minor errors of a clerical nature in the proceedings of the court.

"It is difficult to understand how the court arrived at its findings under the second charge, unless the court believed that the accused was entitled to the benefit of the statute of limitations, which statute had not taken effect.

"In view of the above, the proceedings, findings, and acquittal of the general court martial in the foregoing case of Lieutenant (junior grade) Raymond D. Sollars, U. S. Navy, are disapproved.

"The accused has been released from arrest and restored to duty."

[P. 5] ACCUSED FAILURE TO TESTIFY IN OWN BEHALF NO INFERENCE OF GUILT.

In reviewing the record of proceedings of the general court-martial case of Elmer R. Pearl, engineman second class, U. S. Navy, it is noted that the judge advocate made an opening argument in part as follows:

"The judge advocate must here state that the accused, by not taking the stand in his own behalf, weakened his plea of not guilty, as it must be true that an innocent man charged with the offenses on which the accused was arraigned must desire to deny each and every part of them. This he did not do, and the judge advocate asks the court to render a verdict of guilty to the charge and specifications on which he has been tried."

Naval Courts and Boards, section 669, states in part as follows:

"It is highly improper for the judge advocate or recorder to comment on a failure of the accused to testify in his own behalf."

2. In the case of *People* v. *Tyler* (63 *California* 522), the district attorney in his argument of the case called the attention of the jury to the fact that the defendant had not testified in his own behalf and argued and insisted before said jury that the silence of the defendant was a circumstance strongly indicative of defendant's guilt. The supreme court of California held that:

"Wherever (whatever) the ordinary rule of evidence with reference to inferences to be drawn from the failure of parties to produce testimony that must be in their power to give, we are satisfied that the defendant (with respect to exercising his privilege under the provisions of the act in question) is entitled to rest in silence and security upon his plea of not guilty,

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and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify on his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question" (File 26262–11771A, G. C. M. Rec. No. 6312S, July 9, 1925).

[P. 6] ELIGIBILITY OF AN OFFICER: TO BE PLACED ON THE RETIRED LIST WITH THE PAY OF THE NEXT HIGHER GRADE WHEN THE DISABILITY FOR WHICH RETIRED OCCURRED PRIOR TO THE DATE ON WHICH HE MADE HIS NUMBER FOR PROMOTION.

An officer who has been confined to the hospital since January 5, 1925, the result of a line of duty accident, made his number for promotion on June 4, 1925. He now seeks to be ordered before a board of medical examiners for examination for promotion prior to being ordered before a retiring board, his reason therefor being that, when retired, he would be entitled to retirement in the next higher grade.

Held: Applying the decision of the court in the case of *Cloud* v. *U. S.*, if the officer in question is sent before a retiring board, and the fact now alleged is confirmed, i. e., that he is physically incapacitated to perform the duties of his office, said retiring board will have performed the duties of an examining board, and the officer will be entitled to be placed on the retired list with the rank to which his seniority entitles him to be promoted. However, there is an established procedure of ordering an officer who is due for promotion first to the Board for examination for promotion, then if he fails physically, to order him before a retiring board. It is therefore the opinion of the Department that no change in this procedure should be made in the present case and that the officer concerned has a legal right to be ordered before an examining board to determine his fitness for promotion (File 27231–293 J: AC, August 19, 1925).

GOVERNMENT PROPERTY, LOAN OF.

The Commandant of the Navy Yard at _____ states that from time to time he receives a number of requests from civilian organizations for flags for decorating purposes and authority to lend these flags is delegated to the senior officer present by article 83 (3) Navy Regulations, 1920. However, in view of a recent decision by the Department that, according to law, the Secretary of the Navy is without authority to turn over Government property to States or individuals, information is requested as to whether or not article 83 (3) is still legal.

Held: Because of the Constitutional provision placing in Congress the exclusive power to dispose of property of the United States and the fact that no statute has been enacted authorizing the Secretary of the Navy generally to loan flags for ceremonious [P. 7] occasions, the Department is of the opinion that so much of articles 83 (3) as delegates such authority to the senior officer present is without legal support and should be canceled, until such time as legislation may be passed authorizing the loan of Government property (File 3768–933: 1S, July 30, 1925).

INSULAR FORCE: PHILIPPINE ISLANDS, MEMBERS OF ARE ELIGIBLE FOR TRANSFER TO THE FLEET NAVAL RESERVE.

It was recently held by the Department that enlisted men of the Insular Force, Philippine Islands, are enlisted men serving in the Regular Navy of the United States, and accordingly are eligible for transfer to the Fleet Naval Reserve on the completion of the required service in accordance with section 4 of the act approved February 28, 1925, effective July 1, 1925 (File 26254–3591: 9–7 J: AC, August 11, 1925).

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RETIRED OFFICER: ACCEPTING EMPLOYMENT WITH THE COAST GUARD.

A retired officer recently requested an opinion as to whether or not his retired status would be in any way changed should he accept employment with the Coast Guard.

Held: The act of July 31, 1894, provides: "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate." Accordingly, the Department is of the opinion that if the retired officer in this case is appointed by the President, by and with the consent of the Senate, there is no law which prohibits his accepting the employment which he seeks. In case of acceptance, however, such officer is subject to recall to naval duty in case of national emergency or in time of war (File 9736–144 J: AC, August 11, 1925).

SEARCH OF VEHICLES AND PERSONS ON GOVERNMENT RESERVATION.

The commanding _____ at _____ requests information as to whether or not civilians found on the Government reservation may be searched, such civilians having in their possession passes which are issued by the commanding _____ and which bear the notation that the bearer agrees to have his [P. 8] person searched while on the Government reservation, should the military authorities have reason to believe that he is engaged in liquor traffic.

Held: The fourth article of the amendments of the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Accordingly, it is the opinion of the Department that military authorities have not the legal right to compel civilians to submit to search of their person or their vehicles; however, they may be prevented from entering the reservation if they refuse to submit to search at the time they seek to enter, and should they refuse to submit to search after they are found on the reservation they may be ejected. No additional power is vested in the authorities because the pass bears the notation that the bearer agrees to submit to search (File 28787–54: 1 J: AC, August 3, 1925).

SERVICE NOT WITH TROOPS: MEANING OF, AS USED IN THE WORLD WAR ADJUSTED COMPENSATION ACT.

Held: When a commissioned or warrant officer was on duty in the Navy Department, Washington, D. C., or at the headquarters of a naval district or navy yard, or at a munitions factory, or at a factory manufacturing materials other than munitions or at a shipbuilding yard, or at any other place not overseas, in a purely administrative, research, or supervisory capacity dealing with general questions arising in connection with the administration of the naval service, or as an inspector of material, and not directly administering a particular force in the field, or in training, or on simulated duty, said commissioned or warrant officer was not on duty with troops (File 29460–12: 7 J: AC, August 20, 1925).

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[P. 3] Lieutenant Commander Stuart E. Bray, U. S. Navy, was tried by general court martial on June 15, 1925, at the Navy Yard, Portsmouth, N. H., by order of the Secretary of the Navy and acquitted of the following charges:

Charge I.—Violation of a lawful regulation issued by the Secretary of the Navy.

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Charge II.—Through negligence suffering a vessel of the Navy to be stranded.

[P. 4] The following recommendation was placed on the record by the Judge Advocate General:

"1. Lieutenant Commander Stuart E. Bray, U. S. Navy, was tried by general court martial at the Navy Yard, Portsmouth, N. H., and acquitted of the following charges, I 'Violation of a lawful regulation issued by the Secretary of the Navy,' and II 'Through negligence suffering a vessel of the Navy to be stranded' (2 specifications).

"2. The specification of charge I reads as follows:

" 'In that Stuart E. Bray, now a lieutenant commander, U. S. Navy, while so serving in command of the U. S. S. *S–48*, making passage from New London, Conn., to Navy Yard, Portsmouth, N. H., did, on or about January 29, 1925, while entering the harbor of Portsmouth, N. H., and, approaching shoals and rocks at the entrance of said harbor, fail to keep the hand leads going on said ship.'

"3. Article 883, paragraph 2, Navy Regulations, 1920, provides that:

" 'When going into or out of a port or approaching an anchorage, shoal, or rock, with or without a pilot on board, he (the commanding officer) shall keep the hand leads going, and, if necessary in order to obtain correct soundings, reduce the speed.'

"The evidence adduced before the court showed that no attempt was made to obtain soundings by use of the hand lead. It appears from the evidence that the accustomed place from which soundings were taken, i. e., the gun sponson, was too slippery for a leadsman to safely heave a lead due to ice which had collected on the deck. It further appears from the evidence that there was at least one other point on deck from which a hand lead could have been used with safety, yet no attempt was made to take soundings. It is, therefore, the opinion of this office that there was sufficient evidence presented to warrant a finding of guilty, and it is consequently recommended that the finding of the court on charge I and the specification thereunder be disapproved.

"4. The proceedings, findings, and acquittal on charge II and the supporting specifications in the foregoing case are, in the opinion of this office, legal."

On September 5, 1925, the Secretary of the Navy approved the proceedings, findings, and acquittal on charge II, but disapproved the findings on charge I.

Ensign Arthur F. Dineen, U. S. Navy, was tried by general court martial on June 10, 1925, by order of the Commander Control Force, United States Fleet, on the following charges:

Charge I.—Drunkenness.

[P. 5] *Charge II.*—Conduct to the prejudice of good order and discipline.

The court found the accused guilty of charge I and acquitted him of charge II, and sentenced him to lose twenty (20) numbers in his grade.

The convening authority on August 5, 1925, approved the proceedings, findings, and sentence.

The following endorsement was placed on the record by the Judge Advocate General:

"2. It is noted that between the first and second days of the trial (p. 1 of the record) the court did not meet for a period of one month and five days, having adjourned indefinitely at the end of the first day's proceedings. There is no evidence in the record that the convening authority authorized an adjournment of this nature. In view of these facts, the nonmeeting of the court for the period indicated by the record was improper. However, it appears that the original adjournment was in the interest of the accused, and since he offered no objection to the extended delay in his trial, it is considered that his interests were not prejudiced."

[P. 6] Lieutenant Chester E. Lewis, U. S. Navy, was tried by general court martial and acquitted on the charge of "Culpable inefficiency in the performance of duty."

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[P. 7] The following recommendation of the Judge Advocate General of the Navy was placed on the record:

"Lieutenant Chester E. Lewis, U. S. Navy, was tried by general court martial July 7, 1925, at the Navy Yard, Portsmouth, N. H., by order of the Secretary of the Navy on the charge of 'culpable inefficiency in the performance of duty.' This charge was supported by the following specification: 'In that Chester E. Lewis, now a lieutenant, U. S. Navy, while so serving as navigator of the U. S. S. *S–19* making passage from the Navy Yard, Portsmouth, N. H., to New London, Conn., on or about January 12, 1925, and on or about January 13, 1925, notwithstanding the fact that Cape Cod Light was sighted at about 10:30 p. m. on January 12, 1925, and was passed abeam at about 11:17 p. m. on said date, and that Nauset Beach Light was sighted at about 2:27 a. m. on January 13, 1925, and was passed abeam at about 3:06 a. m. on said date, did, nevertheless, then and there, neglect and fail to obtain reliable, accurate, and definite fixes of the positions of said ship, when means were at hand so to do, as it was the duty of the said Lewis to do, in consequence of which the said ship was, at about 4:16 a. m., on January 13, 1925, stranded on Nauset Beach, Mass.'

"The charge was found by the court not proved and Lieutenant Lewis acquitted.

"It is not known on what ground the court arrived at an acquittal, but the present case may be considered under three headings:

"(1) The extent of the responsibility of the navigator for the safe navigation of the vessel.

"(2) Whether or not he was negligent and inefficient in performing the duties of navigator.

"(3) Whether or not the vessel was stranded as a consequence of such neglect.

"*Responsibility of the navigator.*—The Navy Regulations, article 1007, state that 'the navigation officer is the officer detailed by the Chief of the Bureau of Navigation to perform the navigation duties and is the head of the navigation department of the ship,' and 'aboard smaller ships the executive officer may also be ordered to perform the duties of navigating officer.' Article 1010 (2) Navy Regulations 1920 reads: 'When the ship is approaching land or shoal or entering port, he shall give his careful attention to the course of the ship and the depth of the water.' Testimony was introduced tending to show that it is not customary on submarines for the navigator to remain on the bridge on trips such as the *S–19* was making, creating the inference that when not on the bridge the navigator cannot be properly held responsible for the safe [P. 8] navigation of the ship. There is nothing to prevent the assignment of additional duties to the officer detailed as navigator, standing watches for instance, and the assignment of these additional duties in no way relieves the officer of any responsibilities in connection with the duties of navigator. Whether he was on the bridge or not is immaterial. It is not believed that a proper acquittal could be found under this heading.

"*Negligence and inefficiency in performing the duties of navigator.*—Article 1010 (2) Navy Regulations quoted above requires the navigator to give his careful attention to the course of the ship and the depth of the water when the ship is approaching land or shoal. As the *S–19* was due to reach Pollock Rip Slue at about dawn it was clearly the duty of the navigator 'to give his careful attention to the course of the ship and the depth of the water.' A proper and safe course can be set only after the position of the ship has been ascertained. In view of the fact that the *S–19* was shortly to enter shoal water after reaching Pollock Rip Slue it was essential that the position of the ship be accurately known in order to properly approach this navigational point. The ship was traversing the coast upon which there were adequate navigational marks with which to accurately determine the position of the ship. From the evidence adduced the accused in this case took no adequate means whatever of determining the position of the ship when passing Cape Cod Light, nor again when passing Nauset Beach Light. It is true that he was not informed when the latter light was sighted, nevertheless, by virtue of his responsibility as navigator, it was his duty to insure his being informed when all navigational lights were sighted or if not sighted at the antici-

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pated time that he be informed to that effect. As a consequence of the accused's failure in his duties as navigator, no accurate position was obtained by the navigator or anyone else when these lights were sighted and consequently a proper and safe course was not set. The testimony shows that the commanding officer was satisfied with the position of his ship at 10:50 p. m. after Cape Cod Light was sighted. Without discussing the responsibility of the commanding officer, it further transpires that by virtue of the lack of definite information of the position of the ship, the *S–19* was in fact materially set in from the anticipated track of the vessel closer to the coast line and by the failure of the accused to obtain the information which was available had he so taken advantage of it, the ship was permitted to continue on a course in a position which was materially inshore from that which the commanding officer anticipated and which the navigator had anticipated as the track of the ship. Consequently, the [P. 9] fact that the courses steered were those ordered by the commanding officer, as was contended by the defense does not in any way affect the responsibility of the navigator in the premises. The courses as laid were predicated on the assumption that from the navigational information provided the commanding officer, they represented a safe course. It is the opinion of this office, therefore, that a proper acquital can not be found under this heading.

"*Was the vessel stranded as a consequence of such neglect?*—If Lieutenant Lewis is considered to have been negligent and inefficient in the navigation of his ship, it may be stated as a matter of law that the clause in the specfication reading 'In consequence of which the said ship was about 4:06 a. m. on January 13, 1925, stranded on Nauset Beach, Mass.' is not essential in the determination of the guilt of the accused on the charge as laid. Without these words, the specification would still allege an offense and would support the charge so that if the court found the other portion of the specification proved, it could have properly excepted these words without affecting the findings on the charge. Lieutenant Lewis would have been guilty of the charge 'culpable inefficiency in the performance of duty' if the preceding part of the specification were found proved, whether or not the ship was grounded as a result of such inefficiency and his culpability insofar as the specification is concerned is fully established without the concluding clause. The fact of grounding, therefore, merely affects the gravity of the offense.

"For the above reasons this office considers that:

"(1) Lieutenant Lewis was responsible for the efficient performance of the duties of navigator which had been assigned him by his commanding officer.

"(2) Lieutenant Lewis was, from the evidence adduced, culpably negligent and inefficient in the performance of his duties on the night of January 12–13, 1925, and that

"(3) From the evidence adduced, Lieutenant Lewis was guilty of the charge as laid, whether or not any other cause intervened between his negligence and inefficiency which directly caused the grounding of the *S–19*.

"In view of the above, it is the opinion of this office that the proceedings of the court martial should be approved and that the findings and acquittal should be disapproved."

The Secretary of the Navy on September 5, 1925, approved the proceedings and remarks of the Judge Advocate General but disapproved the findings and acquittal.

[P. 10] Lieutenant Commander Earl R. Morrissey, U. S. Navy, was tried by general court martial at the Naval Station, Cavite, P. I., on May 13, 1925, by order of the Commandant Sixteenth Naval District, and acquitted of the following charge: "Culpable inefficiency in the performance of duty." The following endorsement which was concurred in by the Chief of the Bureau of Navigation and the Secretary of the Navy, was on May 27, 1925, placed on the record:

"The proceedings of the general court martial in the foregoing case of Lieutenant Commander Earl R. Morrissey, U. S. Navy, are approved. The findings and acquittal are not approved. According to the testimony of

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the accused before the Court of Inquiry which was introduced in evidence before the court by the judge advocate, the accused sighted the lights of the *Teresita* about two and one-half minutes prior to the collision, the bearing remained steady and in order to give her more room he gave the order for ten degrees right rudder, which order was executed. He also testified, that he did not blow his whistle 'for the reason that it is the vessel on the left that is supposed to give the first signal.' Had he held his course and given the proper sound signal, the collision would probably not have occurred."

[P. 11] Lieutenant Commander Benjamin Perlman, U. S. Navy, was tried by general court martial on May 8, 1925, at the Naval Station, Cavite, P. I., by order of the Commandant Sixteenth Naval District, and was acquitted of the following charges:

Charge I.—Culpable inefficiency in the performance of duty.

Charge II.—Scandalous conduct tending to the destruction of good morals.

Charge III.—Using a paper knowing the same to contain a fraudulent statement for the purpose of aiding another to obtain payment of a claim against the United States. The following remarks which were concurred in by the Secretary of the Navy were on June 10, 1925, placed on the record by the convening authority:

"In reviewing the record in the foregoing case, the convening authority is of the opinion that the specification of the first charge is not only proved beyond a reasonable doubt but overwhelmingly so. That the accused failed to keep true records is particularly clear and from the evidence it should have been obvious to the accused when for several months the issue of fresh stores alone was in excess of the ration allowance, and also in that the ration records as signed by the accused showed that no coffee, sugar, and so forth, was used for several months, an obvious impossibility. As to the conclusion of the specification: the mess was in debt about the amount alleged. If the accused had kept true records from the very beginning the over issue could not have accumulated to such an extent. If there were criminal transactions on the part of other persons, the accused, by attention to duty and the exercise of ordinary care would have become aware of it and these conditions could not have continued. In its findings the court must have ignored the fact that the accused signed the ration records showing vastly different amounts of supplies received on board than as shown by the ship's log.

"The specification of the second charge was proved beyond all doubt that the accused ordered these supplies for the wardroom mess and that some at least were received on board. It was proved that it was within his knowledge, if not by his orders, that same were charged falsely as different articles to the general mess but it was not proved that he ordered Suchowski to do this. As the gist of the offense charged is the corrupt ordering of a subordinate to do a criminal thing, the specification was not proved.

"With reference to the third charge, in addition to the evidence brought out concerning the second charge, it was proved that the accused received the bill, that he knew it was fraudulent (see testimony of Woodson and Suchowski) and that he forwarded it to a supply officer for payment as approved.

[P. 12] "Subject to the above remarks, the proceedings in the foregoing case are approved. The findings and acquittal of the second charge are approved. The findings and acquittal of the first and third charges are disapproved as not being in accord with the evidence adduced.

"The accused has been released from arrest and restored to duty."

Lieutenant Fred M. Rohow (Medical Corps), U. S. Navy, was tried by general court martial at the Naval Operating Base, Hampton Roads, Va., on May 12, 1925, by order of the Secretary of the Navy, on the following charges:

Charge I.—Conduct to the prejudice of good order and discipline.

Charge II.—Importing liquor.

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Charge III.—Violation of a lawful regulation issued by the Secretary of the Navy.

Charge IV.—Transporting liquor.

The court found the accused guilty of the third charge and acquitted him of the first, second, and fourth charges. He was sentenced to lose five numbers in his grade.

The following recommendation was placed on the record by the Judge Advocate General:

"Fred M. Rohow, passed assistant surgeon, U. S. Navy, was tried by general court martial at the Naval Operating Base, Hampton Roads, Va., on the charges of I 'Conduct to the prejudice of good order and discipline,' II 'Importing liquor,' III 'Violation of a lawful regulation issued by the Secretary of the Navy,' and IV 'Transporting liquor.' He was found not guilty of the offenses alleged under charges I, II, and IV, and was convicted of the offense alleged in the specification of charge III with the exception of certain words which were found not proved. The court sentenced the accused to lose five (5) numbers in his grade.

"The specification of charge III 'Violation of a lawful regulation issued by the Secretary of the Navy' reads as follows:

"'In that Fred M. Rohow, now a passed assistant surgeon, U. S. Navy, with the rank of lieutenant, while so serving on board the U. S. S. *Beaufort*, did, on or about February 24, 1925, knowingly, willfully, without proper authority and not for authorized medical purposes, keep in his possession on board said ship intoxicating liquor.'

"This specification was found proved by the court with the exception of the words 'knowingly, willfully' which words were found not proved.

[P. 13] "The general rule at common law was that scienter, that is, knowledge of the criminality of an act, was a necessary element in the indictment and proof of every crime, and this rule has been followed in regard to statutory crimes even where the statutory definition did not in terms include it (*U. S.* v. *Balint*, 258 U. S. 250). The scienter in the specification quoted above is expressed in the words 'knowingly, willfully' which were excepted by the court, and this specification as found proved by the court, therefore, contains no allegation of knowledge of the criminal nature of the act committed by the accused. The question for determination is the sufficiency of this specification, lacking the element of guilty knowledge, to support the charge of 'Violation of a lawful regulation issued by the Secretary of the Navy.'

"In the case of *U. S.* v. *Balint*, supra, the Supreme Court stated that there has been a modification of the view that scienter was an essential element in the indictment and proof of statutory offenses, the purpose of which would be obstructed by such a requirement. This court held that it is a question of legislative intent to be construed by the court, and if it appears that it was the intent of the legislature that 'he who shall do them shall do them at his peril and will not be heard to plead in defense, good faith, or ignorance' (*Shevlin Carpenter Co.* v. *Minnesota*, 218 U. S. 57), then scienter is not essential and the person commiting the unlawful act is guilty regardless of his knowledge of its wrongfulness. The *Balint case* was one involving a construction of the Antinarcotic Act and the Supreme Court held that the sale of narcotics is an offense even though the seller is unaware of the nature of the drugs, the court stating that the act's 'manifest purpose is to require every person dealing in drugs to ascertain whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him.'

"Also in the case of *United States* v. *Mathis*, 274 Fed. 225, which was a prosecution for the sale of sweet cider containing a greater alcoholic content than that allowed by law, the defendant contended that he purchased the cider from a wholesaler authorized by law to sell and that he assumed that the cider contained only the allowed alcoholic content. In this case the court stated that 'any person who sells cider as a beverage does so at his peril. He must know that he is not violating the law. He must know that the cider contains less than one-half of one percent of alcohol by volume. This is the only way the act could be enforced against persons selling cider containing more than one-half of one percent of alcohol by volume.'

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[P. 14] "The article of Navy Regulations alleged to have been violated by the accused is section 1 of article 118, which reads as follows:

" 'No person in the naval service shall take or keep any alcoholic liquors or any intoxicating or narcotic substance on board ships of the Navy or within the limits of naval stations, marine barracks, or any other place under the exclusive jurisdiction of the Navy Department except as authorized for medical purposes, nor shall any such liquors, intoxicants, or substances be sold or given to said persons or issued to them except for medical purposes, within such places.'

"It is the opinion of this office that it was not the intent of this regulation to impose liability upon persons keeping any of the substances in his possession if he did not in fact know their character and his lack of knowledge was not due to negligence on his part. For this reason if a party should entrust to an officer or enlisted man a package under circumstances which would not reasonably require an investigation of the contents, such officer or man could not be held liable under the above-quoted article if the package in question contained prohibited articles of which the person entrusted was innocent. The present case, however, is different from one of this character. It appears from the evidence and the finding of the court that the accused received from a person outside the United States a package for delivery within the United States, which package contained intoxicating liquor but that the accused was unaware of its contents. Inasmuch as officers and enlisted men in the Navy are required to report all dutiable or contraband articles which they may have in their possession upon coming into the United States from outside, it was incumbent upon the accused in this case to ascertain what was contained in the package entrusted to his care, otherwise he would be unable to furnish the required information as to whether or not the package contained dutiable or contraband articles. It is the opinion of this office, and was evidently the opinion of the court also, that an officer who accepts a package in a foreign country without ascertaining its contents is guilty of a high degree of negligence which brings his case within the rule laid down in the federal cases cited above, viz., that scienter is unnecessary if it appears that it was the intent of the legislature to punish even though guilty knowledge is lacking. It is the opinion of this office that a violation of article 118 of Navy Regulations is consummated when in fact intoxicating liquor is possessed even where knowledge of the nature of the substance in question is lacking where such lack of knowledge is wholly due to extreme negligence on the part of the person [P. 15] having same in his possession. Otherwise it would be extremely difficult to adequately enforce the regulation. Therefore even though the court in its action in this case excepted from the specification the words 'knowingly, wilfully,' it is the opinion of this office that in view of the evidence adduced, the circumstances of the case, and the authorities hereinbefore cited, the specification supports the charge under which it is drawn.

"It is the opinion of this office that the proceedings, findings, and sentence in the foregoing case are legal."

The proceedings, findings, and sentence with the recommendation of the Judge Advocate General were on August 21, 1925, approved by the Secretary of the Navy.

ABSENT: ACCUSED NOT CONSIDERED AS, AFTER EXPIRATION OF ENLISTMENT.

Willie Wilson, mess attendant first class, U. S. Navy, was tried by general court martial on board the U. S. S. *Procyon* by order of the Commander, United States Fleet Base Force and convicted of "Absence from station and duty after leave had expired." He was sentenced by the court to be reduced to the rating of mess attendant third class, to be confined for a period of twelve months, bad-conduct discharge and accessories. On February 26, 1925, the convening authority approved the proceedings, findings, and sentence.

The specification as found proved by the court alleged in effect that the accused became absent over leave on December 9, 1922, and continued so absent without permission from proper [P. 16] authority for a period of about 2 (2) years, one (1) month, and three (3) days, at the expiration of which he surrendered himself on board the U. S. S. *Procyon*. The enlistment of the

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accused expired April 7, 1923, just three months and 29 days after the date his unauthorized absence commenced which was the time remaining on his enlistment which he was required to serve. Accordingly the accused should only have been tried for unauthorized absence for this period of three (3) months and twenty-nine (29) days inasmuch as there was no obligation on his part to continue in the service subsequent to the date of expiration of enlistment, viz, April 6, 1923 (*Ex parte Clark*, 271 Fed. 533).

In the opinion of the Department, however, the above irregularity is not fatal to the proceedings inasmuch as the unauthorized absence and not the period thereof is the gist of the offense (Naval Digest p. 7) and the period subsequent to the date of expiration of enlistment may be rejected as surplusage.

Subject to the foregoing comment it is the opinion of the Department that the proceedings and findings in this case are legal. However as the limit of confinement for the offense of "Absence from station and duty after leave had expired" is six (6) months plus a period equal to the period of unauthorized absence, which in this case was three (3) months and twenty-nine (29) days, it is recommended that the period of confinement be reduced to nine (9) months. With reference to that portion of the sentence which provides for reduction to the rating of mess attendant third class, inasmuch as the enlistment of the accused has expired he is no longer an enlisted man in the Navy though subject to the jurisdiction of a naval court martial for an offense committed while in the Navy (C. M. O. 39, 1919, 17; *Ex parte Clark*, 271 Fed. 533). Not being an enlisted man in the Navy he cannot hold an enlisted rating and consequently the action of the court in providing for reduction to mess attendant third class is a nullity (File 26262–11586A, G. C. M. Rec. No. 62470, April 3, 1925).

BROOM HANDLE: NOT A DANGEROUS WEAPON.

Benjamin W. Sunorski, seaman second class, U. S. Navy, was tried by general court martial convened by the Commander in Chief, U. S. Asiatic Fleet on the charges: (I) "Assault with a dangerous weapon," (II) "Unlawfully wounding another," and (III) "Unlawfully striking another." The accused pleaded guilty to all the charges and specifications thereunder and was sentenced to be reduced to the rating of apprentice seaman, to be confined for eighteen months and then to be discharged from the service with a bad-conduct discharge and all accessories.

The specification under charge I alleges in effect that the accused struck another enlisted man in the Navy with a dangerous [P. 17] weapon, to wit, a broom handle. In *U. S.* v. *Reeves* (38 Fed. 404) the court in charging the jury as to the meaning of the term "dangerous weapon" said as follows:

> "A dangerous weapon is one likely to produce death or great bodily harm; and if you believe from the testimony that the life of the mail-messenger was put in jeopardy by the use of a weapon likely to produce death or great bodily harm, then you are charged that the use of such a weapon is the use of a dangerous weapon."

It does not appear that the mere allegation that a broom handle is a dangerous weapon is sufficient in itself to bring said article within the category of a dangerous weapon as defined by the court in the above-quoted case. Accordingly, in the opinion of the Department the specification in question as drawn does not support the charge of "Assault with a dangerous weapon." Inasmuch as it is deemed impracticable to reconvene the court before which this case was tried for the purpose of reconsidering their findings on this charge with a view to finding the accused guilty in a less degree than charged, the proceedings, and findings on charge I will be set aside (File 26262–11626A, G. C. M. Rec. No. 62599, April 13, 1925).

FINDING AND SENTENCE OF A COURT: IRREGULAR PROCEDURE IN COMMUNICATING TO JUDGE ADVOCATE.

John E. Williams, seaman second class, U. S. Navy, was tried by general court martial at the Navy Yard, Boston, Mass., before the general court martial of which Captain Roscoe C. Moody, U. S. Navy, is president, Department's precept of January 21, 1925, on the charge of "Desertion." He was found

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guilty of the charge, and sentenced to be confined for a period of twelve (12) months, dishonorable discharge and accessories.

Page 9 of the record of proceedings discloses that when the judge advocate was recalled to record the findings of the court he was informed that "he was delaying the proceedings, that the findings were in a notebook kept by one of the members, and was ordered to open the court." The court was accordingly opened, record of previous conviction was received, the court was cleared, the judge advocate was recalled and informed that the findings and sentence of the court were in the notebook. The findings of the court as indicated by the notebook kept by the junior member are * * *; the sentence of the court as indicated by the notebook kept by the junior member is * * *."

Such procedure on the part of the court is extremely irregular and not in accordance with the procedure as set forth in Naval Courts and Boards. Courts martial should not deviate from the [P. 18] prescribed forms when same are fully covered in Naval Courts and Boards. Courts should adhere to the accepted forms in order to prevent any question of legality and by deviation therefrom give cause for an accused to take exception to the proceedings. In this case, although the procedure was irregular, nevertheless it does not invalidate the proceedings.

With regard to the recording of the findings of the court, Naval Courts and Boards, section 688, specifically states:

> "After the court has arrived at its findings the judge advocate or recorder is recalled and directed to record the same. * * * This direction applies to the entire findings."

With regard to the introduction of record of previous convictions, same, section 689, states:

> "The judge advocate or recorder shall, immediately after recording the findings, except where such findings have resulted in an acquittal, state whether or not he has any record of previous convictions by courts martial."

With reference to the recordation of the sentence, same, section 703, provides:

> "When a sentence has been determined upon the judge advocate or recorder shall be called before the court, and under its direction, shall draw up the sentence, specifying the exact nature and degree of the punishment adjudged, and, after approval by the court, shall enter same on the record."

(File 26251–34962A, G. C. M. Rec. No. 63299, August 25, 1925.)

FINDING OF COURT: NOT IN ACCORD WITH EVIDENCE.

Saul P. Davis, private, U. S. Marine Corps, was tried and acquitted by a general court martial convened by the Secretary of the Navy of the offense of "Scandalous conduct tending to the destruction of good morals." The specification alleges that the accused:

> "While so serving as dairyman in charge of the post exchange dairy at the U. S. marine barracks, Navy Yard, Charleston, S. C., having received into his possession and under his control in the execution of his duties as aforesaid, a sum of about sixty-eight dollars and sixty-eight cents ($68.68), in lawful money of the United States which he, the said Davis, well knew to be the property of the said post exchange, did, on or about October 4, 1924, and on various and sundry days thereafter, exact days to the relator unknown, to about March 15, 1925, at said barracks, feloniously embezzle and convert to his own use various and sundry sums of said money, exact amounts to the relator [P. 19] unknown, amounting in all to sixty-eight dollars and sixty-eight cents ($68.68) or thereabouts, the property of the said post exchange."

The evidence presented in this case shows that the accused was chief dairyman at the said post exchange during the aforementioned period; that he or his subordinates delivered to various persons in and around the navy yard milk of the value of about $68.68, from whom he collected the amounts due thereon. These people were not on the regular post exchange milk list but they testified that they considered that they were being supplied with milk

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from the post exchange or marine barracks and that they paid the accused therefor. The exchange officials testified that the money so collected was never turned into the exchange. It does not appear that there were any regular orders in effect at said exchange during this period which prescribed the method of collecing milk bills, but the record does show that the accused was accustomed to collect therefor upon presenting the proper bills to the customers. The customers in question did not appear to have been furnished with bills but the evidence in the record shows affirmatively that they paid the accused the amounts due.

There was no direct testimony as to the ownership of said milk but there was evidence to the effect that the accused while head dairyman supplied the persons in question with milk. And further, there was testimony by the assistant dairymen to the effect that they knew of no source other than the post exchange cows from which the accused obtained any milk. This evidence would appear to show beyond a reasonable doubt that the milk in question belonged to the post exchange.

Upon the receipt of the amounts due on the milk in question it was clearly the duty of the accused to turn over the money collected to his superiors and the evidence that he failed so to do or account for in any way was sufficient to present a prima facie case of conversion against him. In *O'Brien* v. *U. S.*, 27 App. (D. C.) 263, it was held that the inference that a person has embezzled property by unlawfully converting it to his own use may be drawn from the fact that he has not paid the money in due course to the owner or from the fact that he has not accounted for money which he has received.

The witnesses for the prosecution were in no way impeached and the defense offered no evidence with the exception of character evidence. With these facts in view it cannot be seen how the court could reasonably acquit the accused of the charge preferred against him. In view of which the proceedings in the foregoing case are approved but the findings and acquittal are disapproved. As an entirely separate proceeding the accused will be discharged from the U. S. naval service with an undesirable discharge (File 26251-34626A, G. C. M. Rec. No. 62917, June 15, 1925.)

[P. 20] HEARSAY TESTIMONY: IN A TRIAL FOR EMBEZZLEMENT.

William E. Strother, chief yeoman, U. S. Navy, was tried by general court martial convened at the Naval Operating Base, Key West, Fla., on the charge of "Embezzlement of money of the United States intended for the naval service thereof" (2 specifications). He was found guilty of the offenses alleged in both specifications, and was sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of four years, dishonorable discharge, and accessories.

Specification 2 of the above charge as found proved by the court reads as follows:

> "In that William E. Strother, now a chief yeoman, U. S. Navy, while so serving as senior petty officer on duty in the commissary store at the U. S. naval station, Key West, Fla., having between December 1 and 12, 1924, received into his possession and under his control in the execution of his duty as aforesaid currency in lawful money of the United States and checks payable in lawful money of the United States in the total amount of about two thousand one hundred ninety-seven dollars and twelve cents ($2,197.12), which he, the said Strother, well knew to be the property of the United States, intended for the naval service thereof, the said currency and checks being the receipts from cash sales made in the said store, did, on or about December 1, 1924, and on various days thereafter, exact days to the relator unknown, at said naval station, feloniously embezzle and convert to his own use part of said money, to wit, about four hundred nineteen dollars and eighty cents ($419.80), the property of the United States intended for the naval service thereof received into his possession and under his control as aforesaid."

It became necessary, in order to establish the allegations in specification 2, to determine the amounts of various charge accounts for the month of November which had been paid between December 1 and 12, 1924. It appears from the evidence that on the night of December 11–12, 1924, a burglary occurred in

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the commissary store, Naval Operating Base, Key West, Fla., as result of which certain records of the commissary store were stolen. Among these records were those covering the charge accounts for the month of November, and December collections thereon. In connection with establishing the amounts collected by the commissary store between December 1 and 12, 1924, Lieutenant Elliott, Supply Corps, U. S. Navy, the officer in general charge of the commissary store, under whom the accused served as senior petty officer in charge of the commissary store, testified that the amounts collected in the commissary store during the period from December 1 to 12, 1924, was determined by interviewing customers, and by seeing receipted bills in some instances, which these customers held. [P. 21] The counsel for the defense objected to the admission of this testimony on the ground that it was incompetent and the objection was sustained by the court. Then the prosecution established that the original records of the commissary store were missing and contended in effect that the testimony of Lieutenant Elliott was the best available evidence. Counsel again objected to the admission of the testimony of Lieutenant Elliott concerning the collections between December 1 and 12 for November charge accounts as determined in the manner above stated, but this time the court overruled the objection and permitted this evidence to remain in the record. The testimony of the witness concerning this matter is in part as follows:

> "The original records of the store as I said were missing. In order to draw up records showing the condition of the store, I interviewed either personally or my assistants interviewed all patrons of the store who were requested to produce their receipts covering their bills for the month of November. From this information the list was drawn up showing the amounts received or paid into the store from December first until December eleventh."

The foregoing testimony of Lieutenant Elliott was clearly inadmissible as it consisted entirely of hearsay. The proper method of establishing the facts that payment had been made on the charge accounts in question in the absence of records of the commissary store was to introduce as witnesses the customers of the store who could of their own knowledge testify that they had paid to the store, the amounts of their November charge accounts.

It is the opinion of the Department that the admission of the above evidence was prejudicial to the case of the accused insofar as specification 2 was concerned and consequently the finding of the court of specification 2 is disapproved (File 26251–34278A, G. C. M. Rec. No. 62835, June 20, 1925).

INTOXICATING LIQUOR, UNLAWFUL POSSESSION OF, IN VIOLATION OF NATIONAL PROHIBITION ACT, FIRST OFFENSE: SENTENCE OF DISMISSAL OR DISCHARGE NOT LEGAL.

Albert E. Webb, private, U. S. Marine Corps, was tried by general court martial convened by Department's precept dated July 23, 1925, at the Marine Barracks, Quantico, Va., on the charge of "Conduct to the prejudice of good order and discipline." The specification in support of the charge alleges the unlawful possession of intoxicating liquor in violation of section 3, title 2, of the National Prohibition Act. Webb was convicted of the charge and specification thereunder and sentenced by the court to be confined for a period of three years, dishonorable discharge, and accessories.

[P. 22] It appears that in adjudging sentence that the court did not give careful consideration to the provisions of section 720, Naval Courts and Boards, where it is specified in the note under the offense "Conduct to the prejudice of good order and discipline" that "where the offense proved under this charge is of similar nature to one given elsewhere in this table the court shall be guided by the limit there given." The offense proved under this charge was a violation of section 3, title 2, of the National Prohibition Act and was a first offense.

The statutory limit of punishment for the above offense is given in section 720, note 1, and is a fine of five hundred dollars. The statute does not provide for confinement in addition to the fine; however, section 720, Naval Courts and

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Boards, also provides in a note under offenses coming under article 22 of the Articles for the Government of the Navy that "where the statute does not prescribe any period of imprisonment, dismissal or discharge shall not be adjudged, but loss of numbers not to exceed 10, or confinement not to exceed three months may be adjudged."

In view of the above it is the opinion of the Department that the legal limitation of punishment for the offense found proved in this case is three (3) months confinement and loss of pay not to exceed five hundred dollars. As the current enlistment of Webb expires on October 30, 1925, after which he will be in a nonpay status and a fine in excess of his pay to that date could not be carried into effect and in view of the legal limitation of punishment for his offense, it is recommended that the sentence adjudged be mitigated to confinement for three (3) months and to lose all pay during the remainder of his current enlistment, except the sum of three dollars ($3) per month for necessary prison expenses. It is further recommended that the place of duty of the accused be designated as the place of confinement.

Attention is invited to the fact that the form of discharge to be given at the termination of his confinement will be such discharge as is warranted by his record during the term of his enlistment (File 26251–35055A, G. C. M. Rec. No. 63420, August 26, 1925).

STRIKING ANOTHER PERSON IN THE NAVY: PRISONER NOT ON DUTY.

Charley Arnold, private, U. S. Marine Corps, was tried by general court martial at the U. S. Naval Operating Base, San Diego, Calif., convened by Department's precept of July 14, 1925, on the charge of "Striking another person in the Navy" supported by a specification alleging that the said Arnold, while acting as corporal of the guard in charge of prisoners, struck one of the prisoners who was confined at the time. The court found the accused guilty of the charge and specification thereunder, and sentenced him to be confined for a period of one year, dishonorable discharge, and accessories.

[P. 23] In view of the fact that the specification does not allege, or the evidence show that the prisoner so struck was on duty at the time, other than that he was called out of a cell by the accused, the offense is that of striking another person in the Navy when such person is "not on duty and is not a superior officer." Accordingly the legal limitations of punishment for this offense, as approved by the President, is, in the case of an enlisted man, confinement for three months and bad-conduct discharge (Naval Courts and Boards, sec. 720).

In accordance with the foregoing, the proceedings and findings are legal, but so much of the sentence adjudged as is in excess of the legal limitation of punishment is illegal. The sentence therefore will be mitigated to three months confinement, bad-conduct discharge, and accessories, in accordance with the legal limitation of punishment (File 26251–35054A, G. C. M. Rec. No. 63467, August 29, 1925).

CHIEF RADIO ELECTRICIAN AND CHIEF ELECTRICIAN, RADIO ELECTRICIAN, OR ELECTRICIAN: MAY NOT BE APPOINTED ENSIGNS.

Are officers serving in the newly established warrant and commissioned warrant grades of electrician, radio electrician, chief electrician and chief radio electrician eligible for appointment to the grade of ensign?

Held: Under the act of March 3, 1909, which provides: "That chief boatswains, chief gunners, and chief machinists shall be eligible for appointment to the grade of ensign under the restrictions imposed by law upon the appointment of boatswains, gunners, and warrant machinists to that grade," and other acts of like intent, Congress specifically designated certain classes of warrant and commissioned warrant officers from whom appointments to the grade of ensign may be made, and thereby indicating its purpose to restrict the eligibility for appointment to those described in law (File 17789–114, September 10, 1925).

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DISABILITY: LINE OF DUTY.

An enlisted man returned from A. W. O. L. in January 1925. A few days after his return he reported at the sick bay with an ingrowing toenail, from which cellulitis followed, whereupon it [P. 24] was necessary to amputate the toe. A board of survey met and it was recommended that he be discharged from the service—origin not in line of duty—disability due to own misconduct. The reason of the board being that the state of the man was due to neglect of his toe while absent without leave.

Held: In view of the fact that the medical record of the man fails to disclose any evidence to the effect that he was suffering from an ingrown toenail at the time of his return to naval jurisdiction and that he was admitted to the sick list thirteen days after his return, it is the opinion of the Department that the disability should be held to have originated in line of duty and not due to his own misconduct (File 29372–376 J, August 27, 1925).

DISABILITY: LINE OF DUTY.

An enlisted man received injuries at the hands of certain native civilians, who assailed him without provocation while on liberty in Colon, Republic of Panama.

Held: In view of the fact that the assault was without provocation, it is the opinion of the Department that the disability should be held to have originated in the line of duty and not the result of his own misconduct (File 29372–378 J:AC, August 27, 1925).

DISABILITY: NOT IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

An enlisted man was declared a deserter on May 16, 1925, and on June 5, 1925, while standing on a sidewalk in Philadelphia, Pa., he was struck by an automobile and knocked against a fireplug, and was injured to such an extent as to require amputation the same date.

Held: In the absence of facts showing that the injury to his leg was the immediate result of his own misconduct, it is the opinion of the Department that the disability complained of should be held to have originated not in the line of duty and not the result of his own misconduct (File 29372–388 J:AC, September 16, 1925).

MEDICAL ATTENDANCE: BY CIVILIAN PHYSICIANS IN CASES OF OFFICERS OR MEN GRANTED LEAVE OR LIBERTY FROM SHIP OR STATION FOR A PERIOD OF 24 HOURS OR LESS, REIMBURSEMENT FOR.

Are enlisted men on liberty granted for a period of twenty-four hours or less, and officers who have been given permission to leave their ship or station for 24 hours or less, considered in a duty status, and therefore entitled to necessary civilian medical attendance and treatment provided the facilities of the medical Department of the Navy are not available?

[P. 25] *Held:* Section 1586 of the Revised Statute provides: "Expenses incurred by any officer of the Navy for medicines and medical attendance shall not be allowed unless they were incurred when he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had. Howland, page 254, paragraph VIII states: "an officer absent by verbal permit for not exceeding 24 hours, or a soldier absent on pass for not exceeding 24 hours, is considered to be in a duty status, and a bill for medical services properly incurred while in such status is not a private indebtedness but an obligation of the Government to be paid out of the proper appropriation." It accordingly is the opinion of the Department that enlisted men on liberty granted for a period of 24 hours or less, and officers who have been given permission to leave their ship or station for 24 hours or less, may be considered in a duty status, and are therefore entitled to necessary civilian medical attendance and treatment, provided the facilities of the medical department of the Navy are not available (File 9438–212 J: AC, August 27, 1925).

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MIDSHIPMAN: APPOINTMENT AS, FOR ENLISTED MAN.

May a candidate for midshipman from the enlisted personnel of the Navy who passes the competitive mental examination in any year and fails to enter that year on account of physical disqualification be appointed the following year without again taking the competitive examination?

Held: One of the requirements of the act of March 4, 1917, is to the effect that the candidate must have passed a competitive examination with other candidates who seek to enter the academy in the year that he seeks to enter. It is accordingly the opinion of the Department that a candidate for appointment as a midshipman from the enlisted personnel of the Navy who passed the competitive mental examination in a given year, but failed to enter the Naval Academy, during that year on account of physical disqualification, is thereafter in the same status as any other enlisted man who subsequently seeks appointment (File 5252–285 J: AC, September 16, 1925).

NATIVE BORN FILIPINOS: ENLISTED IN NAVY, MARINE CORPS, OR NAVAL AUXILIARY SERVICE WITHOUT HAVING PREVIOUSLY DECLARED THEIR INTENTION TO BECOME CITIZENS.

Held: Native-born Filipinos are enlisted in the Regular Navy without their having previously declared their intention to become citizens, and the Department is authorized to enlist native-born Filipinos in the Naval Reserve and the Marine Corps Reserve without their having previously indicated their intention to become citizens. Native-born Filipinos are not [P. 26] enlisted in the Marine Corps and individuals are no longer enlisted in the Naval Auxiliary Service (File 26252–127: 1 J: AC, August 27, 1925).

OFFICER: PERFORMING DUTY OF COUNSEL FOR THE DEFENSE BEFORE A COURT MARTIAL, STATUS OF.

Held: The exact status of an officer while performing the duty of counsel for the accused before a court martial is the same as that of a civilian counsel acting in that capacity. He is bound regardless of rank to obey the orders of the court and to conform to its rulings after having made due and respectful objection and entered such protest as will preserve in the record of the case the rights of the defense. In this respect he is subject to the orders of the court. The question of rank, however, is not involved, and in that respect the question of insubordination cannot arise. It is for the court to determine in each instance whether or not an officer serving as counsel for the accused has so conducted himself as to be in contempt of court. The nature of the offense which would render counsel for the accused in contempt is, strictly speaking, the same for officers, enlisted men, or civilians acting in that capacity (File 1112–1854: 8 J: AC, September 1, 1925).

RETIRED OFFICER: EMPLOYMENT OF, BY GOVERNMENT OF CANAL ZONE, DEDUCTION OF RETIRED PAY IN CASE OF.

A retired officer seeks employment with the Government of the Canal Zone, but is told that in the event of such employment the amount of his retired pay will be deducted from the amount of salary received.

Held: With reference to the employment of persons by the Government of the Canal Zone, section 4 of the act of August 24, 1912 (37 Stat. 561), provides: "* * * If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this act." Since a retired officer is a person in the naval service within the meaning of the above act, it is the opinion of the Department that his retired pay may be properly deducted from his official salary which he will receive from the Government of the Canal Zone (File 9736–146 J: AC, August 28, 1925).

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RETIREMENT: OF ENLISTED MAN AS AN OFFICER.

An enlisted man was temporarily appointed ensign in the Navy, January 1, 1918; appeared for examination for the Regular Navy and was found physically disqualified; reverted to his [P. 27] former enlisted status December 31, 1921, by an act of Congress, and was transferred to the Fleet Naval Reserve some time in 1922. The man in question requests to be informed as to whether or not he is eligible to be retired in the grade of ensign under the provisions of section 25 of the omnibus bill, which are: "any officer of the Regular Navy who has been retired since December 31, 1921, by reason of physical disability which originated in the line of duty at any time between April 6, 1917, and March 3, 1921, inclusive, while holding higher temporary rank, shall be advanced on the retired list to, or shall be placed on the retired list in, such higher grade or rank."

Held: The provisions above-quoted apply only to those cases where an officer in the Regular Navy has been retired since December 31, 1921, under certain conditions therein specified. The man in question was not retired, but transferred to the Fleet Naval Reserve, consequently the provisions of the omnibus bill do not apply (File 27231–292 J: AC, August 28, 1925).

RETIREMENT IN THE NEXT HIGHER GRADE IF RETIRED BY REASON OF AGE INELIGIBILITY FOR PROMOTION: OFFICERS CITED FOR PERFORMANCE OF DUTY IN COMBAT DURING WORLD WAR.

A question was recently submitted to the Department as to whether or not the following extract of the act of March 4, 1925, is retroactive and also mandatory upon those to whom it applies: "All officers of the Navy and Marine Corps who have been specially commended for their performance of duty in actual combat with the enemy during the World War, by the head of the executive department under whose jurisdiction such duty was performed, when retired by reason of age ineligibility for promotion, shall be placed upon the retired list with the rank of the next higher grade and with three-fourths of the pay they would have received if not advanced in rank pursuant to this section."

Held: It is the opinion of the Department that this act is not retroactive as it is the usual rule that a statute operates from the date of its enactment, and in this act there is nothing to indicate the contrary purpose on the part of Congress. The law in question is not one which is a provision for the retirement of officers, but one fixing their rank and pay on the retired list after they have been transferred thereto, under the general provision for the retirement of officers "by reason of age ineligibility for promotion." Accordingly the rank and pay of those to whom the law applies must be governed by the terms of the law and is mandatory (File 27231–275: 9–1 AD/3, September 10, 1925).

[P. 28] SECOND LIEUTENANT: PROBATIONARY, LOSS OF NUMBERS BY GENERAL COURT MARTIAL, IN THE CASE OF.

An opinion was recently requested from the Department as to whether or not there is any approved legal sentence of loss of numbers by general court martial in the case of probationary second lieutenants.

Held: There is no approved legal sentence of loss of numbers by general court martial in the case of probationary second lieutenants. Since the law provides (act of August 29, 1916, 39 Stat. 611), "That the rank of such officers of the same date of appointment among themselves at the end of said probationary period shall, with the approval of the Secretary of the Navy, be determined by the report of a board of marine officers who shall conduct a competitive professional examination under such rules as may be presented by the Secretary of the Navy and the rank of such officers so determined shall be as of date of original appointment with reference to other appointments to the Marine Corps," it follows that the sentence by a general court martial in such cases would not result in an actual loss of numbers, as in the case of an officer not serving under a probationary appointment (File 1112–1854: 8 J: AC, September 1, 1925).

[C. M. O. No. 10—1925]

STAFF SERGEANT: RANK OF, NEXT INFERIOR TO WHAT.

Is the rank of staff sergeant the next inferior rank to those of sergeant major, quartermaster sergeant, first sergeant and gunnery sergeant, for the purpose of summary court-martial sentences involving reduction to the next inferior rank?

Held: Section 955, Naval Courts and Boards, Change No. 1, April 9, 1925, provides that the next inferior rating of noncommissioned officers holding technical warrants in the Marine Corps is that rating from which last appointed (File 1112-1854: 8 J: AC, September 1, 1925).

VOLUNTEER NAVAL RESERVE: DATE OF PRECEDENCE UPON REAPPOINTMENT IN.

An individual who reenrolled in the Naval Reserve Force, class 1, as a lieutenant July 20, 1921, and was transferred to the Naval Reserve on July 1, 1925, for the unexpired portion of his enrollment, and who applied for appointment in the Naval Reserve and was physically examined for said appointment on July 27, 1925, requests an opinion as to whether on appointment he takes rank from the date of precedence held by him in the Naval Reserve Force or from the date appointed in the Naval Reserve.

Held: The above-referred-to individual failed to make application for appointment in the Naval Reserve until July 27, 1925, seven days after his enrollment in the Naval Reserve had expired. It is accordingly decided that he is in the same status [P. 29] as any other civilian seeking appointment in the Naval Reserve, and accordingly if appointed will take rank from date of appointment and not from the date of precedence held by him in the Naval Reserve Force (File 11130-87: 4 J: AC, August 27, 1925).

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[P. 3] Lieutenant Commander Paul J. Peyton, U. S. Navy, was on March 3, 1924, on board the U. S. S. *Black Hawk*, Manila, P. I., tried by general court martial by order of the Commander in Chief, U. S. Asiatic Fleet, and convicted of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline.

Charge II.—Absence from command over leave.

Charge III.—Drunkenness.

[P. 4] The court sentenced Lieutenant Commander Peyton to be dismissed from the U. S. naval service, but the sentence was on September 25, 1925, set aside by the Secretary of the Navy with the following endorsement:

> "Subsequent to the findings of the general court martial and the approval of the convening authority in the foregoing general court-martial case of Lieutenant Commander Paul J. Peyton, U. S. Navy, considerable evidence was received in the Department which indicates that the cause of the drunkenness and unauthorized absence from his command, of which offenses Lieutenant Commander Peyton was convicted, was a serious mental disturbance leading to the indulgence in intoxicating liquor which aggravated this disturbed mental condition and produced a mental state which led to an attempt at suicide. Also from a consideration of the evidence on record it is believed that a reasonable doubt is certainly created as to the ability of Lieutenant Commander Peyton to distinguish between right and wrong, which is the legal test of responsibility (C. M. O. 24, 1914), when committing the acts with which he was charged.
>
> "In view of the undeniable fact that Lieutenant Commander Peyton was suffering from a disturbed mental condition as evidenced by his actions at the time of the commission of the alleged offenses, and the fact that additional information derived from medical observations subsequent to his conviction and other evidence presented to the Department indicates that Lieutenant Commander Peyton was not mentally sound, the findings and sentence of the general court martial in his case are hereby set aside."

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Captain Herbert Rose, U. S. Marine Corps, was on July 24, 1925, tried by general court martial at the Marine Barracks, Parris Island, S. C., by order of the Secretary of the Navy, and acquitted of the following charge: "Violation of a lawful regulation issued by the Secretary of the Navy. The Department on October 7, 1925, approved the findings and acquittal subject to the following remarks:

"Captain Herbert Rose, U. S. Marine Corps, was tried by general court martial convened by Department's precept of July 17, 1925, and acquitted of the charge "Violation of a lawful regulation issued by the Secretary of the Navy," supported by a specification alleging an unauthorized financial dealing with an enlisted man.

"It is noted that, in the prosecution of this case, the judge advocate offered, and the court received in evidence, over objection of accused counsel, a paper on which there was written and printed matter and a signature purporting to be that of the accused, without same being properly identified or its authenticity established. The receipt in evidence of this document without it first having been properly identified and the signature thereon established as that of the accused was in error.

[P. 5] "On cross-examination by the accused counsel regarding the competency of the above document which had been received in evidence, the judge advocate stated under oath as follows:

"7 A. 'It is not. I identified it as * * *.'

"'My answer to the question is as follows: I did not. I identified this paper as a legal document or paper forwarded to the judge advocate of this court by the Navy Department and introduced it in evidence before the court for what it might be worth.'

"8 A. 'According to naval and military law documents * * *.'

"'To continue with my answer, according to naval and military law documents forwarded by the Navy Department are legal evidence and it is not necessary that I be able to testify as to facts of my own personal knowledge when introducing such documents when acting as judge advocate of this court. I, of course, didn't see this paper turned over by the accused to O'Sullivan, but have introduced it in evidence as a legal document for what the court may consider it worth.'

"9 A. 'As far as my knowledge about the facts is concerned, I know this paper was forwarded from the Department to the judge advocate of this court as the original note signed by the accused. As I have stated before, from my own knowledge I could not, of course, state that this note was delivered by the accused, but in view of the fact that legal documents from the Department are acceptable as evidence, without having to be identified, signatures or otherwise, it is not necessary for me to personally state that from my own knowledge this is the case' (pp. 15 and 16 of the record of proceedings).

It appears from the foregoing that the judge advocate sought to advise the court that, according to naval and military law, documents forwarded by the Navy Department to the judge advocate of a court martial are per se legal evidence, and that identification of the document or the signatures thereon is unnecessary to qualify the document for receipt in evidence.

This statement of the law is incorrect. In oral evidence the witness is the man who speaks; in documentary evidence the competency must be proved by actual testimony, and the credit of the witness is tested by the cross-examination of those who must be called to prove its competency (Naval Courts and Boards, sec. 379).

In the case where original documents are offered in evidence, the document must be properly introduced into evidence by the proper custodian taking the stand to identify such document. (See Naval Courts and Boards, sec. 385). Every document must be authenticated, that is to say, its genuineness must be shown. This may be proved like any other fact—by calling a witness who saw it executed, or to testify as to handwriting. An exception to this general rule exists as to official documents [P. 6] (see Naval Courts and Boards, secs. 386 and 390), but these exceptions do not apply in this case. A memorandum properly proved correct may be introduced into evidence. (See Naval Courts and Boards, sec. 397.) Opinion evidence as to handwriting is allowed by statute (Sec. 398, Naval Courts and Boards).

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It is noted that the judge advocate made no attempt to lay a proper foundation for the receipt in evidence of the alleged promissory note signed by the accused or the alleged statement or confession of the accused relative thereto.

It is apparent that, had the judge advocate offered proper identification of the alleged promissory note and signature thereon (attached to the record as "K"), which evidence was available without the testimony of First Sergeant Francis A. O'Sullivan, sufficient evidence tending to prove the corpus delicti would have been in the record to justify the receipt in evidence of the alleged confession of the accused had same been established as voluntary.

It appears that this case was very perfunctorily conducted by the judge advocate of the court, Captain Alton A. Gladden, U. S. Marine Corps, and a letter of admonition will be issued to that effect.

CONFESSION OF ACCUSED IN A CERTAIN CASE: NOT ADMISSIBLE IN EVIDENCE UNLESS VOLUNTARILY MADE.

In reviewing the record of proceedings in the case of Sergeant Durward B. Morgan, U. S. Marine Corps, it has been noted that the court improperly overruled objections and admitted testimony of witnesses which should have been excluded upon objection being made. The first error in this regard was made when the court admitted over objection the remarks of a witness to the effect that witness told the accused that he should have thought of the trouble he was getting into before he tried to make money selling poison to his shipmates. This evidence was irrelevant and should have been rejected.

In addition the court admitted in evidence an alleged confession made to one of the witnesses in which the accused admitted that he found the liquor which was the subject of the trial "in a bush between his house and the Triangle." This evidence was not shown to have been voluntary on the part of the accused and was objected to by counsel. Upon objection [P. 7] being made the court should not have permitted its admission in evidence until it was affirmatively shown to have been voluntarily made.

The above irregularities are not sufficient to invalidate the proceedings in this case, inasmuch as the remaining evidence in the record is conclusive as to the guilt of the accused and, in fact, his own testimony contains a practical admission of his guilt (File 26251–34786A, G. C. M. Rec. No. 63051, August 11, 1925).

COURT SWORN: WHEN MORE THAN ONE CASE IS TRIED BY THE SAME COURT THE OATH MUST BE ADMINISTERED ANEW IN EACH CASE.

Robert E. L. Bennington, private, U. S. Marine Corps, was tried by general court martial at the Navy Yard, Washington, D. C., and convicted of "Absence from station and duty after leave had expired." He was sentenced by the court to be confined for a period of six (6) months, bad-conduct discharge and accessories.

The record in this case indicates that the court was not sworn at the commencement of this trial but had been sworn once prior to the trial of one Childress at which time the accused in this case together with three other enlisted men who were tried on separate and distinct charges on the same day in successive trials were present and given opportunity to object to the members. Upon no objection being made by either of the four accused the members and the judge advocate were sworn as was also the reporter. Thereupon all of the accused except Childress left the court-martial room and the trial of Childress was held. After the completion of Childress' trial each of the three remaining accused were brought in in turn and their trials held without the court, the judge advocate or reporter being sworn in each case. The court was evidently of the opinion that the act of swearing the members, the judge advocate, and the reporter in the presence of each of the four accused collectively was sufficient and that it was unnecessary to swear the members, the judge advocate, and the reporter in each separate case.

The oaths executed by members of a general court martial and by the judge advocate are provided for by Article 40 of the Articles for the Government of the Navy which reads as follows:

> "The president of the general court martial shall administer the following oath or affirmation to the judge advocate or person officiating as such:

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"'I, A. B., do swear (or affirm) that I will keep a true record of the evidence given to and the proceedings of this court; that I will not divulge or by any means disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law.'

[P. 8] "This oath or affirmation being duly administered, each member of the court, before proceeding to trial, shall take the following oath or affirmation, which shall be administered by the judge advocate or person officiating as such:

"'I, A. B., do swear (or affirm) that I will truly try without prejudice or partiality, the case now depending according to the evidence which shall come before the court, the rules for the government of the Navy, and my own conscience; that I will not by any means divulge or disclose the sentence of the court until it shall have been approved by the proper authority; and that I will not at any time divulge or disclose the vote or opinion of any particular member of the court, unless required so to do before a court of justice in due course of law.'"

As the above oaths are prescribed by law no departure from the form set out can be made and as the oath taken by members applies only to "the case now depending" it is apparent that a single oath cannot be taken by each of the members of a general court martial which will cover the trial of more than one case. In this connection, section 630 of Naval Courts and Boards provides as follows:

"When more than one case is tried by the same court the oath must be administered anew in each case."

It is the opinion of the department after a consideration of the provisions of the preceding paragraph that the members of the court were not legally sworn in the present case.

Until a court is duly sworn according to law it is incompetent to perform any judicial act except to hear and determine challenges against its members (sec. 629, Naval Courts and Boards). In other words, the court is without jurisdiction to try a case until it has been sworn. The judge advocate in this case contended that inasmuch as the accused made no objection to the procedure as outlined above until after the trial was completed he waived the irregularities in question and thus validated the proceedings which would have been invalid had timely objection been made. This contention is erroneous as lack of jurisdiction can be raised at any time, even after finding and sentence and approval by the convening authority. Lack of jurisdiction is absolutely fatal to the proceedings of a court martial and renders such proceedings as void as though they had never been had (*Dynes* v. *Hoover*, 61 U. S. 83; Naval Digest, jurisdiction 70; *U. S.* v. *Ball*, 163 U. S. 669).

In view of the foregoing the proceedings, findings, and sentence in the foregoing case are disapproved. Inasmuch as the court was without jurisdiction to try the accused in this case he has not been placed in jeopardy and will be tried again on the charge originally preferred against him.

Members of the courts martial cannot be urged too strongly to follow the procedure laid down in Naval Courts and Boards for court-martial trials. The procedure followed in the present case was absolutely contrary to law and to the established form [P. 9] and has resulted in invalidating what would have constituted a valid trial had the regular procedure been followed. The court's desire to save a few minutes time has resulted in the loss of considerable time and a delay in the administration of justice in the cases involved, in addition to constituting a violation of law and of the Department's instructions. The form of procedure set out in Naval Courts and Boards was designed to include only those steps necessary to be taken in a general court-martial trial, and the correct manner in which they shall be carried out, and a variance from this procedure may result, as in the present case, in rendering the proceedings null and void (File 26251–35162A, G. C. M. Rec. No. 63616, October 1, 1925).

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"DESERTION" AND "ABSENCE FROM STATION AND DUTY WITHOUT LEAVE:" BOTH CHARGES SHOULD NOT BE PREFERRED AGAINST THE SAME MAN FOR THE SAME OFFENSE.

Fred L. Sawyer, fireman second class, U. S. Navy, was tried and convicted of charge I "Desertion," II "Absence from station and duty without leave," and III "Breaking arrest." The specification of the first charge was found proved; the specification of the second charge proved by plea; and the specification of the third charge proved by plea. He was sentenced by the court to be reduced to the rating of fireman third class, to be confined for a period of three and one-half years, dishonorable discharge and accessories. The convening authority on August 28, 1925, approved the proceedings, findings, and sentence in Sawyer's case, but reduced the period of confinement adjudged to thirty months.

The specification under charge I alleges that the accused deserted from the U. S. S. *Dale* on or about April 15, 1925, and remained a deserter until he surrendered himself to the U. S. naval attaché, Paris, France, on or about July 8, 1925. The specification under charge II alleges that the accused was absent from his station and duty without leave for a period of about eighty-three days, said unauthorized leave commencing on April 15, 1925. From the above, it is apparent that the specifications under the aforesaid charges cover the same offense. It is unnecessary to prefer a charge of "Absence from station and duty without leave" in addition to a charge of "Desertion" inasmuch as the former charge can be found proved as a lesser included offense of the latter. It is improper to convict of both offenses under separate charges (Naval Courts and Boards, section 250). Therefore the finding of the court on charge II and the specification thereunder will be set aside.

The sentence as reduced by the convening authority is in excess of the Department's policy for the offenses found proved. Consequently the period of confinement is reduced to 13 months (File 26262–11884A, G. C. M. Rec. No. 63627, September 24, 1925).

[P. 10] "EMBEZZLEMENT" AND "WRONGFULLY AND KNOWINGLY SELLING SUBSISTENCE STORES OF THE UNITED STATES": AN ACCUSED SHOULD NOT BE HELD UNDER THE TWO CHARGES FOR THE SAME IDENTICAL OFFENSE.

Russell Galbraith, sergeant, U. S. Marine Corps, was tried by general court martial at the Naval Station, Olongapo, P. I., and convicted of (I) "Embezzling subsistence stores of the United States furnished for the naval service thereof" and (II) "Wrongfully and knowingly selling subsistence stores of the United States furnished for the naval service thereof." He was sentenced by the court to be reduced to the rank of private, to be confined for a period of six (6) months, dishonorable discharge and accessories. On August 5, 1925, the Commandant, Sixteenth Naval District, approved the proceedings, findings, and sentence.

It appears from the evidence that the property referred to in the specification of charge II was the same property of which the accused was convicted of having embezzled under charge I and charge II was evidently preferred in order to provide for exigencies in the proof. However, as the acts alleged in the specification of charge II constitute the act of embezzlement alleged under charge I the accused should not be held under two charges for the same identical offense, consequently the finding of the court on charge II and its supporting specification will be set aside (File 26262–11868A, G. C. M. Rec. No. 63585, September 24, 1925).

EMBEZZLEMENT: SPECIFICATION AS FOUND PROVED DOES NOT SUPPORT CHARGE OF.

Roy Whitlock, commissary steward, U. S. Navy, was tried by general court martial convened at the U. S. Naval Station, Cavite, P. I., by order of the Commandant Sixteenth Naval District and U. S. Naval Stations, Cavite and Olongapo, P. I., on two charges, viz: Charge I "Embezzlement of money of the United States intended for the naval service thereof" (3 specifications), and charge II "Scandalous conduct tending to the destruction of good morals" (1 specification).

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The court found Whitlock guilty of the first charge and acquitted him of the second charge, adjudging a sentence of reduction in rating to that of apprentice seaman, six (6) months confinement, bad-conduct discharge and accessories. The proceedings, findings, and sentence were approved without remark by the convening authority on June 11, 1925.

Each of the three specifications under the first charge alleges a specific instance of the embezzlement and conversion to his own use of public moneys by Whitlock while he acted in the capacity of cashier at the commissary store, U. S. Naval Station, Cavite, P. I., in that he received and converted to his own use money paid him in his official capacity by customers of the store in settlement of their indebtedness to the government for goods purchased by them from the store.

The court found each of these three specifications supporting the first charge proved in part, proved except the words "convert to his own use," which words are found not proved.

[P. 11] A naval general court martial is given jurisdiction of the crime of embezzlement by article 14, clause 8, of the Articles for the Government of the Navy. Embezzlement is a statutory and not a common-law crime (Clark and Marshall on Crimes), and the common law cannot, therefore, be resorted to for its definition. The constituent elements of the offense are generally understood, however, and the Federal courts have defined its usual meaning and given it that construction in construing statutes in which the term "embezzle" only is used without specifically providing what constitutes the offense. In *U. S.* v. *Harper*, 33 Fed. 474, the court said: "The term 'embezzle' as used in this count of the indictment, and in the statute, is a word having a particular meaning * * *. It is especially applicable to the unlawful conversion of property by clerks, agents, and servants, acting in fiduciary or trust capacities * * *. It involves two general ingredients or elements—First, a breach of trust or duty in respect to the moneys, properties, and effects in the party's possession belonging to another; and, secondly, the wrongful appropriation thereof to his own use." (See also *U. S.* v. *Northway*, 120 U. S. 327; *Moore* v. *U. S.*, 160 U. S. 268; and *U. S.* v. *Greve*, 65 Fed. 488).

It is evident from the foregoing definition of embezzlement that the wrongful appropriation or conversion of funds must be established in order to convict of the offense.

In view of the fact that each specification under the first charge specifically alleged "did, * * *, embezzle and convert to his own use," the element of conversion contained in the word "embezzle" was alleged with particularity. The court, in its findings on each of the three specifications supporting the first charge, specifically excepted the words "convert to his own use," finding them not proved, and thereby declared this essential element of the offense, as contained both in the word "embezzle," which it found proved, and the specific allegation, not established. The specifications, as found proved, do not, therefore, support the charge of which Whitlock was found guilty, consequently the findings on the first charge, and the sentence in this case, are set aside (File 26262–11807A, G. C. M. Rec. No. 63300, September 5, 1925).

FINDING NOT IN ACCORD WITH EVIDENCE: IMPORTING LIQUOR.

Katherine C. Glancy, nurse, U. S. Navy, was tried by general court martial at the Navy Yard, Washington, D. C., on the charge of "Importing liquor" and was acquitted thereof.

The specification under which Miss Glancy was tried reads as follows:

> "In that Katherine C. Glancy, now a nurse, U. S. Navy, while so serving pursuant to lawful orders en route from the U. S. Naval Station, Guantanamo Bay, Cuba, to the U. S. Naval Dispensary, Navy Department, Washington, District of Columbia, did, on or about April 14, 1925, on board **[P. 12]** the U. S. S. *Kittery*, willfully, knowingly, and unlawfully import into the United States, intoxicating liquor, in quantity about four quarts, in violation of the act of October 28, 1919, forty-one statutes at large, three hundred and five."

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The evidence in this case shows that the U. S. S. *Kittery* arrived at Norfolk, Va., on April 14, 1925; that Mr. J. B. Boone, deputy collector and inspector of customs, saw Miss Glancy, the accused, on board the *Kittery* on April 14; that on April 22 Mr. Boone inspected some personal effects that were manifested as from the *Kittery*, the consignee being named as "Nurse K. C. Glancy." This examination was made at the Naval Operating Base and among the articles searched was a cedar chest which was crated and in which was found a pillow containing four bottles. These bottles were introduced in evidence, three of which were labeled "Haig and Haig" and one "Vermouth." Testimony was elicited from Mr. Boone after an examination of the contents of the bottles to the effect that in his opinion these bottles contained whisky.

The foregoing evidence was not rebutted by the defense, the only evidence being offered pertaining to the previous good character of the accused.

The department is of the opinion, after a consideration of the evidence in this case, that it was not only sufficient to sustain conviction but the only logical and reasonable conclusion which can be drawn from the evidence is the guilt of the accused of the offense charged. In acquitting the accused it is evident that the court carried to an unreasonable extreme the doctrine of reasonable doubt when, from the evidence adduced there could have been no reasonable doubt. Consequently the finding and acquittal in the foregoing case is disapproved (File 26251–34844Y, G. C. M. Rec. No. 63151, July 31, 1925).

PERJURY: POSITIVE AND DIRECT EVIDENCE IS ABSOLUTELY NECESSARY TO PROVE.

Harry C. Tinsley, private, U. S. Marine Corps, was tried by general court martial at the Naval Operating Base, Hampton Roads, Va., and convicted of "Scandalous conduct tending to the destruction of good morals." He was sentenced by the court to be confined for a period of six (6) months, dishonorable discharge and accessories.

The specification of the charge under which Tinsley was tried reads in part as follows:

> "In that Harry C. Tinsley * * * having on March 27, 1925, been duly sworn as a witness before a general court martial by the president thereof, said court martial being then convened at the naval operating base, Hampton Roads, Va., did, willfully, falsely, and contrary to said oath, testify as follows: '16. Q. What leads you to believe that you think you saw liquor in the possession of [P. 13] the accused? A. I bought a pint of whisky from some man. I think he was the man—I don't know; I was drinking at the time.' '17. Q. Can you state positively whether you bought some whisky from the accused on or about February 2, 1925, or not? A. No, sir; I cannot.' '18. Q. Can you state positively whether you saw any liquor in the possession of the accused on February 2, 1925? A. No, sir; I cannot.' '24. Q. Do you wish to change your testimony in any way? A. I didn't read the paper, sir. I was sick and under the influence of whisky. He came over to me and he said you have got to come over here and sign this paper. He sent a man over after me. He had about seven papers there. I signed the top paper and I turned away and he said "that's all" and I walked out.' '27. Q. Did you tell the commanding officer the same story as is in this statement? A. I don't remember, sir.' '29. Q. Were you drunk or sober when you signed it? A. I was drunk—I was about half drunk,' which testimony that 'I think he was the man—I don't know; I was drinking at the time'; 'no, sir; I cannot'; 'no, sir; I cannot'; 'I didn't read the paper, sir. I was sick and under the influence of whisky'; 'I was drunk—I was about half drunk,' was false; whereas, in truth and in fact the said Tinsley knew that he, the said Tinsley, had seen liquor in the possession of the accused; that he, the said Tinsley, recognized the accused as having sold to the said Tinsley, said liquor; that the said Tinsley had read and signed the written statement made by him; and that the said Tinsley was not drunk at the time of making said statement; and the said false testimony was known by him, the said Tinsley, to be false, was material to the issue then and there being tried, and was given with intent to deceive the said general court martial."

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The only evidence offered by the prosecution to prove the falsity of the answers to questions 16, 17, and 18, was the previous statements of the accused himself before Captain McDonald, U. S. M. C., Captain Kingston, U. S. M. C., and Colonel Davis, U. S. M. C., the gist of which was that he positively recognized the accused in the general court-martial case before which he made the alleged false statements, as the person who sold him intoxicating liquor on or about February 2, 1925, that he positively saw liquor in the possession of the accused, Schillenkamp, and that he was perfectly sober at the time. No testimony of witnesses to the transactions in question and the condition of the witnesses at the time of the alleged sale by Schillenkamp was offered. Therefore the only evidence to establish the falsity of the testimony of the accused before Schillenkamp's general court martial was the inconsistent statements of the accused, in one instance stating positively that certain things occurred and existed and in another that he was not positive of the existence of those things and conditions.

[P. 14] In the case of *Clayton* v. *United States*, 284 Fed. 540, the following opinion was rendered by the court concerning the sufficiency of evidence to establish the falsity of testimony alleged in an indictment to be perjured testimony:

> "In prosecutions for perjury it has long been settled that not only must the guilt of the accused be established beyond reasonable doubt, as in other criminal cases, but that the falsity of the matter sworn to by him must be proved by direct and positive evidence. Thus, in *Allen* v. *United States*, 194 Fed. 664, this court quotes with approval the following statement of the rule in 30 Cyc. 1452:
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> " 'Positive and direct evidence is absolutely necessary in a perjury case. Circumstantial evidence standing alone is never sufficient.'
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> "Moreover, where oral testimony exclusively is relied upon to prove the perjury charged, there must be two witnesses, or one witness corroborated by circumstances independently proven (*United States* v. *Wood*, 39 U. S. 430; 30 Cyc. 1452).
>
> "In the case at bar no attempt was made to prove by 'positive and direct evidence' that defendant made false answers to the first two questions set out in the indictment namely, whether he had procured any intoxicating liquor from any person during the period named, and whether he had had any intoxicating liquor in his possession during that period. Indeed, the only evidence in support of these assignments is the testimony of two witnesses as to what defendant had told them in private conversation some time before the grand jury met. This was quite insufficient, for the falsity of a sworn statement is not shown by proof of an unsworn contradictory statement. In view of the strong presumption of innocence, and because of the solemnity of an oath, credit must be given to what defendant said under oath, rather than to what he may have said to the contrary when not under oath (*Billingsly* v. *State*, 49 Tex. Cr. r. 620; 30 Cyc. 1455; Wharton's Crim. Evidence, 387)."

No discussion of the law laid down in the foregoing case is required to show the insufficiency of the evidence adduced at the trial of this case to prove the falsity of the testimony of the accused before the general court-martial trial of Schillenkamp, covered by the answers to questions 16, 17, and 18. The findings of the court, therefore, are not fully covered by the evidence adduced at the trial. consequently the finding and sentence on the charge and the specification thereunder are disapproved (File 26251–34809A, G. C. M. Rec. No. 63266, August 31, 1925).

PERJURY: PROOF OF.

William Lebowitz, chief water tender, U. S. Navy, was tried by general court martial at the Navy Yard, Boston, Massachusetts, on the charges of (I) "Conduct to the prejudice of good **[P. 15]** order and discipline" (3 specifications), and (II) "Scandalous conduct tending to the destruction of good morals" (2 specifications). He was found guilty of charge I and the first specification thereunder, and charge II and the specifications thereunder, and not guilty of specifications 2 and 3 of charge I. The court sentenced the accused to lose pay amounting to $471 and to be discharged from the naval service with a bad conduct discharge.

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The first specification under charge II reads as follows:

"In that William Lebowitz * * * having, on March 23, 1925, been duly sworn as a witness at his own request and in his own behalf before a board of investigation, by the recorder thereof, said board of investigation having been then and there lawfully convened and empowered to administer oaths, by order of the commandant, navy yard, Boston, Mass., 'to inquire into and report upon the unlawful operation of a still on board the U. S. Navy harbor tug number *seventy-one* at the Navy Yard, Boston, Mass., during the period from October 26, 1924, to March 7, 1925,' did, then and there, willfully, falsely, corruptly, and contrary to said oath, in answer to the question asked him, the said Lebowitz, by the recorder of said board, 'Witness Donaldson stated that he had distilled denatured alcohol and that it was returned to the commissary. Have you anything to say relative to that matter,' testify as follows: 'He may have for all I know. He didn't return it to me. I didn't see it,' which said testimony, namely the testimony 'He may have for all I know. He didn't return it to me. I didn't see it,' was false; whereas, in truth and in fact, the said Donaldson had, on or about January 23, 1925, delivered distilled denatured alcohol to him, the said Lebowitz, at the said commissary store, as he, the said Lebowitz well knew; and the said false testimony was known by the said Lebowitz to be false, was material to the issue then and there being investigated by the said board of investigation and was given with the intent to deceive the said board of investigation."

In order to legally convict the accused of the offense alleged in the above-quoted specification it was necessary to establish that the sworn testimony quoted therein was given by the accused, was material to the issue, and was knowingly false and made with the intent to deceive. In order to establish this offense the prosecution offered in evidence the record of the board of investigation before which the alleged false testimony was given which established that he made the statements in question. The only evidence presented to establish that the testimony of the accused before the board was false was the testimony of one Donaldson, engineman first class, who, it appears, was the party who received from the commissary store certain denatured alcohol which he stated he distilled and returned to the accused for drinking purposes. At common law it was necessary in proving a case of perjury, which is the offense [P. 16] alleged in the above-quoted specification, to establish that the alleged perjured testimony was false by the direct testimony of two credible witnesses. This rule has long since been relaxed, however, and it is now held that a charge of perjury may be sustained by either the testimony of two credible witnesses, or by that of one witness and corroborating circumstances. But the oral testimony of one witness is insufficient (*U. S.* v. *Hall*, 44 Fed. 864; *Boren* v. *U. S.*, 144 Fed. 801; *Clayton* v. *U. S.*, 284 Fed. 537). The underlying principle of this rule is, that if there be but one witness to prove the allegation of falsity, then oath is placed against oath and it remains doubtful where the truth lies, the oath of the accused, which is alleged to be false, being sufficient to counterpoise the testimony of a single witness (*U. S.* v. *Hall*, 44 Fed. 864). This requirement applies, however, only to proof of the falsity of the oath. A single witness is sufficient to establish the taking of the oath and the matter sworn to (*U. S.* v. *Hall*, supra). As stated the testimony of Donaldson was the only evidence offered to establish the falsity of the testimony of the accused before the board which is referred to in the above specification, and was insufficient, in view of the foregoing, to establish the falsity of the accused's testimony. The finding of the court on specification 1 of charge II is disapproved.

In view of a recommendation to clemency signed by five members of the court, the bad-conduct discharge will be remitted (File 26251–34823X: A, G. C. M. Rec. No. 63207, September 5, 1925).

SPECIFICATION FAULTY: DOES NOT SUPPORT THE CHARGE.

Thomas F. Mulgrew, seaman first class, U. S. Navy, was tried by general court martial on the charges of I "Disobeying the lawful order of his superior officer," II "Threatening to assault his superior officer while in the execution of the duties of his office," and III "Striking another person in the Navy." He was found not guilty of the offense alleged in the

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specification of charge I and guilty of those covered by charges II and III and was sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of five (5) years, dishonorable discharge and accessories. On June 30, 1925, the convening authority approved the proceedings, findings, and sentence but reduced the period of confinement with corresponding accessories to three (3) years.

The specification of charge II reads as follows:

> "In that Thomas Francis Mulgrew, now a seaman first class, U. S. Navy, while so serving on board the U. S. S. *Worden*, did, on or about May 13, 1925, on board said ship, having been ordered by one Hughie Furl Dunbar, then a coxswain, U. S. Navy, who was then on duty as petty officer of the watch on said ship, to stand by the [P. 17] deep-sea sounding apparatus, say to him, the said Dunbar, 'You ain't going to get away with this any longer,' or words to that effect."

It will be noted that this specification does not contain a threat to assault Dunbar. An assault is an unlawful offer or attempt with force or violence to do a corporal hurt to another (Clark and Marshall on Crimes). The mere fact that the accused remarked "You ain't going to get away with this any longer" without further allegations of the circumstances surrounding the making of these remarks, does not necessarily mean that the accused had corporal injury in mind. An essential averment of the specification is therefore lacking.

It has long been recognized in naval law that a specification must be complete in itself and must contain every element of the offense charges (Naval Courts and Boards, sec. 198, 210). Furthermore, failure to include within the specification essential requirements and particulars of the offense constitutes an error in substance and cannot be cured by verdict (*U. S.* v. *Hess*, 124 U. S. 483). In the case cited the court stated as follows:

> "The general and, with few exceptions * * * the universal rule, on the subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially or by way of recital."

A further discussion of this point is contained in the case of *People* v. *Albow*, 140 N. Y. 130, in which case the court rendered the following opinion:

> "A criminal charge may be and often is supported by inferences from facts which imply the existence of the principal fact constituting the offense. But the principal fact must be charged in the indictment. It is not sufficient to allege the facts from which an inference of the principal fact may be drawn, without charging the principal fact. The settled rule of criminal pleadings requires that all the elements which enter into the definition of an offense must be stated in the indictment. The strictness which formerly prevailed in respect to unessential matters in indictments which often defeated the ends of justice has been properly relaxed. But the rule that the offense must be charged in plain and intelligible language, and that the indictment must set forth all the essential elements of the crime, is and ought to be preserved alike for the protection of the accused and in the interest of the certain and orderly administration of the criminal law."

In the present case the gravamen of the offense charged is that the accused spoke certain words to his superior officer, and that in speaking those words, he intended to threaten bodily injury. The intent of the accused in using the words is therefore [P. 18] a very important element of the offense necessary to be alleged and proved. The failure to include an allegation of intent to assault in the specification under consideration constitutes, in the opinion of this office, in view of the above citations, a fatal defect. The proceedings and findings on charge II are accordingly set aside.

Charge III, "Striking another person in the Navy" is the only charge remaining, and as the limitation of confinement for this offense is one (1) year, the period of confinement with corresponding accessories will be reduced to one (1) year (File 26262–1179SA, G. C. M. Rec. No. 63247, September 19, 1925).

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STOLEN GOODS: ILLEGAL POSSESSION OF, SHOULD NOT BE INCORPORATED AS A SEPARATE CHARGE, WHERE ACCUSED IS ALSO CHARGED WITH THEFT, OF THE SAME GOODS.

Carl E. Jellum, seaman second class, U. S. Navy, was tried and convicted of charge I "Theft," and II "Knowingly having in his possession goods which had been feloniously stolen from another." The accused entered a plea of guilty to both charges and the specifications thereunder. He was sentenced by the court to be reduced to the rating of apprentice seaman, to be confined for a period of six (6) months, dishonorable discharge and accessories. The convening authority on August 5, 1925, approved the proceedings, findings, and sentence.

The specification under charge I alleges that Jellum stole a sum of about twenty-five dollars and a pocketbook of the value of about eight dollars. The specification under charge II alleges that Jellum had in his possession the aforesaid twenty-five dollars and pocketbook. It would appear that charge II was preferred to cover exigencies of proof, but inasmuch as the possession of property of which a person is also charged with having stolen is merely an incident of the charge of "Theft," the accused should not have been held under both the charge of theft and the charge of having stolen property in his possession, accordingly the finding on charge II and the specification thereunder will be set aside (File 26262–11772A, G. C. M. Rec. No. 63576, September 24, 1925).

AIRCRAFT MANEUVERS: ARMY APPROPRIATION ACT OF 1920; FLIGHTS MADE BY "SHENANDOAH" LEGAL.

The following provision is from the Army Appropriation Act of 1920: "and provided further, That hereafter the Army Air Service shall control all aerial operations from land bases, and **[P. 19]** naval aviation shall have control of all aerial operations attached to a fleet, *including shore stations whose maintenance is necessary for operation connected with the fleet, for construction and experimentation and for the training of personnel.*" The act as originally drafted did not contain the *italicized* portion, as shown above, and it was at once seen that should the bill pass as it stood, the Naval Aviation Service would pass to the control of the Army, except while the hydroplanes were in absolute use with the fleet at sea.

Held: The naval air station at Lakehurst, N. J., is maintained as a necessary unit in connection with the fleet, and the Secretary of the Navy has control over all aerial operations from that station. All flights made by the *Shenandoah* were projected from that station, which by law, is under naval control, consequently, all flights which were authorized by the Secretary of the Navy, to be made from that station, whether for experimentation, for the training of personnel, or other purposes, were aerial operations, which the Navy had authority to undertake (File 26983–1843 AD/3, October 1, 1925).

FLEET NAVAL RESERVE: TRANSFER OF ENLISTED MEN TO; EFFECTIVE FROM DATE ORDERED BY THE SECRETARY OF THE NAVY.

J. K., an enlisted man of the Navy, made the proper request for transfer to class 1–C, Fleet Naval Reserve, which application was duly approved by the proper authority who directed that such transfer be effective June 24, 1924. In the meantime the man was transferred to another command, where on July 3, 1924, he was discharged from the naval service, the order directing his transfer to the Reserve not having reached him. Question presented: Was the transfer to the Reserve effective on June 24, 1924, and was his discharge on July 3, 1924, legal?

Held: Since July 1, 1922, the Department has had two cases to decide, the facts of which are almost identical in principle with the ones presented in the case at hand (Tatro and Dalton). In each instance it was decided that the date on which the Secretary of the Navy ordered the transfer to take effect was governing date, and relative to this question the Attorney General, on July 17, 1924, said in substance that when the Secretary of the Navy has transferred a man to the Fleet Naval Reserve, his eligibility has been estab-

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lished in the only way provided by law and that such transfer is conclusive on everyone. Applying the above decision, with those of Tatro and Dalton, to this case, the transfer of J. K., to the Fleet Naval Reserve became an accomplished fact on June 24, 1924, and by the act of August 29, 1916, his discharge on July 3, 1924, was illegal, as by that act, the discharge of transferred members of the Fleet Naval Reserve is prohibited "without their consent, except by sentence of a court martial" (File 28550–1899 J : AC, October 8, 1925).

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[P. 3] Major Henry M. Butler, U. S. Marine Corps, was tried by general court martial at Marine Barracks, Washington, D. C., August 20, 1925, by order of the Secretary of the Navy and was acquitted of the following charges:

Charge I. Drunkenness.

Charge II. Unlawfully having intoxicating liquor in his possession.

On October 31, 1925, the Secretary of the Navy disapproved the findings and acquittal and concurred in the following endorsement which was placed on the record by the Deparement:

> "Major Henry M. Butler, U. S. Marine Corps, was tried by general court martial convened at the Marine Barracks, Washington, D. C., by order of the Secretary of the Navy [P. 4] and acquitted on the following charges: (I) Drunkenness, (II) Unlawfully having liquor in his possession.
>
> "The charges and specifications read as follows:
>
> *Charge I.*—Drunkenness.
>
> "*Specification.*—In that Henry M. Butler, now a major, U. S. Marine Corps, while so serving at the U. S. marine barracks, Quantico, Va., was, on or about April 30, 1925, in the city of Washington, D. C., under the influence of intoxicating liquor and thereby incapacitated for the proper performance of duty.
>
> "*Charge II.*—Unlawfully having intoxicating liquor in his possession.
>
> "*Specification.*—In that Henry M. Butler, now a major, U. S. Marine Corps, while so serving at the U. S. marine barracks, Quantico, Va., did, on or about April 30, 1925, in the city of Washington, D. C., in violation of section three, title two of the National Prohibition Act, willfully, knowingly, and unlawfully, have in his possession intoxicating liquor in the amount of about two quarts."

In support of charge I the prosecution called nine witnesses. The first witness, Terry, a police officer, testified that he did not think the accused was drunk—that he did not look drunk to him. The second witness, Brandt, a police officer testified that he could detect a slight odor of some alcoholic drink on the accused, but that he was not drunk. The third witness, Fithian, a civilian, testified that the accused had been drinking, that his eyes were bloodshot and fiery and that he acted in a very nervous state. The fourth witness, Ford, a civilian, testified that the accused had been drinking, that he would not say he was intoxicated, that he was wavering, was able to stand, but not steadily, but that he was not in a fit condition to command troops. The fifth witness, McAuliffe, a police officer, testified that it looked to him as though the accused had had a few drinks—but there was no drunkenness. The sixth witness, Wren, the deputy clerk of the police court, testified that at the police court the accused looked as though he had been drinking, that his hair was slightly dishevelled and his face slightly flushed. The seventh witness, Connor, a civilian testified that the accused [P. 5] looked drunk, that he looked as if he could not hold himself up and was staggering all around the place. The eighth witness, Lester, a police officer testified that at the police court the accused had a strained appearance, walked regular, speech slightly incoherent but that he talked logically on various subjects and was in good condition when he left the police court. The ninth witness, Mrs. Gilbert, a civilian, testified that the accused was intoxicated, that he was so drunk that he was quiet, very drunk but quiet—liquor on his breath and propping himself up against the automobile all the time.

The test as to what constitutes drunkenness is set forth in C. M. O. No. 1, 1922, in which it is stated that "The Articles for the Government of the Navy do not require any particular degree of drunkenness, and it is considered that such

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charge is supported by showing incapacity for the full performance of duty as a result of indulgence in intoxicating liquor," and that drunkenness is "any intoxication which is sufficient to sensibly impair the rational and full exercise of the mental and physical faculties."

From a consideration of the rule set forth above in connection with the evidence before the court the Department is of the opinion that the guilt of the accused on charge I was established beyond a reasonable doubt and that the finding and acquittal on charge I are not in accordance with the evidence adduced.

In support of charge II the prosecution established that the accused removed a bottle from his automobile and threw it into a side lot where it broke. The broken bottle was found, it smelled of whisky, had a label marked "Scotch Whisky," and the ground where it was broken was wet and smelled of whisky. The prosecution further established that the wife of the accused removed a bottle from his automobile and placed it in the bushes. This bottle was labelled "Royal Vat Whisky," was turned over to a police officer, marked for identification, offered in evidence before the court, and was found to contain whisky.

The evidence introduced by the prosecution clearly established that the accused had intoxicating liquor in his possession. Since under the National Prohibition Act possession of intoxicating liquor is prima facie unlawful and the burden rests on the possessor to show its lawfulness (*Fineburg* v. *U. S.*, 2 F. (2d) 955), the prosecution established a prima facie case of illegal possession.

As the accused offered no evidence in explanation of such possession the Department is of the opinion that the guilt of the accused on charge II was established beyond a reasonable doubt and that the finding and acquittal on that charge are not in accordance with the evidence adduced.

In the opinion of the Department the proceedings are legal. It is recommended that findings and acquittal on charges I and II and the specifications thereunder be disapproved.

[P. 7] Lieutenant (j. g.) Vilas R. Knope, U. S. Navy, was on April 1, 1925, tried by general court martial at Naval Operating Base, Pearl Harbor, T. H., by order of the Commandant, Naval Operating Base, Pearl Harbor, T. H., on the following charges:

Charge I.—Conduct unbecoming an officer and a gentleman.

Charge II.—Conduct to the prejudice of good order and discipline.

Charge III.—Falsehood.

The court acquitted Lieutenant Knope of the first and third charges and convicted him of the second charge. He was sentenced to lose one hundred (100) numbers in his grade. As a result of the following remarks and recommendations being spread upon the record by the Judge Advocate General, the Secretary of the Navy on November 3, 1925, disapproved the findings on charge II, and the specification thereunder, and accordingly set the sentence aside:

> "Vilas R. Knope, lieutenant (j. g.) U. S. Navy, was tried by general court martial at the Naval Operating Base, Pearl Harbor, T. H., on the charges of I 'Conduct unbecoming an officer and a gentleman' (3 specifications), II 'Conduct to the prejudice of good order and discipline,' and III 'Falsehood' (2 specifications). He was found guilty of the offense alleged under charge II and not guilty of the remaining offenses and was sentenced to lose one hundred numbers in his grade. On April 20, 1925, the Commandant, Naval Operating Base, Pearl Harbor, T. H., approved the proceedings, findings, and sentence.
>
> "In reviewing the record of proceedings in this case it is noted that the court admitted over objection of counsel a letter from the Chief of the Bureau of Navigation addressed to the Commandant Fourteenth Naval District, the contents of which follow:
>
> " '1. Copies of references (*a*) and (*b*) are, it is presumed, on file in the office of the Commanding Officer, Naval Air Station, Pearl Harbor, who should, it is believed, be able to testify in regard to the subject matter thereof from his own knowledge as the result of his interviews with Lieut. Knope.
>
> " '2. Taken in connection with above references, enclosed photostats serve to present what is believed to be a complete case against Lieut. Knope, and it is believed that evidence is available in the Fourteenth Naval District to

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sustain the charge against that officer of having given a worthless check. It will be noted that one of the enclosures is a photostat of a document signed by a Mr. C. T. Littlejohn, Jr., of the city of Honolulu who, together with the proper representatives of the Bank of Hawaii, Limited, and the First National Bank of Hawaii, would it is believed, be able to give direct testimony as to the worthlessness [P. 8] of Lieut. Knope's check dated June 3, 1924, for $150. This check is manifestly the same one referred to in reference (*a*) and (*b*).

"'3. It is noted that demand and protest of this check is said to have been forwarded, properly addressed to Lieut. Knope. It is not known to the Bureau whether or not that officer reported to his commanding officer that his check had been protested and his official statement thereby compromised; it is held that he should have done so. Whether he did or not is a matter as to which the Commanding Officer, Naval Air Station, Pearl Harbor, can undoubtedly testify.

"'4. It is considered possible that this matter may have been presented to the Commandant's attention by the civil authorities at Honolulu or reported by Lieut. Knope, and that, thereafter, the Commandant has taken action in the case. If, however, the Commandant has as yet taken no action, it is desired that he do so, and the Bureau, considering all features of this case in their proper connection with Lieut. Knope's record in such matters, recommends that the Commandant try this officer by general court martial.'"

This letter pertains to the offense alleged under charges II and contains matter extremely prejudicial to the accused in that it expresses an opinion that a complete case is made out against Lieutenant Knope.

The above-quoted letter was not admissible under any rule of evidence as it was an ex parte statement and a hearsay document. The fact that it emanated from the Chief of the Bureau of Navigation does not make it admissible (C. M. O. 2, 1921, 20). The admission of this letter, in the opinion of this office, constitutes a fatal defect.

The specification of charge II alleges in substance that the accused induced the Auto Dealers Finance Company of Pensacola, Fla., to accept as part payment of an indebtedness a check dated June 3, 1924, drawn by the accused, the latter well knowing that he did not have sufficient funds on deposit on June 4 in the bank upon which drawn to cover said check, and did allow said check upon presentation at the bank to be dishonored because there were insufficient funds to provide for its payment. From the evidence adduced it is noted that the accused, upon learning that the check in question had been presented at the bank and protested, immediately provided the necessary funds to cover the check and protest fees, these funds being provided the day following protest. The evidence further shows that the wife of the accused requested an employee of the bank to advise her upon arrival of the check in order that the necessary funds to pay it could be deposited. Through some oversight on the part of the bank employee, Mrs. Knope was [P. 9] not informed of the arrival of the check, and it was dishonored without her knowledge or that of the accused. It is evident from these facts that the accused had no intention to allow the check in question to be dishonored, and exhibited no dishonorable indifference to the payment of the check, which, in the opinion of this office, is essential to constitute the offense charged.

In view of the foregoing, it is recommended that the finding of the court on charge II, and the specification thereunder and the sentence in this case be set aside.

This office cannot concur with the comment of the convening authority concerning the court's action in rejecting certain evidence which had been offered by the prosecution and objected to by counsel for the accused. The greater part of this evidence consisted merely of letters which were ex parte statements and hearsay, and as such inadmissible. For example, the court properly refused to admit in evidence a letter for the firm of Bailey, Banks, and Biddle Company, addressed to the Navy Department which contained an assertion that the accused owed them a bill amounting to thirty dollars ($30), which was evidently offered for the purpose of establishing the allegations in specification 3 of charge I, that the accused was "indebted to Bailey, Banks, and Biddle Company, of Philadelphia, Pa., in the sum of thirty dollars ($30)." This letter was merely a hearsay document.

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This case appears to be one in which, because of the inability of the prosecution to secure witnesses who, of their own knowledge, could establish the allegations in the specifications, resort was had to correspondence concerning the alleged offenses which as pointed out above, was hearsay and inadmissible. The proper way to establish that the accused was justly indebted to the concerns named in the specifications of charge I, for example, was to present as witnesses the bookkeepers or other officials or employees of the concerns who could present the books of the concerns in evidence to show the indebtedness of the accused, such witnesses being the ones who actually made the records or under whose direction the records were made. In this connection see Court Martial Order 9, 1924, 3. If such witnesses were unavailable, and such appears to have been the situation in the present case, resort to depositions should have been had. In any event letters from the alleged creditor concerns would be inadmissible as being hearsay and depriving the accused of his right to be confronted by the witnesses against him and to submit them to cross-examination.

It is the opinion of this office that the proceedings and findings on charges I and II and the specification thereunder are legal.

[P. 11] AN ACCUSED CANNOT BE FOUND GUILTY OF AN OFFENSE OTHER THAN ONE WHICH IS ENUMERATED AS A LESSER INCLUDED OFFENSE UNDER THE ORIGINAL SPECIFICATION.

In reviewing the record of proceedings in the case under consideration it is noted that the accused was tried on the charge of "Sleeping on watch," but that the court, in arriving at a finding, found the specification proved except the word "sleep," which word was found to be not proved, and for which excepted word the court substituted the words, "and prior thereto did fail to keep a proper log of his watch and to conserve his electrical power, as it was his duty to do," which substituted words were found to be proved. After arriving at this finding the court sentenced Wilchens to reduction to the next inferior rating. The proceedings, findings, and sentence were approved by the convening authority, who was also the senior officer present, on September 17, 1925.

The Department is of the opinion that the court in substituting the words above set forth found the accused guilty of a specification totally different and distinct from the specification originally preferred. The effect of this action was to find the accused guilty of the commission of an offense of which he was not charged and against which charge he was not prepared to defend himself. To find an accused guilty of an offense without first advising him concerning the facts and circumstances surrounding the commission of the offense is not consonant with the principles of naval justice.

In view of the foregoing the finding and sentence in the case of the above-named man will be set aside (File 26287–10617 C, October 22, 1925).

EMBEZZLEMENT: CHARGE OF, NOT SUBSTANTIATED.
HEARSAY EVIDENCE

Warren C. Dowell, yeoman second class, U. S. Navy, was tried by general court martial at the Naval Operating Base, Hampton Roads, Va., on the charge of "Embezzlement" (13 specifications). He was found guilty as charged under eight (8) specifications and not guilty under one specification, and was sentenced by the court to be reduced to the rating of apprentice seaman, to be confined for a period of two (2) years, dishonorable discharge and accessories. Four (4) specifications were nolle prossed.

The first specification of the charge reads as follows:

> "In that Warren C. Dowell, now a yeoman second class, U. S. Navy, while so serving as Navy mail clerk on board the U. S. S. *Vestal* and as such Navy mail clerk being employed in the Navy branch of the U. S. postal service, having received into his possession and under his control, in the execution and under color of his office, as aforesaid, the sum [P. 12] of

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about twelve dollars ($12) in lawful money of the United States, from one John H. Kirby, then a seaman second class, U. S. Navy, serving on board the U. S. S. *Vestal*, for the purpose of paying the charges on a collect-on-delivery parcel placed in the United States mails by Hyman Gruskin of Brooklyn, N. Y., did, on or about October 13, 1923, exact date to the relator unknown, on board said ship, feloniously embezzle and convert to his own use the said sum of money of about twelve dollars ($12), the property of the United States intended for the postal service thereof."

The remaining specifications allege like offenses, differing only in names, amounts, and dates.

It appears from the evidence that it was the duty of the accused as mail clerk to deliver collect-on-delivery parcels to the persons to whom addressed, collect charges thereon, and to remit the amount due the sender of the parcel by postal money order. For the purpose of establishing that Gruskin, the party named in the above-quoted specification, had not received a remittance to cover the amount due on the collect-on-delivery parcel for which the accused collected twelve dollars ($12) from Kirby, the judge advocate offered in evidence an Application for Indemnity For Lost C. O. D. Parcel, which had been executed by Gruskin. The accused objected to the admission in evidence of this document but the court overruled the objection and it was received in evidence. Gruskin himself did not testify at the trial and the only identification of the document consisted of the testimony of the post-office inspector who stated that the claim in question was submitted to him in the course of official business by the U. S. Post Office Department, but the inspector knew nothing about the facts stated on the face other than what he obtained from reading the document itself.

Section 388 of Naval Courts and Boards recites the rule concerning the admissibility of documents of the character referred to in the preceding paragraph. This section reads in part as follows:

"Where the author of a document does not appear as a witness, it remains only a hearsay statement and can be received only under some exception to the hearsay rule. Thus, in general, ex parte affidavits, letters from members of the family of the accused, certificates from a physician that an accused has been under medical treatment, etc., the admission of which would in effect permit the author to testify without submitting him to cross-examination, are mere hearsay statements and are inadmissible in evidence * * *."

And section 410 of Naval Courts and Boards provides that "an affidavit differs from a deposition in that it is taken ex parte [P. 13] and offers the opposite party no opportunity to cross-examine the maker thereof. An affidavit, therefore, is not admissible in evidence for the purpose of proving the subject matter with which the affidavit deals. A rule to the contrary would, in effect, permit a person to testify without subjecting him to cross-examination by the party against whom his testimony is given." The application for indemnity which was executed by Gruskin was in the form of an affidavit and was inadmissible in evidence as being merely an ex parte affidavit not falling within any of the exceptions to the hearsay rule. In the opinion of the Department the admission of this document constituted a fatal error insofar as specification 1 is concerned.

The same character of affidavits as discussed above were introduced over objection without the party making them being called as a witness in connection with specifications 2, 4, 7, 12, and 13. The proper procedure to have followed was for the judge advocate to offer as witnesses the parties making the affidavits who, of their own knowledge, could testify as to the facts stated in these documents, and who could have been cross-examined by the defense in connection therewith. If any of them could not have been offered as witnesses in person the judge advocate should have obtained their depositions under the authority of the act of February 16, 1909, section 16 (35 Stat. 622), the provisions of which are set out in section 112 of Naval Courts and Boards.

With reference to specification 6, the evidence shows that the accused delivered to one E. C. Raynor, an electrician's mate second class, a collect-on-delivery parcel and received for transmittal to the sender twelve dollars ($12) charges

thereon. It was the duty of the accused to remit the twelve dollars to the sender of the parcel by postal money order but no record of a money order transmitting this amount to the party involved could be found in the money-order register. The sender of the collect-on-delivery parcel did not appear as a witness at the trial and there is no positive evidence on record to the effect that he did not receive the twelve dollars due him on this transaction. In the opinion of the Department such evidence is essential to establish a prima facie case and the failure of the prosecution to produce the sender of the collect-on-delivery parcel to establish that he in fact did not receive the money due him, leaves the record with insufficient evidence to sustain the conviction of the accused on this specification.

In view of the foregoing, the findings of the court on specifications 1, 2, 4, 7, 12, and 13, and specification 6 will be disapproved. It is the opinion of the Department that the proceedings and findings on specifications 5 and 10 and the sentence are legal, however as the sentence was based on eight (8) specifications and now only one (1) remains and it involves only $22.50, the period of confinement is remitted and the dishonorable discharge will [P. 14] be carried into execution immediately (File 26251–34699A, G. C. M. Rec. No. 63438, October 2, 1925).

SPECIFICATION DOES NOT ALLEGE AN OFFENSE:

In reviewing the deck court in the case of Lee J. Panzer, it is noted that the specification to which he pleaded "guilty" reads as follows:

> "In that Lee J. Panzer, now a seaman second cl., U. S. Navy, while so serving on board the U. S. S. *Colorado*, did, on or about July 21, 1925, on board said ship, in violation of article 122 (2), U. S. Navy Regulations, 1920, have in his possession, wrongfully, knowingly, and without proper authority, one blue dress jumper of the value of about three dollars and seventy-five cents ($3.75), the property of one James M. Carmine, then a seaman second class, U. S. Navy."

The court found the specification proved by plea and sentenced the accused to solitary confinement on bread and water for five (5) days with full ration every third (3d) day, and to lose eighteen dollars ($18) per month of his pay for a period of one (1) month, total loss of pay amounting to eighteen ($18). The sentence was approved by the convening authority on August 5, 1925.

It is the opinion of the Department that the specification is insufficient in that it fails to allege an offense against the accused. Article 122 (2), Navy Regulations, 1920, provides that the clothes, arms, military outfits, and accouterments furnished by the United States to any enlisted person in the Navy or Marine Corps, or required by such persons as a part of their prescribed uniforms or outfits, shall not be sold, bartered, exchanged, pledged, loaned, or given away, except by competent authority therefor. The above specification does not set forth that the accused sold, bartered or exchanged, or gave away any of his clothes, arms, or any part of his uniform for the article in question, and mere possession of an article of clothing belonging to another person in the naval service is not a violation of article 122 (2).

It does not appear that the possession of the clothing referred to in the specification was in violation of any ship's order. Attention is invited to Court-Martial Order No. 6, 1921, page 28, which suggests that commanding officers promulgate an order to their commands prohibiting anyone from having in his possession, without permission from proper authority, articles of property belonging to the United States or any person in the service other than himself. Attention is further invited to section 198, Naval Courts and Boards.

In view of the foregoing the proceedings, findings, and sentence in the case of the above-named man are set aside (File 27217–5784 C, October 6, 1925).

[P. 15] STATEMENT OF ACCUSED INCONSISTENT WITH PLEA.

In reviewing the summary court martial in the case of Laurence E. Whitaker, apprentice seaman, U. S. Navy, it is noted that the accused, after pleading guilty to a specification alleging that he "by offer of money, corruptly endeavored

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to persuade one Beusee to place him, the said Whitaker, on report in order that he might attempt to procure an undesirable discharge from the naval service" made an oral statement as follows:

> "I was only joking and trying to have some fun with Beusee when I asked him to put me on the report. I did not think that he would take my request as other than a joke."

The Department is of the opinion that the statement of the accused is inconsistent with his plea of guilty for the reason that a court might have properly acquitted the accused in this case if the assertions contained in this statement had been established in evidence before the court.

If the accused pleads guilty and then makes a statement inconsistent with such plea, the procedure the court should follow is outlined in section 667, Naval Courts and Boards.

In view of the foregoing, the proceedings, finding, and sentence in the case of the above-named man will be set aside (File 26287–10607 C, October 6, 1925).

CONFINEMENT, REDUCTION OF: WHERE ACCESSORIES ARE ADJUDGED, DOES NOT OF ITSELF REDUCE THE LOSS OF PAY UNDER SUCH ACCESSORIES.

Held: A reduction in the period of confinement alone, where accessories are adjudged in conformity with section 883, Naval Courts and Boards, does not of itself reduce the loss of pay under such accessories. Where a discharge is also adjudged and carried into effect at the termination of the confinement, so reduced by the convening authority, no question will arise because of failure to reduce the corresponding accessories, as the loss of pay is immediately terminated by the discharge. If, however, the discharge is not carried into effect, the loss of pay will continue for the full period of confinement adjudged by the court unless the accessories have been correspondingly reduced (File 26262–11890: 1A, November 7, 1925).

[P. 16] DISCHARGE AS UNDESIRABLE: ONCE EXECUTED CANNOT LEGALLY BE REVOKED, EXCEPT WHERE IT WAS PROCURED BY FRAUD OR IN VIOLATION OF LAW.

Because of the receipt of certain evidence an undesirable discharge was issued to an enlisted man. The evidence upon which this discharge was issued has since been proved erroneous, however, by numerous decisions it has been

Held: That when a discharge is issued by competent authority and is not procured by fraud or in violation of law, it is an accomplished fact and cannot legally be revoked. In this case an appropriate notation can be made on the Department's records and on the discharge in question, to the effect that the evidence upon which the undesirable discharge was issued has since been proved to be erroneous (28550–1893: AD/3, October 29, 1925).

NAVAL AVIATION OBSERVER IS A FLYING OFFICER: WITHIN THE TERM AS USED BY THE ACT OF JULY 12, 1921.

Held: An opinion was rendered by the Department on March 31, 1922, which defined a "flying officer" as a duly qualified "naval aviator." That opinion, however, was given without consideration of the status of aircraft observers. In order to qualify as an aircraft observer an officer must complete a course of training at Pensacola, Fla., after which he is appointed a "naval aviation observer" and detailed to duty involving flying. It is accordingly the opinion of the Department after an examination of the act of July 12, 1921, that an officer who was duly qualified as an aircraft observer and is detailed to duty involving flying, is in fact a flying officer within the meaning of the act (File 26983–1260: 1 J, November 4, 1925).

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[P. 3] Lieutenant Francis P. Kenny, Supply Corps, U. S. Navy, was on October 23, 1925, tried by general court martial at the U. S. Naval Training Station, Great Lakes, Ill., by order of the Secretary of the Navy and found guilty by plea of the charge of "Absence from station and duty without leave." The court sentenced Lieutenant Kenny to lose 25 numbers in his grade.

In approving the proceedings, findings, and sentence the Department placed the following indorsement on the record:

> "The accused in this case pleaded guilty to a serious military offense, 'Absence from station and duty without [P. 4] leave from proper authority.' There is no evidence of any extenuating circumstances. It is inconceivable to the Department that a commissioned officer could, under any favorable circumstances remain so absent for a period of seven days, without at least communicating with his superior officers.
>
> "The Department does not concur in the recommendation to clemency. Previous good character and long service of the accused cannot justify his misconduct on this occasion. The Bureau feels that a case of this nature cannot be other than deliberate, and that to extend clemency would convey a false impression to the service, indicating that the Department condones unreliability on the part of commissioned officers."

[P. 5] CHILD, SMALL, TESTIMONY OF: SHOULD NOT BE ADMITTED UNTIL CHILD HAS BEEN EXAMINED ON VOIR DIRE FOR THE PURPOSE OF DETERMINING THE COMPETENCY AS A WITNESS.

The Department is of the opinion, after a review of the record of proceedings in the foregoing case of Frank R. Hoit, storekeeper second class, U. S. Navy, that his discharge as undesirable would not be justified in view of the fact that the action of the convening authority in disapproving the findings and sentence was reasonable in the light of the evidence adduced.

The court erred in admitting the testimony of Dallas Henley, who, it appears from the evidence, was a very young child, without first examining her on her voir dire for the purpose of [P. 6] determining her competency as a witness. There is no precise age within which children are precluded from testifying as witnesses in a trial on the presumption that they have not sufficient understanding. At the age of fourteen every person is presumed to have common discretion and understanding, until the contrary appears; but under that age it is not so presumed; and therefore inquiry should be made as to the degree of understanding which a child offered as a witness may possess; and if the child appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, she is competent to testify regardless of age. The principal point to be determined and that which renders the testimony of a child admissible is the determination that the child understands that the oath administered was to tell the truth, and that if the truth was not told that the child would be punished (Greenleaf on Evidence, vol. 1, p. 504). In this connection section 440 of Naval Courts and Boards provides as follows:

> "The admissibility of testimony of children is not regulated by their age, but by their apparent sense and understanding. The court may, in its discretion, receive the testimony of any child, regardless of age, and give it such weight as it may appear to deserve; provided, only that in the opinion of the court the child understands the moral importance of telling the truth, for which purpose the court may examine the child."

Considering as a whole the evidence offered, and particularly the testimony of the child, Dallas Henley, assuming that her testimony was competent, it is believed that the identification of the accused as the guilty party was entirely insufficient. The child, who was the only witness to testify as to the actual commission of the evidence, did not indicate the method by which she identified the accused except his smiling face. This, of course, is altogether too indefinite to justify conviction. It appears from the evidence offered at the trial that

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other children were in the compartment at the time of the commission of the alleged offense, and the judge advocate should have called these children as witnesses, if they could have qualified, and thereby might have established beyond a reasonable doubt the identity of the guilty party.

In view of the foregoing the recommendation of the Chief of the Bureau of Navigation that Hoit be discharged as undesirable is disapproved. He will be retained in the naval service unless he desires to be released (File 26262–11898A, G. C. M. Rec. No. 63695, November 16, 1925).

[P. 7] DEFECTIVE SPECIFICATION: NOT CURED BY A PLEA OF GUILTY.

In reviewing the summary court martial in the case of Harold Olsen, fireman, third class, U. S. Navy, it is noted that the specification alleges that the accused,

> "* * * now serving on board the U. S. S. *Huron*, did, on or about July 13, 1925, while so serving on board the U. S. S. *Chaumont*, have in his possession without permission from proper authority, a watch valued at twenty-four dollars, the property of one Alfred E. Erelan, then a machinist's mate first class, U. S. Navy, then serving on board the U. S. S. *Huron*, and the said Olsen did then and there appropriate the said watch to his, the said Olsen's own use."

It is the opinion of the Department that the specification is insufficient in that it fails to allege an offense against the accused, as set forth in Court-Martial Order No. 237, 1919, page 15. Attention is further invited to Court-Martial Order No. 6, 1921, page 28, which suggests that commanding officers promulgate an order to their commands prohibiting any one from having in his possession without permission from proper authority articles of property belonging to the United States or any person in the service other than himself. Attention is further invited to section 198, Naval Courts and Boards.

In view of the foregoing the Secretary of the Navy directs that the proceedings, findings, and sentence in the case of the above-named man be set aside.

It is noted that the reviewing authority in his action on this case recognized the defects in this specification but predicted his approval of the proceedings upon the fact that the accused, by his plea of guilty, admitted all the allegations contained in the specification and that this admission cured the defects inherent therein.

As a matter of information for the service at large it is deemed desirable to point out that a plea of guilty cannot remedy a specification which is fatally defective for want of allegations which constitute an offense. A specification to be valid must set forth, clearly and intelligibly, every matter legally essential to constitute the offense and the want of specific averments cannot be supplied by implication. Every specification must show that an offense has been committed and how committed. The object of a specification is to fully inform the accused and the court of the offense, to the end that the accused may avail himself of such defense as may be in his power and to enable the court to award an adequate punishment, if conviction be had, based on the facts set forth in the specification.

It is wholly insufficient to merely allege that an act was done unlawfully or without authority without showing why or in what matter the act was unlawful. Such a statement is a mere conclusion on the part of the convening authority, setting forth [P. 8] no facts or circumstances. For an act to be unlawful it must have been committed in violation of some law, regulation, or order in force at the time of the commission of the act; if there be no law, regulation, or order prohibiting the act a mere statement of unlawfulness cannot create an offense. Conversely, a law or regulation may be in effect at the time the act was committed, yet if the act be committed in a manner not expressly prohibited and merely charged as having been unlawfully done, without setting forth any facts or circumstances, it is clear that the conclusion reached by the pleader is erroneous, for the reason that the facts, had they been set forth, would not have constituted an offense. When the essential requirements of time, place and circumstances are wanting such particulars are matters of substance, not of form, and their omission is not aided or cured by the finding of a court (File 26287–10652 C, December 12, 1925).

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HEARSAY RULE: THE FACT THAT A LETTER COMES FROM THE BUREAU OF NAVIGATION DOES NOT REMOVE IT FROM THE RESTRICTIONS IMPOSED BY.

In the action on the record of proceedings of the general court-martial trial of Frank Barciszewski, seaman second class, U. S. Navy, the convening authority made the following comment:

> "The reviewing authority is of the opinion that the court erred in its decision in regard to the admissibility in evidence of the letter from the Chief of the Bureau of Navigation."

The letter in question was one from the Chief of the Bureau of Navigation in which it was stated that certain fingerprints of the accused were identical with fingerprints in the service record book which the accused contended was not his service record book. On objection the court refused to permit the admission of this letter in evidence.

In the opinion of the Department the court's action in sustaining the objection of the accused was proper. The letter from the Chief of the Bureau of Navigation was not offered in evidence through the person who wrote it and who knew of his own knowledge the facts stated, and to permit its introduction would have denied the accused his right to be confronted by the witnesses against him. The fact that the letter came from the Bureau of Navigation did not remove it from the restrictions imposed by the hearsay rule as it did not fall within any of the exceptions to this rule (C. M. O. 2, 1921, 20). This letter was merely hearsay evidence and as such inadmissible. See sec. 388, Naval Courts and Boards; file 26262–11904A, G. C. M. Rec. No. 63724, November 19, 1925).

[P. 9] SCANDALOUS CONDUCT: ACTS CONSTITUTING.

Paul M. Bradley, seaman first class, U. S. Navy, was tried by general court martial convened by Department's precept of August 29, 1925, at the Receiving Ship, San Francisco, Calif., on the charges of I "Conduct to the prejudice of good order and discipline" (2 specifications), II "Scandalous conduct tending to the destruction of good morals," III "Drunkenness," IV "Falsehood," and V "Stealing property of the United States intended for the naval service thereof." He entered a plea of guilty to the third charge and specification thereunder. He was convicted of all charges and specifications thereunder and sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of twelve (12) months, dishonorable discharge and accessories.

The specification under the second charge, as found proved, provides as follows:

> "In that Paul M. Bradley, now a seaman first class, U. S. Navy, while so serving on board the U. S. S. *Sirius*, did, on or about April 27, 1925, on board said ship, knowingly, willfully, and without proper authority, enter number two cargo hold."

While the specification, as originally laid, properly supported the charge, it is the opinion of the Department, that the acts charged in the specification, as found proved by the court, do not, in themselves, constitute an offense, without setting forth the violation of a special or local ship's order.

> "Each specification must be complete, and in itself state an offense, and support the charge. Any specification which, standing alone, does not fulfill these requirements is fatally defective (Naval Courts and Boards, sec. 198).
>
> "Acts are of a scandalous nature, and consequently are properly specified under the charge of 'scandalous conduct tending to the destruction of good morals,' which give offense to the conscience or moral feeling; call out condemnation; involve scandal or disgrace to reputation; bring shame or infamy; or because of their evil nature are malum in se" (Naval Courts and Boards, sec. 233).

It follows, therefore, that the specification under the second charge, as found proved, even had it constituted an offense, would not support the charge under

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which laid. In relation to the second charge and specification thereunder, the proceedings are approved, but the findings are disapproved.

It is the opinion of the Department, that the proceedings, and findings relative to charges I, III, IV, and V, and the specifications thereunder, and the sentence in this case are legal (File 26260–34785A, G. C. M. Rec. No. 63916, December 3, 1925).

[P. 10] SPECIFICATION AS FOUND PROVED DOES NOT CONSTITUTE AN OFFENSE:

Hazen E. McDonald, Sergeant, U. S. Marine Corps, was recently tried by general court martial under the charge of "Theft" (1 specification). The court sentenced him to be reduced to the rank of private, to be confined for a period of six (6) months, dishonorable discharge and accessories.

In its findings, the court excepted the words "feloniously and steal" in the specification under the charge and substituted therefor, the word "wrongfully," and that the accused, Hazen E. McDonald, sergeant, U. S. Marine Corps, was of the charge guilty in a less degree than charged, guilty of "Scandalous conduct tending to the destruction of good morals." As found proved, the specification under the charge of "Scandalous conduct tending to the destruction of good morals," now reads as follows:

> "In that Hazen E. McDonald, now a sergeant, U. S. Marine Corps, while so serving with the marine detachment, U. S. S. *Mayflower*, in camp at Swampscott, Mass., did, on or about July 7, 1925, in a head at said camp, wrongfully take, and carry away from the possession of one William A. Boudewynz, then a private, U. S. Marine Corps, one watch of the value of about fifty dollars ($50), said watch being the property of the said Boudekynz, and did then and there appropriate the same to his own use."

It would appear from its findings that the court did not believe the accused in this case, entertained the necessary intent to commit "Theft" at the time he took the watch in question, and that the accused intended to return the above-mentioned property to its rightful owner. It is the opinion of the Department that the court was warranted in so believing in view of all the facts in this case as brought out in the evidence. To commit the offense of "Theft" there must be a taking and removal of the thing by trespass, there must be an intent to deprive the owner permanently of his property therein, and the intent must exist at the time of the taking (C. M. O. 174, 1918, p. 20, *State* v. *Shepard*, 63 Kansas 545). It is clear from the evidence that McDonald came into possession of the watch, rightfully, and there is enough evidence to warrant the belief that at no time did he entertain the idea to deprive the owner permanently of his property therein.

A specification to support a charge should properly set forth facts, acts of commission or omission, and not mere inferences or conclusions of law (Winthrop, p. 215). If, in the specification as found proved by the court, the word "wrongfully" is omitted, it will be seen that the accused is charged merely with taking a watch, the property of one Boudewynz. This, obviously, of itself is not an offense, and therefore, cannot support the charge of "Scandalous conduct tending to the [P. 11] destruction of good morals." The question then arises whether the descriptive adverb "wrongfully" applied to a statement of fact, otherwise setting forth no crime, is sufficient in a specification. In the case of *Connelly* v. *American Bonding and Trust Company*, 113 Ky. 903, the court held that:

> "An allegation that an arrest was wrongful states but a mere conclusion of law. The word "wrongfully" as set forth in a specification must mean wrongfully in the sight of the law, unlawful, contrary to law. While such words may properly be used in describing the intent with which certain acts specifically set forth, and which in themselves constitute a crime, were committed, they are improper when, upon such words alone, depends the entire criminality set forth."

In view of the foregoing, the proceedings are approved, and the findings and sentence are disapproved (File 26251–35286A, G. C. M. Rec. No. 63886, December 9, 1925).

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SPELLING OF NAME OF ACCUSED ERRONEOUS: NOT FATAL TO PROCEEDINGS IF SPELLING IS "IDEM SONANS" WITH HIS TRUE NAME.

Calton Bruner, hospital apprentice, first class, U. S. Navy, was recently tried by general court martial at the U. S. Naval Station, Guam, by order of the Commandant, U. S. Naval Station, Guam, and convicted of the charge of "Drunkenness" (2 specifications), and was sentenced to be reduced to the next inferior rating, and to be confined for a period of three (3) months.

The convening authority on October 10, 1925, disapproved the proceedings, findings, and sentence in this case, and directed that the accused be released from arrest, and restored to duty. It appears that the convening authority took the foregoing action by reason of the fact that the true spelling of the surname of the accused is "Bruner." In the specifications, pleadings, finding, and sentence, his name was spelled "Brunner." Section 204, Naval Courts and Boards provides, in part, as follows: "His name should be stated as appearing in his service record, or in the Navy Register (44)." However, the footnote (44) states, "an error in the name of the accused, if unobjected to and idem sonans with his true name, is not fatal." Under the doctrine of "idem sonans," it is stated in 29 Cyc. 272, in part, as follows:

> "The law does not regard the spelling of names so much as their sound. By the doctrine of idem sonans, if two names, although spelled differently, sound alike, they are to be regarded as the same. Great latitude is allowed in the spelling and pronunciation of proper names, and in all legal proceedings, whether civil or criminal, if two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial."

[P. 12] Further, it was held in *Faust* v. *U. S.*, 163 U. S. 452, that the fact that a defendant's name was W. J. Foust, while he was indicted as W. J. Faust did not constitute a material variance. A similar holding is found in 29 Kan. 337, in which case, the defendant's name was Shaffer and it was spelled in the indictment Shafer. The accused in this case, Bruner, did not object to the erroneous spelling of his name and the name as used was clearly idem sonans with his true name.

In view of the foregoing, it is the opinion of the Department that the error in the spelling of the surname of the accused in this case, which error was not objected to by the accused, was not fatal (File 26262–11955A, G. C. M. Rec. No. 63936, November 28, 1925).

CIVILIAN PHYSICIANS: LEGALITY OF APPOINTMENT IN THE NAVAL RESERVE OF CANDIDATES WHO HAVE BEEN EXAMINED BY.

An ex-lieutenant of the Naval Reserve has requested an appointment in the Naval Reserve, but it is impracticable for him to appear before a medical officer of the Regular Navy in order to establish his physical fitness for appointment.

Held: It is the opinion of the Department that there is no authority at law or regulation for accepting a physical examination conducted by a civilian physician in the case of a candidate for appointment in the Naval Reserve. Naval Reserve Regulations specifically require such examination to be made by medical officers of the Regular Navy (File 26521–494:1 J:AC, November 28, 1925).

DENTAL RESERVE CORPS: SERVICE IN FROM MARCH 31, 1914, TO AUGUST 21, 1914, CANNOT BE CREDITED IN ESTABLISHING PRECEDENCE IN THE REGULAR NAVY.

A dental surgeon who is at present in the Regular Navy requested to have his service as assistant dental surgeon, Dental Reserve Corps, from March 31, 1914, to August 21, 1914, counted toward establishing his precedence.

Held: The Department rendered an opinion on August 14, 1918, which was reconsidered and affirmed on October 30, 1918, that only the active service of dental officers appointed or commissioned in the Regular Navy is to be reckoned in determining the rank and precedence of officers now in the Dental Corps, [P. 13] and those hereafter appointed. There are no new facts presented in the present case, consequently there is no basis for a reconsideration of the two former decisions (File 13707-69:2–1 AJAG, December 15, 1925).

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DISABILITY: NOT IN LINE OF DUTY, DUE TO OWN MISCONDUCT.

A member of the naval service was admitted to the sick list with a diagnosis of psychosis, intoxication, alcoholic, origin not in line of duty. The medical officer who made the entry stated that in his opinion there was a reasonable doubt as to whether or not the disability complained of was due to the officer's own misconduct, stating that "Alcohol is apparently the most important immediate factor in bringing on his present condition, although the depression, inability to concentrate and failure of memory are out of all proportion to his physical condition, and the length of time he has been drinking." A board of survey concurred in the report as related to misconduct. When the man in question was received at the naval hospital at Washington, he was admitted with a diagnosis of malaria, the psychosis having entirely cleared up. It further appeared that the particular type of malaria from which he was suffering did not produce mental manifestations. Consequently there is no connection between the malaria which was diagnosed at the hospital in Washington, and the psychosis-intoxication, alcoholic, from which he was previously suffering. In view of the foregoing it is the opinion of the Department that the disability for which the man in question was admitted to the sick list was psychosis-intoxication, alcoholic, and should have been held to have originated not in line of duty and due to his own misconduct (File 29372–402 J: AC, December 11, 1925).

ELIGIBILITY: FOR APPOINTMENT IN THE VOLUNTEER NAVAL RESERVE.

A commander in the Naval Reserve Force, was transferred July 1, 1925, from class 6, V. N. R., to the Naval Reserve by operation of law. The enrollment in which this officer was serving at the time of his transfer expired on July 26, 1925, and he applied for appointment in the Naval Reserve, September 19, 1925. To what rank is he eligible for appointment?

Held: From an examination of section 1, of the act of February 28, 1925, effective July 1, 1925, it is seen that where an officer, transferred to the new Naval Reserve by operation of law, has applied, within three (3) months after July 1, 1925, for appointment in said Reserve, said officer shall, if found physically qualified for appointment, be appointed in the confirmed grade or rank held by him in the Naval Reserve Force as date of transfer in accordance with the provisions of section 7 of the above-mentioned act. Since the records show that the officer [P. 14] in question applied for appointment prior to October 1, 1925, and that he has been found physically qualified, he is eligible for appointment as commander (File 28550–1907 J: AC, December 14, 1925).

NATIONAL FLAG: GRATUITOUS ISSUE OF TO RELATIVES OF A DECEASED PERSON IN THE NAVAL RESERVE, NOT ON ACTIVE DUTY AT THE TIME OF HIS DEATH, CANNOT BE MADE.

The relatives of G _____ who was a member of the Naval Reserve, now deceased, on inactive duty when his death occurred, applied to the Secretary of the Navy for a gratuitous issue of a flag, to be used for draping his coffin.

Held: Under the provisions of the act of June 30, 1914, and subsequent opinions bearing on this subject, the Secretary of the Navy cannot issue a flag to the relatives of a deceased person of the Naval Reserve unless his death occurred while on active duty (File 3768–635; 1 J: AC, December 9, 1925).

NAVAL RESERVE: POSITION OF IN PARADES AND CEREMONIES, WITH RELATION TO THE NATIONAL GUARD.

Does the National Guard precede the Naval Reserve where both organizations are participating in a parade or other ceremony?

Held: From an examination of the acts of June 3, 1916, and February 28, 1925, it is seen that the Naval Reserve is a part of the Regular Navy, while the National Guard is not a part of the Regular Army, except when ordered into Federal service, consequently it is the opinion of the Department that since

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the Naval Reserve is a component part of the Navy, it is entitled to occupy a part of the position in a line of parade, or other ceremony, allotted to the United States Navy, and since the National Guard is not a component part of the Army, except when ordered into the Federal service by the President in time of war or national emergency, it follows that the position of the Naval Reserve in parades and for other ceremonies should precede that of the National Guard (File 28550–1921 J : AC, December 12, 1925).

ONE IN THE NAVAL SERVICE CANNOT BE FORCED TO SUBMIT TO AN OPERATION WHICH IS CONSIDERED DANGEROUS TO LIFE, AND WHERE ONE IS SUFFERING FROM A DISEASE WHICH SUCH AN OPERATION WOULD REMEDY, THE DISABILITY INCURRED IS IN LINE OF DUTY, IF THE DISEASE WAS SO CONTRACTED.

C was suffering from hernia, which was contracted in line of duty, and it was decided by a board of medical survey, that, by an operation, the disease was reducible. The man in question persistently refused to submit to the proposed operation.

Held : An individual in the naval service may not be ordered against his will, to submit to an operation which is dangerous to [P. 15] life or limb, and an operation for hernia is a major operation and is one which is dangerous to life. It is accordingly the opinion of the Department that C should not be ordered to submit to the operation and that the disability incurred is in line of duty, and not due to his own misconduct (File 29372–391, 29372–401 J : AC, December 7, 1925).

PRECEDENCE: IN RANK OF OFFICERS GIVEN THE SAME DATE OF COMMISSION, BUT SELECTED BY DIFFERENT BOARDS.

The question of precedence in rank of officers given the same date of commission, but selected by different selection boards, was recently submitted to the Department for consideration.

Held: The same question was submitted in 1922 and on June 15 of that year an opinion was given, that "all officers in your grade selected by boards prior to the one selecting you are senior to you in rank." After a careful review of that portion of the act of August 29, 1916, which pertains to selection boards, the Department is of the opinion that to hold a contrary view to its opinion of June 15, 1922, would defeat the very purpose for which the selection law was enacted (File 11130–101 J : AC, December 14, 1925).

PRECEDENCE: UPON APPOINTMENT IN NAVAL RESERVE, DATE OF, FOR OFFICER OF NAVY WHO ENROLLS WITHIN FOUR (4) MONTHS AFTER RESIGNING.

An officer of the Navy resigned on May 15, 1925, and took his physical examination for appointment in the Naval Reserve on September 3, 1925. His commission was signed and executed by the President on November 4, 1925. What is his date of precedence in the U. S. Naval Reserve?

Held: From an examination of the provisions of the act of February 28, 1925, it is seen that former officers of the Navy shall take precedence among themselves and with other officers of the Naval Reserve according to the dates of the commissions held by them in the Navy when separated therefrom only in those cases where they are appointed in the Naval Reserve in the same rank or grade as last held by them in the Navy within four (4) months after their separation. Since the facts presented show that the man in question was not appointed until November 4, 1925, more than five and a half months after his separation from the Regular Navy, it is the opinion of the Department that his date of rank in the Naval Reserve should be November 4, 1925, the date of his appointment therein (File 11130–87 : 5 J : AC, December 14, 1925).

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[P. 3] Pay Clerk Claude C. Barrett, U. S. Navy, was tried by general court martial on board the U. S. S. *Nevada*, San Pedro, Calif., on November 10, 1925, by order of the Commander Battleship Divisions, Battle Fleet, U. S. Fleet, and convicted of the charge of "Absence from station and duty without leave." The court sentenced Pay Clerk Barrett to lose $75 per month of his pay for a period of six months. The Secretary of the Navy on January 7, 1926, approved the following endorsement which was placed on the record by the Chief of the Bureau of Navigation:

> "Although the record of the accused, Claude C. Barrett, Pay Clerk, U. S. Navy, covering the past two years is unsatisfactory, the fact that the accused introduced evidence to substantiate that he required and received medical treatment, while absent without leave, for illness which was not shown to have resulted from his own misconduct, and the further fact that his attempt to communicate with his ship failed, inclines this Bureau to the opinion that these are mitigating circumstances, warranting the Department's consideration of the recommendation to clemency.
>
> "It is therefore recommended that the loss of pay be reduced to the loss of forty dollars ($40) per month for a period of six (6) months."

Lieutenant Cope M. Blackford, passed assistant surgeon, U. S. Navy, was tried by general court martial at the U. S. Naval Training Station, Great Lakes, Ill., on November 17, 1925, by order of the Secretary of the Navy and acquitted of the charge of "Neglect of duty." The Secretary of the Navy approved the proceedings, findings, and acquittal on January 7, 1926, and concurred in the endorsement which was placed on the record by the Chief of the Bureau of Navigation:

> "Although the evidence before the court is to the effect that the accused, Lieutenant Blackford (MC) U. S. Navy, received no orders either oral or written to audit the accounts current of the recruiting officer at Louisville, Ky., and to count the cash, it remains an admitted fact that Lieutenant Blackford (MC) U. S. Navy, did sign official certificates that he had counted the cash on hand as shown in the statement, without actually doing so. It should be obvious to any commissioned officer that the purpose of such a certificate is to protect the interest of the Government. The action of Lieutenant Blackford (MC), U. S. Navy, who, although without criminal intent, conducted an important business matter in a manner that would not be tolerated by a private employer, was in the opinion of this Bureau reprehensibly careless."

[P. 4] Lieutenant William H. Ferguson, U. S. Navy, was tried by general court martial at the U. S. Naval Training Station, Great Lakes, Ill., on November 9, 1925, by order of the Secretary of the Navy and was convicted of the charge of "Neglect of duty." The court sentenced Lieutenant Ferguson to lose ten numbers in his grade, and five members of the court recommended him to the clemency of the reviewing authority. On December 31, 1925, the proceedings, findings, and sentence, and the following remarks of the Chief of the Bureau of Navigation were approved by the Secretary of the Navy:

> "The Bureau does not concur in the recommendation to clemency. The accused in this case is an officer holding a commission as a lieutenant, and the duties performed by him were commensurate with that rank. An officer assigned duties of importance authorized by regulations for his grade must be held to a strict responsibility for the efficient performance thereof. Evidence adduced before the court, and the statement of the accused himself, clearly shows that the accused was well aware that the methods of handling Government funds, for which he was responsible, were irregular and improper. Nevertheless, the accused neglected and failed to enforce his orders for the proper safeguard of the money. That the accused subsequently offered to reimburse the Government for the loss involved does not mitigate his offense.

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"Approval of the proceedings, findings, and sentence of the general court martial in the case of Lieutenant William H. Ferguson, U. S. Navy is recommended."

[P. 5] Lieutenant Commander Martin Griffin, U. S. Navy, was tried by general court martial on board the U. S. S. *Langley* on December 14, 1925, by order of Commander Aircraft Squadrons Battle Fleet, and was found guilty by plea of the following charges:

Charge I.—Drunkenness.

Charge II.—Conduct to the prejudice of good order and discipline.

The court sentenced Lieutenant Commander Griffin to lose five numbers in his grade. The convening authority on December 19, 1925, placed the following endorsement on the record:

"The convening authority is of the opinion that the sentence of the court in the foregoing case of Lieutenant Commander Martin Griffin, U. S. Navy, is entirely inadequate to the nature of the offense. However, the proceedings, findings, and sentence in this case are approved only in order that the accused might not escape punishment for the serious offense of which he was convicted upon his own plea.

"The accused is hereby released from arrest and restored to duty."

Lieutenant Andrew L. Haas, U. S. Navy, was tried by general court martial on board the U. S. S. *Relief*, Honolulu, T. H., on September 14, 1925, by order of Commander Fleet Base Force, U. S. Fleet, on the following charges:

Charge I.—Drunkenness.

Charge II.—Using reproachful words towards another person in the Navy.

Charge III.—Falsehood.

Lientenant Haas was acquitted of charge I, but was convicted of charges II and III, and the court sentenced him to lose 20 numbers in grade. On January 8, 1926, the Department placed the following endorsement on the record:

"Lieutenant Andrew L. Haas, U. S. Navy, was tried by general court martial convened by order of the Commander Fleet Base Force, U. S. Fleet, on the charges of (I) 'Drunkenness,' (II) 'Using reproachful words toward another person in the Navy,' and (III) 'Falsehood.' He was found not guilty of [P. 6] charge I, and guilty of charges II and III, and was sentenced to lose twenty numbers in his grade. The proceedings, findings, and sentence were approved by the convening authority on October 3, 1925, subject to certain remarks concerning the improper admission of evidence:

"In reviewing the record of proceedings in this case, it has been noted that the precept is addressed to 'Commander Duncan M. Wood, U. S. Navy, commanding U. S. S. *Relief*,' but the name of this officer does not appear in paragraph 2, which in accordance with the usual form reads as follows:

" 'The court is composed of the following members, any five of whom are empowered to act, viz:' "

Then follows a list of the officers comprising the court. Commander Wood sat at the trial in this case as is evidenced by the fact that his name appears among those present as members and that he signed the record of proceedings as president of the general court martial.

"It is well settled that an officer cannot serve as a member of a general court martial unless he is designated as such by the convening authority (C. M. O. 114, 1918, 27). Inasmuch as the name of Commander Wood did not appear in that part of the precept designating the members constituting the court martial, it is evident that he was not actually designated as a member of this court martial by the convening authority and he was not authorized, therefore, to sit as a member at this trial. The convening authority approved the proceedings, findings, and sentence in this case without commenting on the point in question, but his action in this regard cannot ratify and make good the presence of Commander Wood as a member at this trial. As trial by a court not legally constituted is not a trial which can be said to be 'due process of law,' the above irregularity results in invalidating the proceedings in this case (22 Op. Atty. Gen. 137).

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"The accused in this case may be tried again and he cannot plead former jeopardy, as the court had no jurisdiction by reason of improper membership, and action of the court is not a trial.

"In view of the foregoing, the proceedings, findings, and sentence in this case will be set aside."

Lieutenant Edward K. Lee, passed assistant surgeon, U. S. Navy, was tried by general court martial at the Navy Yard, New York, on October 22, 1925, by order of the Secretary of the Navy and acquitted of the following charges:

Charge I.—Drunkenness.

Charge II.—Conduct to the prejudice of good order and discipline.

[P. 7] On December 31, 1925, the Secretary of the Navy placed the following endorsement on the record:

"In reviewing the record of proceedings of the foregoing case, it appears that neither the preliminary investigation by the responsible parties nor the prosecution of the accused was attended with due diligence. In cases where the charge of 'Drunkenness' is involved, it is the usual procedure that the accused be examined by a medical officer as to his condition in order that suitable and expert testimony may be available as the best evidence in proving the alleged offense. This procedure is not only a matter of general knowledge to the naval service but particularly to officers of the Medical Corps. However, in the present case it is noted that the executive officer of the naval hospital, New York, N. Y., and the officer of the day at the time of the commission of the offenses alleged did not secure all the necessary and specific evidence available for sustaining the charges on which the accused was recommended for trial. It is also noted that the judge advocate seemed satisfied to propound general questions to witnesses, accept general answers, and conduct the prosecution in a perfunctory manner, rather than to seek to provide the court with specific and necessary facts by a thorough and diligent examination of the witnesses for the prosecution and cross-examination of the witness for the defense.

"Subject to the foregoing remarks, the proceedings, findings, and acquittal in the foregoing case of Edward K. Lee, passed assistant surgeon, U. S. Navy, with the rank of lieutenant, are approved."

Elliott McF. Moore, Ensign, U. S. Navy, was tried by general court martial on board the U. S. S. *Milwaukee* on December 17, 1925, by order of the Commander Scouting Fleet, U. S. Fleet, and was convicted of the following charges:

Charge I.—Neglect of duty.

Charge II.—Culpable inefficiency in the performance of duty.

The court sentenced him to lose ten numbers in his grade. On January 6, 1926, the Department concurred in the following endorsement of the Chief of the Bureau of Navigation:

[P. 8] "In the opinion of this Bureau, the importance of a proper performance of duty by the officer of the deck of a vessel at sea cannot be overestimated. The evidence before the court clearly reveals the fact that the accused, Ensign Elliott McF. Moore, U. S. Navy, who was the officer of the deck, neglected and failed to take necessary action to keep track of the bearings of the light which had been sighted. Had he done so, he would have had knowledge that danger of collision existed in ample time to have taken seasonable precautions to avoid collision. It would appear, however, that the accused was indoctrinated with the spirit of follow the leader, and relied upon the action of the leading ship of the formation to keep his own ship out of danger.

"The Bureau does not concur in the recommendation to clemency, for the above reasons, and recommends approval of the proceedings, findings, and sentence of the general court martial in the case of Elliott McF. Moore, Ensign, U. S. Navy."

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LOANING GOVERNMENT PROPERTY: CONSTITUTES A WRONGFUL DISPOSITION OF SUCH PROPERTY.

Charles Williams, gunnery sergeant, U. S. Marine Corps, was recently tried at the U. S. Marine Barracks, Quantico, Va., and acquitted of the charge of "Wrongfully and knowingly disposing of property of the United States intended for the naval service thereof (2 specifications)."

The specifications allege in effect, that Williams wrongfully, knowingly, and without proper authority disposed of three (3) bags of oats, of the total value of about seven dollars and eighty cents ($7.80), property of the United States intended for the naval service thereof, to one J. S. Ficklen, a civilian of Quantico, Va. The prosecution conclusively established, and the accused, upon taking the stand in his own behalf, admitted, that the oats in question had been loaned by him to Ficklen. As is set forth in Winthrop's Military Law and Precedents, volume II, page 1099, loaning Government property constitutes a wrongful disposition of such property. In view of the foregoing, it is apparent that the accused wrongfully and know- [P. 9] ingly disposed of Government property, and the court should therefore have found him guilty as charged.

If it was the court's idea in acquitting the accused that extenuating circumstances showed the offense to be a minor one, it nevertheless was the duty of the court to convict the accused as charged, inasmuch as the evidence showed him to be guilty, and then to have adjudged a sentence commensurate with the offense as indicated by all of the circumstances.

In view of the foregoing, the proceedings in the case of Charles Williams, gunnery sergeant, U. S. Marine Corps, are approved, but the findings and acquittal are disapproved (File 26251–35602A, G. C. M. Rec. No. 64162, January 9, 1926).

TRIAL OF AN ENLISTED MAN: FOR AN OFFENSE COMMITTED ON A PRIOR ENLISTMENT. NOT LEGAL WHERE HONORABLE DISCHARGE WAS GIVEN, EXCEPT FOR A VIOLATION OF ARTICLE 14, ARTICLES FOR THE GOVERNMENT OF THE NAVY.

Joseph Bahen, machinist's mate second class, U. S. Navy, was tried by general court martial and convicted of ------. He was sentenced by the court to be reduced to the rating of fireman third class, to be confined for a period of ten years, dishonorable discharge and accessories.

The enlistment under which Bahen was serving at the time of the alleged commission of the offense of which he was convicted by the court expired March 31, 1925, and he was discharged with an honorable discharge. On April 1, 1925, Bahen reenlisted for an additional period of four years and it was during this enlistment that he was brought to trial, on May 22, 1925, for the offense committed in his prior enlistment. Except in cases of offenses in violation of article 14 of the Articles for the Government of the Navy, there is no authority of law giving jurisdiction to a court martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted. (Court-Martial Order 12, 1921, p. 11.) The offense of which the accused was convicted in this case is not a violation of article 14. It is evident, therefore, that in the present case the court before which Bahen was tried was without jurisdiction and the proceedings, findings, and sentence in the foregoing case will be set aside (File 26262–11764A, G. C. M. Rec. No. 63101, September 21, 1925).

[P. 10] WHERE AN ACCUSED IS REDUCED IN RATING: BY SENTENCE OF A COURT MARTIAL, SUCH REDUCTION MUST BE IN THAT BRANCH OF THE SERVICE TO WHICH THE ACCUSED BELONGS.

Arthur W. Benninger, hospital apprentice first class, U. S. Navy, was tried by general court martial convened on board the U. S. S. *Colorado* on January 7, 1926, and convicted of "Desertion." He was sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of twenty-four (24)

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months, dishonorable discharge and accessories. The convening authority on January 14, 1926, approved the proceedings, findings, and sentence but reduced the period of confinement with corresponding accessories to twelve (12) months.

In all cases involving confinement at hard labor for more than three (3) months, the accused is to be reduced to the lowest rating of that branch of the service to which he belongs (sec. 883, Naval Courts and Boards). The lowest rating in the special branch of the service in which Benninger is serving is that of hospital apprentice second class (sec. 953, Naval Courts and Boards), in view of which so much of the sentence that involves reduction to the rating of apprentice seaman is illegal and void, and that part of the sentence involving reduction in rating will be set aside (File 26262–12066A, G. C. M. Rec. No. 64308, February 2, 1926).

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[P. 3] Quartermaster Clerk Claude T. Lytle, U. S. Marine Corps, was tried by general court martial at Marine Barracks, Cape Haitian, Republic of Haiti, on December 12, 1925, by order of the commanding general, First Brigade, U. S. Marine Corps, and was found guilty by plea of the following charges:

Charge I. Assault with a dangerous weapon.

Charge II. Drunkenness.

The court sentenced Quartermaster Clerk Lytle to be restricted to his quarters and station for a period of three months, and to lose $75 per month of his pay for a period of six months. The convening authority on December 19, 1925, placed the following endorsement on the record:

> "The proceedings and findings in the foregoing case of Claude T. Lytle, quartermaster clerk, U. S. Marine Corps, are approved. The convening authority considers that the court in imposing such a grossly inadequate sentence has [P. 4] usurped the powers vested alone in the reviewing authority and the sentence is approved in this case only in order that Quartermaster Clerk Lytle may not entirely escape punishment for the very serious charges of which he was found guilty.
>
> "Drunkenness, though at all times reprehensible, is particularly so in officers serving in the Republic of Haiti where the conduct of American officers should be above reproach and where officers are always on a duty status and liable to be called upon at any time to meet some emergency requiring the full and unimpaired use of all their faculties."

DESERTER: DELIVERY OF TO A NAVAL GUARD IS NAVAL ACTIVITY FOR THE PURPOSE OF PAYING A REWARD.

A naval guard was recently sent from New Orleans to Sanderson for the purpose of taking into custody a deserter who was held by the police at the latter place. The question was presented as to whether or not the delivery of the deserter to the naval guard as Sanderson constituted a delivery into naval custody for the purpose of paying the reward.

Held: The guard constitutes a direct agent of naval activity, and accordingly a delivery to the naval guard constitutes a delivery to naval jurisdiction (File 26516–419:1 J, February 24, 1926).

DISABILITY: LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

An enlisted man reported to the medical officer, on board his ship, complaining of a sore eye. The medical officer, on July 24, 1925, stated that the irritation was caused from syphilis and that the man should be transferred to the hospital for treatment. [P. 5] The man was not so transferred until August 5, 1925, and is now suffering from permanent impairment of vision in that eye.

Held: Since it is the opinion of the medical officer who finally handled the case that an early antisyphilitic treatment would have prevented the extensive impairment of vision, it is held that while the acquired disability did not originate in line of duty and is due to his own misconduct, the present eye trouble is in line of duty and not due to his own misconduct, as had he received

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timely treatment, his condition would not have reached such a state that a permanent impairment of vision would have resulted (File 29372–397 J : AC, December 16, 1925.

DISABILITY : NOT IN LINE OF DUTY AND NOT DUE TO OWN MISCONDUCT.

A member of the naval service, while in his home, was killed by a shot from a pistol fired by his small stepson who was not mentally responsible for the act. It appears that the shot was fired as a result of a domestic altercation between the above-named man and his wife, the child having assumed without warrant, that his stepfather was about to commit violence upon his mother.

Held: The Attorney General rendered an opinion, cited in C. M. O. No. 5, 1921, that where a member of the naval service was killed in his own home, as a result of jealousy, his death grew out of domestic relations and was entirely separate and distinct from his relation to the government, and that his death was not incurred in line of duty. Applying that decision to the present case, the department is of the opinion that the disability complained of should not be held to have originated in line of duty, but in view of the fact that the injury was inflicted by a child, whose mentality was such as to render him irresponsible, and that the reasons for inflicting the wound were in fact unfounded, it should be held that the disability was not the result of his own misconduct (File 29372–415–J, January 25, 1925).

DRUNKENNESS : CONSIDERATION OF ATTENDANT CIRCUMSTANCES.

In trials for the offense of drunkenness, courts martial will be expected to consider all attendant circumstances of each case and adjudge a sentence commensurate with the nature of the offense proved and the rank of the accused, leaving the question of the mitigation of the sentence to the convening or reviewing authorities.

NAVY CROSS : CONFERRING OF ON MEMBERS OF THE NAVAL RESERVE FOR DISTINGUISHED SERVICE IN THE LINE OF THEIR PROFESSION.

COMMANDING OFFICER OF A MERCHANT SHIP.

The Captain of the S. S. *President Roosevelt* was instrumental in saving the lives of the personnel of the S. S. *Antinoe* and the [P. 6] question has been presented to the department as to whether or not, as a lieutenant in the Naval Reserve, he is eligible to receive the Navy Cross.

Held: The act of February 4, 1919, provides for the conferring of the Navy Cross on persons who, while in the naval service since April 6, 1917, have distinguished themselves by extraordinary heroism in the line of their profession. By the Naval Reserve Act of 1925, the Naval Reserve was made a component part of the United States Navy, and was made to consist of the Fleet Naval Reserve, the Merchant Marine Naval Reserve, and the Volunteer Naval Reserve. The duties of a naval reservist performed as the commanding officer of a merchant ship are clearly in the line of his profession, since the above-mentioned enactment of 1925 provided that the Merchant Marine Naval Reserve, a class of the Naval Reserve, is a component part of the Navy. It is accordingly the opinion of the Department that the captain of the S. S. *President Roosevelt* is eligible to receive the Navy Cross (27327–45 : 1 J : AC, February 5, 1926).

REWARD FOR THE APPREHENSION AND DELIVERY OF DESERTERS.

The question was recently presented to the Department as to whether or not a reward for the apprehension and delivery of a deserter or straggler of the U. S. naval service can be paid to a mail carrier or any other person in civil life who is not a duly appointed officer of the law.

Held: The payment of the reward, as described in the above question, is not prohibited by the appropriation act of 1926 and further is not prohibited by Navy Regulations, 1920, and in a decision of the Department, rendered on

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November 16, 1921, it was held that "A postmaster or any other Government official or employee, except an officer or enlisted man in the service, may be paid the $50 reward for the delivery of a deserter, provided such official or employee is not expressly restricted from receiving the reward by the terms of the offer." The payment of the reward to those officers of the Department of Justice, who, by the regulations of that Department are prohibited from receiving any fees or compensation other than those specifically provided for the performance of their general duties, would be prohibited. It accordingly follows that the reward in question can legally be paid to a mail carrier or any other person in civil life, even though he is an officer of the law, except as provided for in the regulations of the Department of Justice (File 26516-419:2 J:AC, February 19, 1926).

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[P. 3] Captain Frank L. Pinney, U. S. Navy, was tried by general court martial by order of the Commander Scouting Fleet, U. S. Fleet, on board the U. S. S. *Milwaukee* on December 14, 1925, and was fully acquitted of the charge of "Neglect of duty." On February 27, 1926, the Department placed the following endorsement on the record:

"Captain Frank L. Pinney, U. S. Navy, was tried by general court martial convened by order of the Commander Scouting Fleet and fully acquitted on a charge of 'Neglect of Duty.' This charge was supported by two specifications averring (1) that he failed to take the reasonable precaution of sleeping in the emergency cabin, but did sleep in the cabin stateroom of his ship, well knowing that an inexperienced officer of the deck was on duty, and that communication via orderlies was unreliable, and that the only direct means of communication from the bridge to his stateroom was by telephone through central; (2) that he failed to repair immediately to the bridge after a light had been reported to him, and the course of the ship had been changed to avoid collision.

"The testimony in this case shows that the *Milwaukee* on the night in question was cruising in column formation, open order, distance six hundred yards, speed eight knots, the *Milwaukee* being the second ship in column, that at about 2:06 a. m. the *Milwaukee* was in collision with the schooner *Benjamin A. Van Brunt*, and that the officer of the deck on the midnight to 4 a. m. watch was an ensign who had graduated from the Naval Academy in 1924 and was consequently of limited experience.

"The testimony further discloses that there is an emergency cabin on the U. S. S. *Milwaukee* near the navigating bridge easily accessible to the officer of the deck in case of emergency. One of the main purposes in providing this [P. 4] emergency cabin was that the commanding officer might with reasonable comfort be near the bridge when under way and thus be readily accessible in case of emergency. The testimony shows that Captain Pinney on the night in question slept in the regular cabin stateroom remote from the bridge, the only direct communication with the bridge being by telephone through central station. This method of communication had not been used at any time by the officer of the deck who was on watch at the time of the collision with the schooner *Van Brunt*. The system of communication used between the officer of the deck and the captain was by orderly, the orderly being stationed at the cabin door, the procedure being for the officer of the deck to summon the orderly by push button, when the orderly arrived on the bridge to give the message to the orderly for the captain, which message was delivered without report being made to the officer of the deck that the message had been so delivered. The testimony indicates that the officer of the deck sent two messages to Captain Pinney a short time prior to the collision with the schooner *Van Brunt*, one at about 1:50 a. m. reporting the sighting of a light, and one at about 2 a. m. reporting a change of course, that these messages were delivered by the orderly to Captain Pinney, asleep in his stateroom, and that these messages did not reach Captain Pinney in the sense that he 'had knowledge of their being made or of their nature' and that he did not reach the bridge until after the collision with the schooner *Van Brunt* had taken place.

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"The court found the accused not guilty of the charge and specifications thereunder and did 'fully acquit' him of the charge. Article 686, Naval Courts and Boards, states in part as follows:

" 'The use of this form of acquittal indicates that a court not only fails to find a charge proved beyond a reasonable doubt, but that it finds no facts whatever, as brought out by the evidence introduced in the case which reflect adversely on the conduct of the accused in connection with matters pertaining to the charge and specification. In other words, a court should not "fully acquit" in cases where the record shows any uncontroverted facts whatever reflecting upon the accused.'

"The Department thoroughly concurs in the remarks of the Chief of the Bureau of Navigation hereon that there can be no doubt that Captain Pinney erred in judgment in sleeping below remote from the bridge, instead of in the emergency cabin, and as expressed in paragraph four of his endorsement, as follows:

[P. 5] " 'The bureau adheres to the belief that the commanding officer is always responsible for the safe conduct of his ship. When disaster results through an error in judgment or negligence, even though one of his subordinates may have been directly responsible, the captain must share in the responsibility.'

"The Department cannot approve the full acquittal of a commanding officer of neglect of duty who has failed to utilize the facilities furnished him for the safe conduct of his ship. The testimony in this case indicates a lack of appreciation of the necessity for that extreme vigilance and precaution against possible emergency under all conditions and the keen sense of duty that the Department expects of officers entrusted with the great responsibility of command of naval vessels.

"The proceedings of the court are approved, the findings are disapproved."

Lieutenant Commander Samuel S. Thurston, U. S. Navy, was tried by general court martial by order of the Commander in Chief, U. S. Fleet, on board the U. S. S. *Wyoming*, on January 5, 1926, and was convicted of the charge of "Neglect of duty." The court sentenced Lieutenant Commander Thurston to lose three numbers in his grade. In approving the proceedings, [P. 6] findings, and sentence the convening authority placed the following endorsement on the record:

"The court and the accused in this case evidently considered only a narrow construction of the Engineering Manual and gave no consideration to its intent. The intent of the instructions could not be met by the act of giving the valve physical motion, however small, and calling that moving the valve. The intent of the instructions is by movement to insure that the valve is operable or to determine that it is not operable. This intent could be met by giving the valve its full movement, and such act would also be complying with the wording of the instructions.

"The intent of the instructions was known to both the accused and the court, and to say that the accused did not neglect his duty because he did move the valve while not moving it in such a manner as to meet the intent of the regulations, is a claim that cannot be admitted. This is advocating 'lip service' only to an instruction designed to insure the safety of the ship. In other words, the valve must be moved in a manner to meet the intent of the regulations which are well known to all. That it was not moved in such a manner was shown by the fact, available to the court, that the valve was frozen on the stem and could not be closed. It was shown in the testimony that only about one-third of the number of turns required to actually close the valve could be taken.

"There is a further fact. It was known to the court that no specific orders existed in the Engineering Department to carry out Engineering Instructions relative to the movement of valves; and that no record was kept of such movements. This shifted the onus (to show that such orders existed and that valves were moved, and by the word 'moved' must be considered properly moved) to the accused.

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"Other than the above and that fact that the punishment awarded for the specification of which the accused was found guilty is entirely too light, no serious fault is to be found with the record except that the court could have gone into how much knowledge there existed on the part of the personnel of what really constituted the opening and closing of this valve.

"Subject to the above, the proceedings, findings, and sentence of the general court martial in the foregoing case of Samuel S. Thurston, lieutenant commander, U. S. Navy, are approved. He will be released from arrest and restored to duty."

[P. 7] DISABILITY: LINE OF DUTY.

F was accepted for enlistment October 10, 1924, without any physical defects being noted. On December 4, 1925, he was admitted to the sick list with a diagnosis of curvature of the spine, origin not in line of duty and not due to his own misconduct, as it existed prior to enlistment.

Held: In view of the fact that the man was accepted for enlistment without any physical defects being noted, and further, that his condition was such that it did not incapacitate him for the proper performance of his duty for a period of more than one year, that there is a history of an injury to his back while in training after enlistment, from which time he has not been free from pain in that region, the disability should be held to have originated in the line of duty and not due to his own misconduct (File 29372–411 J, January 6, 1926).

EX-NAVAL OFFICER: DATE OF PRECEDENCE OF ON APPOINTMENT IN THE U. S. NAVAL RESERVE.

An ex-officer of the Navy fulfilled all the requirements for appointment in the Naval Reserve within the four months immediately following his resignation from the Navy and the only reason he was not appointed prior to September 15, 1925, the expiration of the four months' period, was due to delays in forwarding the report of his physical examination. It is contended for him that he should be considered as having fulfilled the requirements for such appointment on the date he was examined and found physically qualified, and that therefore he should be entitled to the date of precedence corresponding to the date of his commission in the Navy.

Held: Before an individual can be said to be appointed within the meaning of the provisions of the Naval Reserve Act, his appointment must have been consummated as a matter of fact by some affirmative act of the President, either in person or through the Secretary of the Navy. The ex-officer, in question, cannot therefore be considered as having been appointed in the Naval Reserve until the necessary action was taken by the President, and that was not done until after four months had elapsed after his resignation had been accepted. It accordingly [P. 8] follows that he is not entitled to the date of precedence corresponding to the date of his commission in the Navy (File 11130–87: 5–1 J, February 24, 1926).

NAVAL RESERVE: PROCEDURE FOR TRANSFERRING OFFICERS OF, FROM ONE CLASS TO ANOTHER CLASS THEREIN. LETTER OF BUREAU OF NAVIGATION NOT SUFFICIENT.

A former officer of the Regular Navy applied for an appointment in the Volunteer Naval Reserve in accordance with the Naval Reserve Act, and received his commission and executed the oath and acceptance of office. The Bureau of Navigation then addressed a letter to him part of which is as follows: "In compliance with your request—you are hereby transferred effective this date in the rank of lieutenant from the Volunteer Naval Reserve to the Fleet Naval Reserve for deck and engineering duties."

Held: The Naval Reserve Act of 1925 requires that the President shall appoint individuals to commissioned grades or ranks in the Fleet Naval Reserve, the Merchant Marine Naval Reserve or the Volunteer Naval Reserve, and since the facts in this case show that this officer was appointed in the Volunteer Naval Reserve of the U. S. Navy, and since the President is the only one authorized by the Naval Reserve Act of 1925 to appoint individuals to commissioned grades or ranks in either the Fleet Naval Reserve, the Merchant

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Marine Naval Reserve, or the Volunteer Naval Reserve, it is the opinion of the department that the above-mentioned letter of the Bureau of Navigation is not sufficient to change the status of the officer from the Volunteer Naval Reserve, in which class he was commissioned, to that of an officer in the Fleet Naval Reserve, in which class he has never received a commission (File 28550–19206 J, January 29, 1926).

PRECEDENCE, CHANGE IN ORDER OF: NO DISTINCTION, IN PRECEDENCE, IS MADE BETWEEN THOSE GRADUATES OF THE NAVAL ACADEMY WHO ARE COMMISSIONED IN THE LINE AND THOSE WHO ARE COMMISSIONED IN THE SUPPLY CORPS.

An officer of the Supply Corps was graduated from the Naval Academy on March 29, 1917, and commissioned an ensign in the Supply Corps March 30, 1917, the date on which other members of his class were commissioned ensigns of the line. He was assigned precedence next after the junior member commissioned ensign in the line.

Held: Section 1483, R. S., provides that "Graduates of the Naval Academy shall take rank according to their proficiency as shown by their order of merit at the date of graduation." An examination of this statute shows that no distinction is made between those graduates of the Naval Academy who are commissioned in the line and those who are commissioned in the [P. 9] Supply Corps, and all graduates take precedence according to their proficiency on the date of graduation. It accordingly follows that the officer in question should have been assigned precedence with other graduates commissioned ensigns of the line on that date as shown by the order of merit established by the academic board (File 11130–102 J, February 3, 1926).

WORLD WAR ADJUSTED COMPENSATION ACT: ELIGIBILITY TO RECEIVE ADJUSTED COMPENSATION UNDER.

OFFICER HOLDING PROBATIONARY APPOINTMENT.

S was commissioned as assistant dental surgeon with the rank of lieutenant (j. g.) for a probationary period of two years from July 3, 1917. He accepted the appointment September 10, 1917, and served continuously until June 9, 1919. Is he eligible to receive compensation under the World War Adjusted Compensation Act?

Held: An examination of the act of August 29, 1916, shows that the only manner in which an individual could be appointed an assistant dental surgeon in the Regular Navy, under that act, which was in force when S was appointed, was by a probationary appointment for a period of two (2) years. Then the probationary appointment was in fact an appointment in the Regular Navy, since that was the only method whereby an individual could become an assistant dental surgeon in the Regular Navy. Since the World War Adjusted Compensation Act excludes all individuals holding a permanent or provisional commission or permanent or acting warrant in any branch of the naval forces, it follows that S is not entitled to receive the compensation allowed by the above-mentioned act (File 29460–98 J, February 5, 1926).

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[P. 3] Boatswain John D. Cross, U. S. Navy, was tried by general court martial on February 5, 1926, by order of the Commander Battleship Divisions, Battle Fleet, United States Fleet, and was convicted of the charge of "Drunkenness." The court sentenced Boatswain Cross to lose six months' seniority in the date of his warrant as boatswain, to lose corresponding rank in the list of boatswains in the Navy, and to lose $50 per month of his pay for a period of six months. On February 28, 1926, in approving the proceedings, findings, and sentence, the convening authority placed the following endorsement on the record:

> "This officer has plead guilty to drunkenness on board ship, with no extenuating circumstances. Under the regulations of the Navy the maximum punishment is dismissal.

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"This offense is a deliberate act, premeditated, destructive to good morals and strikes at the very foundation of discipline on board ship. In the opinion of the convening authority an officer whose appetite for alcoholic stimulant causes him to disregard the effect upon the organization of which he is a member and is guilty of an offense of this nature lacks that special fidelity imposed in his commission or warrant and is unfit to retain it.

"The sentence is therefore considered inadequate.

"Subject to the above remarks and in order that the accused may not entirely escape punishment, the proceedings, findings, and sentence of the general court martial in the attached case of John D. Cross, boatswain, U. S. Navy (*Nevada*), are approved. He will be released from arrest and restored to duty."

AFFIDAVIT: INADMISSIBLE IN EVIDENCE FOR THE PURPOSE OF PROVING THE SUBJECT MATTER WITH WHICH IT DEALS.

FINGERPRINT EXPERT: MUST QUALIFY AS SUCH.

Carl K. Summers, private, U. S. Marine Corps, was tried by general court martial convened by order of the Secretary of the Navy and convicted on the following charges: (I) "Stealing money of the United States intended for the naval service thereof," (II) "Unlawfully destroying Government property" (2 specifications), (III) "Conduct to the prejudice of good order and discipline, and (IV) "Desertion." He was sentenced to be confined for a period of five years, dishonorable discharge and accessories.

Charges I and II and the specifications thereunder read as follows:

[P. 4] "*Charge I.*—Stealing money of the United States intended for the naval service thereof.

"*Specification.*—In that Carl K. Summers, now a private, U. S. Marine Corps, while so serving at the U. S. Marine Corps base, naval operating base, San Diego, Calif., did, during the period from 3 p. m., September 5, 1925, to 8 a. m., September 8, 1925, feloniously take, steal, and carry away from the possession of the United States, to wit, from a field safe in the office of the base property officer at said marine corps base, a sum of about twenty-six dollars and seventy-four cents ($26.74), in lawful money of the United States, the property of the United States intended for the naval service thereof, and did then and there appropriate the same to his own use.

"*Charge II.*—Unlawfully destroying public property.

"*Specification 1.*—In that Carl K. Summers, now a private, U. S. Marine Corps, while so serving at the U. S. Marine Corps base, naval operating base, San Diego, Calif., did, during the period from 3 p. m., September 5, 1925, to 8 a. m., September 8, 1925, at said base, willfully and unlawfully destroy public property of the United States, the same being a portable field safe.

"*Specification 2.*—In that Carl K. Summers, now a private, U. S. Marine Corps, while so serving at the U. S. Marine Corps base, naval operating base, San Diego, Calif., did, during the period from 3 p. m., September 5, 1925, to 8 a. m., September 8, 1925, at said base, willfully and unlawfully destroy public property of the United States, the same being a wall safe."

In support of charges I and II the prosecution established that one portable field safe and one wall safe had been cut open and from the field safe a sum of money amounting to twenty-six dollars and seventy-four cents ($26.74) had been stolen. The accused was assigned as janitor in the office in which these safes [P. 5] were located. A pad of transportation blanks, some rubber stamps, and some vouchers that had been in the field safe were found in a desk used by the accused in the office. Certain fingerprints were found on top of the wall safe which were developed by powder, photographed, and enlarged by one W. J. Macy of the police department of San Diego, Calif. At the trial the witness Macy was called by the prosecution and identified one photograph appended to the record as "Exhibit 2" as being an enlargement of a photograph of certain latent fingerprints on the wall safe taken by himself. The witness Macy did not qualify as a fingerprint expert, although this was not a condition precedent to his identifying the photograph as one taken by him, nor was he

questioned as to whether or not the photograph he had taken was identical with the fingerprints of the accused. To establish that the fingerprints on the wall safe were identical with those of the accused the judge advocate offered in evidence an affidavit, appended to the record as exhibit 3, as follows:

HEADQUARTERS U. S. MARINE CORPS,
Washington, November 6, 1926.

To whom it may concern:

The negative latent finger impressions alleged to have been taken from a safe in the post property office, Marine Corps Base, Naval Operating Base, San Diego, Calif., by Mr. W. J. Macy, Superintendent of the Bureau of Identification of San Diego, Calif., and which were later forwarded to this office by the commanding officer, Marine Corps Base, Naval Operating Base, San Diego, Calif., for the purpose of identification, are identical with:

Summers, Carl Kenneth, who enlisted in the U. S. Marine Corps, October 29, 1924, at the Marine Corps Base, Naval Operating Base, San Diego, Calif.

(Signed) EDWARD E. LOCKOUT,
Q. M. Sergeant, U. S. Marine Corps.

Subscribed and duly sworn to before me at Headquarters, U. S. Marine Corps, Washington, D. C., this 6th day of November 1925.

(Signed) C. E. NUTTING,
Major Asst. Adjutant & Inspector,
U. S. Marine Corps.

This document was a mere ex parte affidavit, and as such was inadmissible in evidence had timely objection been made to it. In this connection, it is stated in section 388 of Naval Courts and Boards that "ex parte affidavits * * * the admission of which would, in effect, permit the author to testify without submitting him to cross-examination, are mere hearsay statements and are inadmissible in evidence." And section 410 of Naval Courts and Boards states that "an affidavit, therefore, [P. 6] is not admissible in evidence for the purpose of proving the subject matter with which the affidavit deals." Furthermore, it is a well-settled rule of law that before expert testimony can be accepted as evidence *the witness giving such testimony must qualify as an expert and the burden of so qualifying a witness rests upon the party introducing him as a witness* (Sec. 426, Naval Courts and Boards). The party who executed the above affidavit did not appear as a witness at the trial of this case and no evidence whatever appears in the record qualifying him as an expert. The leading American case on this subject is *People* v. *Jennings* (252 Ill. 534; 43 L. R. A. N. S. 1206) in which case it was held that a comparison of fingerprints may be made by witnesses skilled in the art, for the purpose of identifying one accused of crime, and, witnesses who for several years have made a study of fingerprints in connection with detective bureaus and had actual experience in identifying persons by that method, may make comparison, as experts, of fingerprints in evidence for the purpose of identification.

The proper procedure in a case involving the identification of fingerprints is to obtain the services of a person skilled in this art. This person should be called as a witness and qualified as an expert. In order to qualify him as an expert he should be questioned as to the length of time he has been employed in this line of work; what instruction he has received in it; what positions he has held that required knowledge of this nature; and whether he has had actual experience in identifying persons by this method. If the court is satisfied as to the qualifications of the witness and accepts him as an expert his attention should be called to fingerprint impressions which have been introduced in evidence and proved to be those of the accused, for example, the fingerprints in the service record of the accused, and he should then be asked if in his judgment the impressions in issue were made by the fingers of the same person.

It was the duty of the court to reject the affidavit although no objection was offered to its introduction.

The evidence offered to establish charges I and II was entirely circumstantial, and the evidence of fingerprints referred to above was one of the circumstances without which the evidence would have been very obviously insufficient to justify the conviction of the accused of these charges. It is therefore the opinion of the Department that the guilt of the accused of the offenses alleged under

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charges I and II was not established by the evidence offered at the trial, and consequently it is recommended that the findings on these charges, and the specifications thereunder be disapproved.

The proceedings and findings on charges III and IV are, in the opinion of the Department, legal. While the sentence adjudged is not in excess of the maximum provided for the [P. 7] offense found proved under charge III under the California Statutes (5 years imprisonment and $5,000 fine) (Statutes and Amendments to the Code (California) 1925, p. 415), therefore, so much of the sentence as relates to confinement and accessories will be reduced to twelve months which was the sentence adjudged in the general-court-martial case of Jacob M. Boord, private U. S. M. C., who was tried, by a different court, on the same charges and specifications, but was acquitted on charges I and II (File 26251–35532–Y–A, G. C. M. Rec. No. 64267, March 6, 1926).

DISABILITY: IN LINE OF DUTY AND NOT DUE TO HIS OWN MISCONDUCT.

C was found physically qualified and was accepted for enlistment in 1924. On March 3, 1926, he was admitted to the sick list with a diagnosis of deformity of the right foot, the origin of which was considered not in line of duty and that it existed prior to enlistment. C stated that he fractured his ankle before enlistment, but that in 1925, while engaged in authorized basketball practice he again fractured it, but in a different place, and it is the site of the second break where the constant pain is.

Held: In view of the fact that his present disability is in all probability either directly or indirectly the result of the injuries received in 1925, approximately one year after he entered the naval service, it is the opinion of the Department that the disability should be held to have originated in the line of duty and not due to his own misconduct (File 29372–439 J:AC, April 20, 1926).

DISABILITY IN LINE OF DUTY: AND NOT DUE TO OWN MISCONDUCT, WHERE MEMBER OF NAVAL SERVICE REFUSES TO SUBMIT TO AN OPERATION WHICH IS DANGEROUS TO LIFE AND DISABILITY RESULTS FROM HIS REFUSAL.

T was admitted to the sick list with a diagnosis of "goitre." On March 31, 1926, a board of medical survey held that the disability occurred not in line of duty and not the result of his own misconduct, as the symptoms exhibited were probably due to diseased tonsils and an operation for the removal of which the man refused to submit.

Held: The Bureau of Medicine and Surgery is of the opinion that an operation for the removal of tonsils is one which is not without danger to life, consequently from the opinions of J. A. G. [P. 8] of December 7, 1925, and April 20, 1926, it is seen that the Department is without authority to order a man to submit to such an operation, and where one is suffering from a disease which such an operation would remedy, the disability incurred is in line of duty, if the disease was so contracted (File 29372–440 J:AC, April 28, 1926).

SHIP'S SERVICE STORES: ON VESSELS NOT HAVING A SHIP'S STORE MAY SELL SUCH ARTICLES AS ARE INCLUDED IN A SHIP'S STORE.

Held: Article 1442 (3) Navy Regulations, 1920, provides that: "The commanding officer in his discretion may establish and operate a ship's service store on the ship under his command for the sale of articles not permitted in the ship's store. Sales in the ship's service store shall be limited to such articles as are specifically approved by the commander in chief and shall not include any articles that are authorized to be sold in the ship's store." From an examination of the above-quoted extract the Department is of the opinion that the second sentence of the quotation is applicable only in those cases where there is a ship's store on board a vessel the commanding officer of which desires to establish and operate a ship's service store, and that in those cases where there is no ship's store on board such vessel, the commanding officer may in his

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discretion establish and operate a ship's service store on board his ship not only for the sale of such articles as are usually included in a ship's service store, but also such articles as are included in ship's stores (File 26806–198 J : AC, April 28, 1926).

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[P. 3] WHERE THE ACCUSED HAS MADE A STATEMENT TO THE COURT NOT UNDER OATH: A JUDGE ADVOCATE OR RECORDER (IF THERE BE NO COUNSEL) MUST UPON COMPLETION OF SUCH STATEMENT, INFORM THE COURT THAT THE PROVISIONS OF SECTION 590, NAVAL COURTS AND BOARDS, HAVE BEEN COMPLIED WITH.

In reviewing the summary court martial in the case of Harry James Huber, seaman first class, U. S. Navy, it was noted that the accused made a statement to the court not under oath, that he was not represented by counsel and that the record failed to show that the provisions of section 590, Naval Courts and Boards, had been complied with. On April 8, 1926, it was directed that the court be reconvened for the purpose of correcting this error if it was clerical; if, however, it was an omission in fact from the proceedings, no correction was to be made, but a statement to that effect was to appear in the record of proceedings in revision. On April 16, 1926, the convening authority advised the Department that the court could not be reconvened for the reason that it had been dissolved by order of the convening authority on April 3, 1926.

Section 949 (64), Naval Courts and Boards, provides that if the accused be without counsel and makes an oral statement, immediately following the notation that such statement was made must appear the entry that:

> "The recorder informed the court that the substance of Section 590, Naval Courts and Boards, had been carefully explained to the accused."

In view of the mandatory provisions of this section and in consideration of the fact that the only way the record of a court martial can be corrected is to reconvene the court before which the case was tried and have it authorize the necessary corrections in its proceedings in revision (C. M. O. 3, 1925, 7), the Department is of the opinion that the proceedings in the case of the above-named man are illegal (File 26287–10801; 1 C, May 3, 1926).

DISABILITY IN LINE OF DUTY: AND NOT DUE TO OWN MISCONDUCT, WHERE MEMBER OF NAVAL SERVICE REFUSES TO SUBMIT TO AN OPERATION WHICH IS DANGEROUS TO LIFE AND DISABILITY RESULTS FROM HIS REFUSAL.

H was admitted to the sick list on February 2, 1926, with contusion, right knee, due to fall, the origin of which was considered [P. 4] in line of duty. On February 4, 1926, the diagnosis was changed to dislocation articular cartilage, right knee, line of duty. On February 15, 1926, the man refused to be operated on for this disability, and as a result of such refusal, the origin of his disability was considered not in the line of duty and due to own misconduct, and the board gave as its reason that the operation which was offered to the man was not dangerous to life or limb to such an extent that he was justified in refusing to submit.

Held: In an opinion of the Bureau of Medicine and Surgery relative to this case the following was stated:

> "Since the surgical operation as advocated requires the opening of an important joint and the removal of dislocated cartilage, this Bureau is of the opinion that it cannot be positively stated that such an operation will effect a permanent cure nor that it would not be accompanied by ill effects, such as possible infection, and limitation of motion of the knee."

In view of the facts stated in the case, and the fact that the case is one which might be dangerous to life or limb as indicated in the opinion of the Bureau of Medicine and Surgery, the Department holds the disability complained of to have originated in the line of duty and not the result of his own misconduct (File 29372–437 J : AC, April 20, 1926).

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DISABILITY IN THE LINE OF DUTY: NOT THE RESULT OF HIS OWN MISCONDUCT.

B was examined by a Board of Medical Survey and found to be suffering from constitutional psychopathic inferiority, without psychosis, the origin of which the board found to be not in the line of duty, not the result of his own misconduct. The man in question had completed approximately three years' service prior to admission to the sick list for this disability.

Held: In view of the fact that the Bureau of Medicine and Surgery stated that this disease is a condition which includes certain border line mental states, the Navy Department is of the opinion that the fact that this man made no statement in rebuttal should not be given any consideration, for the reason that his mental condition is obviously such as to render such statement valueless, and further, in view of the period of service and the fact that no disability was noted on enlistment, that the origin of the disability should be considered as in the line of duty (File 29372–436 J : AC, May 4, 1926).

[P. 5] DISPOSITION TO BE MADE OF ORIGINAL RECORDS OF THE BUREAU OF NAVIGATION UPON ORDER OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

COPIES OF OFFICIAL RECORDS, AUTHENTICATED UNDER SEAL, ARE, UNDER SEC. 882, R. S., ADMISSIBLE IN EVIDENCE EQUALLY WITH THE ORIGINALS.

The Chief of the Bureau of Navigation was served with a subpena directing him or other official or employee custodian of the records and documents to produce a certain letter, addressed to the Secretary of the Navy and now on file in the Navy Department, the said letter being required by the Supreme Court of D. C. in an equity case. An employee took the letter to court, but he was informed that the plaintiff would probably demand the delivery of the original letter and its retention in the records of the Court at least until the case had finally been decided.

Held: Realizing that the records of the departments would frequently be required in connection with litigation in the Federal courts and that it would be obviously impracticable and inadvisable that the original of such records be taken from the custody of the heads of the several departments for the purpose of introduction in evidence before courts, Congress provided that "Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof (sec. 882, R. S.). From the case of *Cohn* v. *U. S.*, it is seen that by "documents," within the meaning of the above-mentioned section of Revised Statutes, is meant any paper which is required by law to be kept on file in the Department (File: A6–6 (2) A17–4 (260428) J : AC, May 3, 1926).

FLEET NAVAL RESERVE: MEMBER OF, MUST BE RELEASED FROM BEFORE HE CAN BE APPOINTED IN THE COAST GUARD.

A member of the Fleet Naval Reserve, class 1–c, desires to be released therefrom to accept a temporary appointment as boatswain in the U. S. Coast Guard, and that in order that he may be notified of his status in the Naval Reserve and not lose any privileges to which he would otherwise be entitled, he requests a decision as to whether or not it will be necessary for him to be discharged from the Fleet Naval Reserve before accepting an appointment in the Coast Guard.

Held: The act of January 28, 1915, which established the Coast Guard, provides that said Coast Guard shall constitute a part of the military forces of the United States, and section 4 of the Naval Reserve Act of 1925 provides that no officer or man of the Naval Reserve shall be a member of any other naval or military organization except the Naval Militia. In view of the foregoing, the Department is of the opinion that man cannot [P. 6] serve in both the Naval Reserve and the Coast Guard at the same time, and before a member of the Fleet Naval Reserve can accept an appointment in the Coast Coast Guard he must be discharged from the Fleet Naval Reserve (File 28550–1787 : 5 J : AC, April, 5, 1926).

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LINE OF DUTY: NOT THE RESULT OF HIS OWN MISCONDUCT.

DRUG ADDICT: MAN WHO IS ON THE SICK LIST FOR OBSERVATION AS. TIME WHILE MAN IS ON SUCH LIST SHOULD BE CONSIDERED AS LINE OF DUTY AND NOT THE RESULT OF HIS OWN MISCONDUCT WHERE OBSERVATION DOES NOT DISCLOSE THAT THE MAN IS ADDICTED TO THE USE OF DRUGS.

J was admitted to the sick list December 8, 1925, with a diagnosis of poison, cocaine, acute, not in line of duty, due to his own misconduct. On December 10, 1925, he was discharged from the sick list to be kept under observation. On January 25, 1926, he was transferred to the naval hospital, Mare Island, with diagnosis undetermined, and on February 4, 1926, diagnosis was changed to "no disease." The question is presented as to whether or not the time spent on the sick list from January 25, 1926, to February 4, 1926, should be considered as having been due to his own misconduct.

Held: The man's presence on the sick list from January 25, 1926, to February 4, 1926, was merely the result of precautionary measures taken for the determination whether or not he was a drug addict, and as a matter of fact he was not disabled during that time. The Navy Department is accordingly of the opinion that since he was not suffering from any physical or mental disability during the time in question, and that his presence on the sick list as a precautionary measure did not disclose that he was a drug addict, it should be held that the time lost was not due to his own misconduct (File 29372–430 J: AC, March 31, 1926).

SIX MONTHS' DEATH GRATUITY: DEPENDENTS OF MEMBERS OF THE FLEET NAVAL RESERVE NOT ENTITLED TO WHERE SUCH MEMBERS DIE ON ACTIVE DUTY.

Held: An examination of the act of June 4, 1920, discloses that benefits of said act are applicable only to officers, enlisted men, or nurses on the active list of the regular Navy or regular Marine Corps, or on the retired list while on active duty (File 26543–472 J: AC, April 5, 1926).

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[P. 4] Ensign Stanley A. Williams, U. S. Navy, was tried by general court martial on board the U. S. S. *Sloat*, Mare Island, Calif., April 16, 1926, by order of Commander Destroyer Squadrons, Battle Fleet, U. S. Fleet, on the following charges:

Charge I.—Absence from station and duty after leave had expired.

Charge II.—Conduct to the prejudice of good order and discipline.

Ensign Williams was convicted of the first charge and was acquitted of the second, and the court sentenced him to lose five numbers in his grade. In approving the sentence the convening authority on May 7, 1926, placed the following endorsement on the record which endorsement was concurred in by the Bureau of Navigation and the Secretary of the Navy:

> "The proceedings and finding under charge I of the general court martial in the foregoing case of Ensign Stanley A. Williams, U. S. Navy, are approved.
>
> "The finding of the court under charge II is not approved.
>
> "The defendant in this case, Ensign Stanley A. Williams, U. S. Navy, was found guilty of charge I, 'Absence from station and duty after leave had expired,' and acquitted of charge II, 'Conduct to the prejudice of good order and discipline' (missing ship).
>
> "No defense was offered by the accused for his unauthorized absence. The only defense offered by the accused for the offense of 'missing ship' were certain statements made by himself to witnesses that he was satisfied with his duty on the *Mullany*, [P. 5] and thus could have had no reason for avoiding duty on the *Mullany*.
>
> "The counsel for the accused in his argument stated that it is necessary to prove intent in cases of missing ship. This is in error. Missing ship without specific intent to do so constitutes an offense separate from unauthorized absence. This is fully set forth in Court-Martial Order No. 8 (5), 1924.

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"The convening authority considers the sentence adjudged by the court inadequate.

"Subject to the foregoing remarks, and in order that the accused may not entirely escape punishment, the sentence is approved.

"Ensign Stanley A. Williams, U. S. Navy, will be released from arrest and restored to duty."

EXPIRATION OF ENLISTMENT: STATUS OF MAN AFTER.

In reviewing the record of proceedings of the general court-martial case of Macario Taripa, mess attendant first class, U. S. Navy, it is noted that the court reduced the accused to the rating of mess attendant third class. Inasmuch as the enlistment of Taripa expired July 6, 1926, he is no longer an enlisted man in the Navy, though subject to the jurisdiction of a naval court martial for an offense committed while in the Navy (C. M. O. 9, 1925, p. 16). Not being an enlisted man in the Navy, he cannot hold an enlisted rating, and consequently the action of the court in providing for a reduction to mess attendant third class is a nullity.

Subject to the foregoing, it is the opinion of the Navy Department that the proceedings, findings, and sentence in the case of Macario Taripa, mess attendant first class, U. S. Navy, and the action of the convening authority thereon, are legal (File 26262–12202A, G. C. M. Rec. No. 64826, May 19, 1926).

SERVICE RECORD: ENTRIES IN, WHERE PROPERLY INTRODUCED IN EVIDENCE, SUFFICIENT TO ESTABLISH PRIMA FACIE CASE OF DESERTION IF SUFFICIENT FACTS ARE RECORDED.

Thomas Wilson, Jr., fireman first class, U. S. Navy, was tried by general court martial convened by order of the Secretary of the Navy at the Navy Yard, New York, N. Y., and acquitted on the following charge and specification:

"*Desertion.*

"*Specification.*—In that Thomas Wilson, Jr., now a fireman first class, U. S. Navy, did, on or about November 14, 1924, while so serving on board the U. S. S. *Coghlan*, desert from said ship and from [P. 6] the U. S. naval service, and did remain a deserter until he was delivered on board the U. S. receiving ship, Navy Yard, New York, N, Y., on or about January 23, 1926."

In support of the charge the judge advocate offered in evidence certain entries from the service record of the accused, and the report of return of deserter. The entries from the service record were as follows:

"From page 9: Name, Wilson, Thomas, Jr.; rate, fireman first class; place, U. S. S. *Coughlan*. 11–14–24, breaking arrest, a. w. o. l. since 8 a. m. this date. Left no effects."

"11–24–24, declared a deserter this date in accordance with art. D-7112, Bu. Nav. Manual, 1921. (Signed) J. M. B. Smith, Lieutenant Commander, U. S. N."

After reading the report of return of deserter and introducing it into evidence the prosecution rested. The defense offered no evidence, and after argument by the judge advocate and counsel for accused the court directed the judge advocate (p. 6 of the record) to submit to the court information as to the status of this case where no admission is made by the accused, and stated:

"Under a ruling of the department the court has accepted evidence from the enlistment record merely to supply that measure of corroboration which is required to satisfy a legal requirement in the case of admissions made in court. In the absence of the admission it would seem to the court necessary for the judge advocate to produce additional evidence before the court can act in this case."

The court then adjourned.

Upon the meeting of the court the following day counsel for accused objected to the words "U. S. S. *Coughlan*" appearing in the extract from the service record

of the accused offered in evidence on the ground that those words were not contained in the extract so read and had been supplied by the judge advocate. The court sustained the objection of counsel and the words in question were stricken from the record. At this point the judge advocate requested that the case be reopened in order that the prosecution might submit further evidence. The counsel for the accused objected to the case being reopened, but before the court could make a ruling the judge advocate withdrew his request to reopen the case. The judge advocate erred in withdrawing his request, as the last page of the service record contained an entry over the signature of the commanding officer U. S. S. *Coghlan* to the effect that the accused had deserted from the U. S. S. *Coghlan* at Philadelphia, Pa., on November 24, 1924, which should have been introduced in evidence to show the origin of the accused's absence. The court erred at this point in not directing the judge advocate to submit any further evidence that might be available, or in not adjourning if necessary for a reasonable period in order that further evidence might be procured with a view to a more thorough investigation of the case (sec. 452, Naval Courts and Boards).

[P. 7] It is not clear from the record whether the court based their findings and acquittal on the fact that the origin of the absence of the accused was not proved or whether they entertained the idea that an admission on the part of the accused is necessary in a case of this nature, where the prosecution relies solely on documentary evidence. The statement of the court that under a ruling of the department evidence from an enlistment record is admissible in a trial for desertion only in corroboration of admissions made in court by an accused is erroneous. No such ruling has been made by the department, and Court-Martial Order 5, 1925, 7, to which the judge advocate invited the attention of the court, contains no reference to an admission on the part of an accused and has no bearing on the present case. The case referred to in that court-martial order was that of Jack B. King, seaman, second class, U. S. Navy, who was tried for desertion and convicted, the material allegations in the specification being that King had, while serving on the U. S. S. *Sinclair*, on or about April 23, 1924, deserted from said ship and from the U. S. Navy and remained in desertion until he was delivered at the U. S. Naval Training Station, Great Lakes, Ill., on or about July 1, 1924. The prosecution relied solely on documentary evidence. The extract from King's service record established that he had failed to return to the U. S. S. *Sinclair* at the expiration of leave on April 23, 1924, but the report of return of deserter showed that he had been delivered at the Naval Training Station, Great Lakes, Ill., on July 1, 1924, by naval guard, The findings and sentence were disapproved by the Department, due to the fact that no evidence was introduced to show when and where King first came within naval jurisdiction or whether his return was by surrender or delivery, it being apparent that he was already under naval control at the time of his delivery by naval guards at the Naval Training Station, Great Lakes, Ill. It appeared from the evidence introduced in the King case that persons who witnessed the actual return of King to naval jurisdiction might have been available to testify without resorting to the use of the written report of deserter received on board, and the Department in commenting on this case stated that where witnesses are available who can testify of their own knowledge of the circumstances in connection with the offense of desertion their testimony should be offered rather than the written reports. There was nothing in the remarks of the Department in this case from which an inference could be drawn that documentary evidence could not be introduced to prove unauthorized absence, or that if such evidence was introduced it must be substantiated by an admission on the part of the accused.

The present case does not present the problem encountered in the King case. An inspection of the report of return of deserter and the service record of the accused in the present case discloses **[P. 8]** that these two documents contained sufficient data to establish a prima facie case of unauthorized absence if properly introduced in evidence (sec. 392, Naval Courts and Boards). The entries in the service record showed that the accused while attached to the U. S. S. *Coghlan* broke arrest, absented himself without leave, and left no effects, on November 14, 1924. The report of return of deserter showed that the accused was apprehended by the civil authorities and delivered on board the U. S. receiving ship at New York, N. Y., in civilian clothes on January 23, 1926. Had

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these entries been properly introduced a prima facie case of unauthorized absence would have been established, and in the absence of any evidence in explanation or rebuttal introduced by the defense the court would have been fully justified in finding this accused guilty of desertion, the intent to permanently abandon the service being established by the facts that he broke arrest, left no effects, was absent for a period of approximately 14 months, and was apprehended and delivered to the naval authorities in civilian clothes.

Subject to the foregoing, it is the opinion of the Navy Department that the proceedings, finding, and acquittal are legal (File 26251–35919A, G. C. M. Rec. No. 64538, May 12, 1926).

AUTHORITY OF COMMANDING OFFICER TO ADMINISTER OATHS FOR PURPOSES OF NAVAL ADMINISTRATION.

A request was recently made of the Navy Department that an interpretation of Navy regulations be rendered regarding the authority of the commanding officer, U. S. Naval Reserve Air Station, Sand Point, Seattle, Wash., to administer oaths to officers under his command for purposes of naval administration.

Held: The act of March 4, 1917 (39 Stat. 1171), upon which the Navy regulation in question is based, provides relative to this subject as follows: "That judges advocate of naval general courts martial, and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, be, and they are hereby authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration." After a careful examination of the foregoing, the Navy Department [P. 9] is of the opinion that the commanding officer of the U. S. Naval Reserve Air Station, Sand Point, Seattle, Wash., is authorized to administer oaths to officers under his command for purposes of naval administration (File: A17–6 (5) NA13 (260415) J:AC, May 10, 1926).

DISABILITY, LINE OF DUTY.

An individual was examined for appointment as midshipman June 3, 1924, and no physical defects were noted. On December 7, 1925, at the annual examination of midshipmen, he was found to have defective color perception. On March 15, 1926, he was reexamined and rejected on account of this disability. On April 2, 1926, he was admitted to the sick list at the Naval Academy with a diagnosis of myopia, not in the line of duty, the medical officer being of the opinion that the condition existed prior to the appointment.

Held: In view of the fact that the physical examination of the midshipman at the time of entrance to the Naval Academy showed no defect in vision, that the physical examination of December 7, 1925, did not disclose the disability of myopia, and that there are no affirmative facts showing that either of said disabilities existed prior to his appointment to the Naval Academy, the Navy Department is of the opinion that each of said disabilities, i. e., defective color perception and myopia, should be held to have originated in the line of duty (File: OO–Burton, Eugene P1P./2–5 (2) (260503) J:AC, May 17, 1926).

DISABILITY IN LINE OF DUTY.

W enlisted in the Marine Corps on October 2, 1925, and no physical defects were noted. On March 26, 1926, he was admitted to the sick list with a diagnosis of "flat foot," origin not in line of duty and not the result of his own misconduct. The man admitted that for a period of about four years prior to his entry into the Marine Corps he suffered with pain and weakness of both feet, but since his entry into the service these symptoms had been much exaggerated, and are now such as to incapacitate him for the proper performance of his duty.

Held: While statements describing certain physical conditions noticed prior to enlistment may be considered as evidence tending to show that the disability discovered had its origin prior to enlistment and not in the line of duty, it is not

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deemed advisable that the statement of an individual in the naval service to the effect that he had the disability complained of prior to enlistment should be accepted as conclusive evidence of said fact, unless such statement of the claimant contains a description of certain physical conditions which he had noticed prior to his [P. 10] enlistment, which conditions could have no other plausible explanation than that he was suffering from the disability complained of prior to his enlistment in the naval service. Since enlisted men of the Marine Corps are given two medical examinations prior to their enlistment, in each of which the feet of the recruits are most carefully examined, the Navy Department is of the opinion that the statement of W cannot be accepted as proof of the fact that he had flat feet prior to his enlistment in the Marine Corps (File: ML–White, Marvin F./P13–2 (260427) J:AC, May 8, 1926).

DISABILITY, LINE OF DUTY: NOT THE RESULT OF HIS OWN MISCONDUCT.

D enlisted in the Marine Corps October 16, 1922, and served approximately three years and six months prior to the onset of his present disability. A board of medical survey convened at the naval hospital, New York, and found that he was suffering from constitutional psychopathic inferiority, without psychosis, and held that in its opinion said disability did not originate in the line of duty and it was not due to misconduct.

Held: Applying the decisions of the Navy Department of November 30, 1925, July 22, 1922, May 19, 1921, and July 1, 1923, to the present case, the disability is held to have originated in the line of duty and not due to misconduct (ML–Delsardo, Bartholomew/P2–5 (1) (260510) J:AC, May 15, 1926).

DISABILITY, LINE OF DUTY: NOT DUE TO OWN MISCONDUCT.

S enlisted in the Navy October 1, 1925, and no physical defects were noted upon his enlistment. He was admitted to the sick list March 22, 1926, with a diagnosis of mental deficiency, and transferred to the naval hospital, New York, where his diagnosis was changed to psychopathic constitutional inferiority, without psychosis. On May 5, 1926, a board of medical survey convened in his case confirmed this diagnosis and considered that the disability complained of did not originate in line of duty but existed prior to enlistment.

Held: This case is in all respects similar to the cases referred to in the opinion of the Navy Department approved May 15, 1926, and applying the holdings in the cases referred to in that opinion to the case of S, the Navy Department is of the opinion that the disability complained of should be held to have originated in the line of duty and not the result of his own misconduct (MM–Snyder, Sylvester P./P2–5 (2) (260525) J:AC, June 9, 1926).

[P. 11] DISABILITY: MANIFESTING ITSELF AFTER ENTRY INTO NAVAL SERVICE SHOULD BE HELD LINE OF DUTY IN ABSENCE OF AFFIRMATIVE FACTS SHOWING OTHERWISE.

The record of proceedings in the case of a retiring board found that the officer is incapacitated for active service by reason of color blindness, and that the defect is believed to be congenital. No facts substantiating this belief were introduced.

Held: Section 1449 R. S. gives a retiring board the authority to inquire into and determine facts touching the nature and occasion of the disability of any officer whose case is before it, and such powers of a court martial or court of inquiry as may be necessary. A retiring board is required to inquire into all facts touching the officer's disability, and in the absence of affirmative facts showing that the claimant did in fact have the disability complained of prior to his acceptance into the naval service, the disability shall be considered as having had its origin subsequent to the entrance of the claimant into the naval service. A board may be ordered to reconvene for the purpose of establishing, insofar as possible, the affirmative facts available bearing directly upon the origin of the disability complained of (File 26253–1784 J:AC, May 6, 1926).

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DISCHARGE, HONORABLE: GIVEN FOR CONVENIENCE OF GOVERNMENT; JURISDICTION OF NAVAL COURTS MARTIAL TERMINATED UPON THE DELIVERY OF DISCHARGE.

An enlisted man of the naval service was given an honorable discharge on April 8, 1926, for the convenience of the Government, as provided for in Article B–9107, Bureau of Navigation Manual. After the man had received his discharge and had left the limits of the station, late in the afternoon of the same day he was apprehended and returned to the station and brought to trial before a summary court martial for an offense alleged to have been committed prior to discharge. The enlistment of the man did not expire until April 21, 1926.

Held: The jurisdiction of the courts martial over enlisted men who are discharged by reason of expiration of enlistment does not terminate, notwithstanding the delivery of the discharge certificate, until midnight of the last day of service. Discharge at any other time or for any other cause takes effect upon delivery of the certificate. It is the opinion of the Navy Department that the discharge in this case was given for the convenience of the Government and not by reason of expiration of enlistment, and that the jurisdiction of naval courts martial terminated upon the delivery of the discharge (File 26287–10878C, June 11, 1926).

PERSONAL-PROPERTY TAX.

An officer who is attached to a naval station, but because there are no Government quarters available resides away from Government territory, has been taxed by the city in which he resides [P. 12] for personal property. The officer requested an opinion from the Navy Department as to the legality of this tax.

Held: The question presented is one over which the Navy Department has no jurisdiction, and must be determined between the officer and the city officials. A similar case was had in New Hampshire regarding the payment of poll tax by an Army officer, and it was held that the officer was not taxable due to the fact that he could not be said to have established a domicile in that State (OA–/L14–1 (8) (260517) J:AC, June 12, 1926).

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[P. 3] Boatswain Richard E. Hawes, U. S. Navy, was tried by general court martial at the U. S. Submarine Base, Coco Solo, C. Z., on March 8, 1926, by order of the Commandant, Fifteenth Naval District, and was acquitted of the charge of [P. 4] "Culpable inefficiency in the performance of duty." The Chief of the Bureau of Navigation on March 5, 1926, placed the following endorsement on the record:

> "U. S. Navy Regulations, 1920, article 1061 (2) and 1063 (3), make the officer of the deck responsible for the safety of the ship, subject, however, to any orders he may receive from the commanding officer.
>
> "The accused while on duty as officer of the deck and knowing his position to be doubtful failed to station lookouts and get soundings, both of which safety precautions are required by Navy Regulations in the conditions existing prior to the time the vessel grounded.
>
> "This Bureau is of the opinion that the specifications of the charge in this case are inadequate in that they failed to specify the failure of the accused to take soundings and station lookouts as required by Navy Regulations.
>
> "Subject to the above remarks it is recommended that the proceedings, findings, and acquittal in this case be approved."

The above remarks were concurred in by the Secretary of the Navy on June 19, 1926.

[P. 5] SUMMARY COURT-MARTIAL SENTENCES INVOLVING CONFINEMENT, DEPRIVATION OF LIBERTY ON SHORE ON A FOREIGN STATION, OR EXTRA POLICE DUTIES.

Summary court-martial prisoners serving sentences involving confinement, deprivation of liberty on shore on a foreign station, or extra police duties for

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a period of thirty days or more shall hereafter, upon the commencement of the running of such sentence, be credited with one-third of the period of such sentence. Upon the expiration of two-thirds of the period of the sentence the prisoner will be released from arrest and restored to duty provided his conduct or performance of duty while a prisoner warrants, in the opinion of his commanding officer, such release and restoration to duty; otherwise the sentence as approved shall be carried out.

This procedure shall apply equally ashore and afloat, and nothing herein contained shall be construed as restricting in any manner the power of reviewing authorities of summary courts martial to remit, mitigate, or set aside, in whole or in part, any sentence adjudged by summary court martial.

The conditions herein provided shall apply to prisoners serving sentences adjudged by deck courts whenever applicable.

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[P. 3] Lieut. John G. Clausing, United States Marine Corps, was tried by general court martial on May 5, 1926, at the United States naval station, Guam, by order of the commandant, United States naval station, Guam, and was acquitted of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline.

Charge II.—Drunkenness.

On June 25, 1926, the convening authority placed the following endorsement on the record:

> "The court erred in excusing two witnesses for the prosecution, and erred in allowing a witness for the prosecution to refuse to answer a proper and legal question. As these rulings did not operate to the injury of the accused, the proceedings of the general court martial in the foregoing case of John G. Clausing, first lieutenant, U. S. Marine Corps, are approved.
>
> "The findings on the specification of the first charge and the finding and acquittal on the first charge are approved. The finding on the original specification of the second charge is approved. The findings on the additional specification of the second charge and the acquittal on the second charge are disapproved in view of the above-referred-to erroneous actions of the court, and in view of the unrefuted testimony of Sydney R. Vandenburg, a Federal official of the Department of Agriculture, to the effect that the accused was in an intoxicated condition.

Lieut. John B. Cooke, United States Navy, was tried by general court martial on June 22, 1926, on board the U. S. S. *Altair* by order of the commander, Submarine Divisions, Battle Fleet, on the charge of "Neglect of duty" (four specifications). The court convicted Lieutenant Cooke of the charge and two specifications thereunder, and sentenced him to lose three numbers in his grade. In approving the proceedings, findings, and sentence [P. 4] the convening authority on July 8, 1926, placed the following endorsement on the record:

> "The convening authority is of the opinion that the court erred in not finding the second specification of the charge proved in view of the voluntary statement made by the accused to his commanding officer, as given on page 43 of the record and the corroborative evidence.
>
> "It is believed also that the court was in error in not admitting in evidence the testimony given by the accused before a board of investigation, as the controlling principle in such a case is whether or not the purported inducement was of such a nature as to cause the accused to make an untrue statement. It is unreasonable to believe that the accused, an officer of age and experience, would have been induced to make an untrue statement under oath under the conditions set forth.
>
> "The convening authority notes certain minor defects in the record but none of these are considered prejudicial to the interest of the accused and none are so serious as to affect the legality of the proceedings.
>
> "The convening authority is of the opinion that, in view of the serious nature of the offense of which the accused was found guilty, the sentence is inadequate.

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"Subject to the foregoing remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant John B. Cooke, U. S. Navy, are approved. He will be released from arrest and restored to duty."

Chief Pay Clerk Carl W. Dunlap, United States Navy, was tried by general court martial on July 2, 1926, on board the U. S. S. *Savannah*, by order of the commander, Submarine Divisions, Battle Fleet, and was acquitted of the charge of "Drunkenness." On July 17, 1926, the proceedings, findings, and acquittal were approved by the convening authority.

The Chief of the Bureau of Navigation on August 6, 1926, placed the following endorsement on the record, which remarks were on August 10, 1926, concurred in by the Secretary of the Navy:

"This case appears to have been poorly prepared by the reporting officer before making his recommendation for further disciplinary action to the Commander, Submarine Division, Battle Fleet. The proper time to determine the condition of any officer or man as to his sobriety is at the time when his condition is considered unsatisfactory to his superior officer. It is therefore the opinion of this Bureau that the commanding officer of the U. S. S. *Savannah* erred seriously in not requiring reliable witnesses, sufficient in number, to examine the accused at the time and to state their opinion in writing."

[P. 5] Lieut. Commander Rush S. Fay, United States Navy, was tried by general court martial on July 19, 1926, on board the U. S. S. *Black Hawk*, by order of the commander in chief United States Asiatic Fleet on the following charges:

Charge I.—Through negligence, suffering a vessel of the Navy to be stranded.

Charge II.—Culpable inefficiency in the performance of duty.

The court convicted Lieut. Commander Fay of charge I, but acquitted him of charge II. He was sentenced to lose two numbers in his grade. On August 6, 1926, the convening authority placed the following endorsement on the record:

"The proceedings of the general court martial in the foregoing case of Lieutenant Commander Rush S. Fay, U. S. Navy, are approved.

"The findings on the first charge and specification thereunder are approved.

"The findings on the second charge and specification thereunder are disapproved for the reason that in the opinion of the Commander in Chief they are not in accord with the evidence adduced.

"The Commander in Chief is of the opinion that the sentence is inadequate for the offense found proved, and that the court has, in effect, infringed upon the prerogative of the convening authority by exercising clemency in this case. The sentence is, however, approved. He will be released from arrest and restored to duty."

Ensign Robert H. Keliher, United States Navy, was tried by general court martial on July 27, 1926, on board the U. S. S. *Colorado* by order of the commander in chief Battle Fleet, United States Fleet, on the following charges:

Charge I.—Drunkenness.

Charge II.—Conduct unbecoming an officer and a gentleman.

The court convicted Ensign Keliher of both charges and sentenced him to lose 50 numbers in his grade. In approving the proceedings, findings, and sentence the convening authority on August 7, 1926, placed the following endorsement on the record:

"In reviewing the record of proceedings of the general court martial in the foregoing case of Ensign Robert H. Keliher, U. S. Navy, the convening authority is of the opinion that the sentence adjudged by the court is entirely inadequate to the offense of which the accused was found guilty.

"Subject to the foregoing remarks the proceedings and findings are approved, and in order that the accused may not entirely escape punishment, the sentence in the foregoing case is approved.

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"Ensign Robert H. Keliher, U. S. Navy, will be released from arrest and restored to duty."

[P. 7] Lieut. Commander James B. Will, United States Navy, was tried by general court martial on July 14, 1926, on board the U. S. S. *Savannah*, by order of the commander, Submarine Divisions, Battle Fleet, on the charge of "Through negligence suffering a vessel of the Navy to be hazarded." The court convicted Lieut. Commander Will of the charge and sentenced him to lose three numbers in his grade. In approving the proceedings, findings, and sentence the convening authority on July 19, 1926, placed the following endorsement on the record:

"In reviewing the proceedings in this case, it was noted that the court sustained the objection of the accused to the admission in evidence of the ship's copy of the smooth log of the U. S. S. *Eagle 47* based upon the plea of the accused that this was a carbon copy although it was pointed out by the judge advocate of the court that this carbon copy was duly authenticated.

"In view of the ruling of the Judge Advocate General of the Navy that carbon copies signed in carbon by the same act as the signing of the original or signed separately in the same manner as the original are counterparts or duplicate originals, it is considered that the court erred in sustaining the objection of the accused in this instance.

"Subject to the foregoing remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant Commander James B. Will, U. S. Navy, are approved. He will be released from arrest and restored to duty."

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[P. 4] EXPIRATION OF ENLISTMENT: STATUS OF MAN AFTER.

In reviewing the record of proceedings in the general court-martial case of C. W., seaman second class, U. S. Navy, it is noted that the court reduced the accused to the rating of apprentice seaman. Inasmuch as the enlistment of W. expired on October 27, 1925, he is no longer an enlisted man in the Navy though subject to the jurisdiction of a naval court martial for an offense committed while in the Navy (C. M. O. 9, 1925, p. 16). Not being an enlisted man in the Navy he cannot hold an enlisted rating and, consequently, the action of the court in providing for reduction to apprentice seaman is a nullity.

Subject to the foregoing, the proceedings, findings, and sentence are legal (File 26251–37259A, G. C. M. Rec. No. 65097, July 14, 1926).

SPECIFICATION DOES NOT SUPPORT CHARGE.

H. T. M., fireman first class, U. S. Navy, was tried by general court martial on board the U. S. S. *Savannah* at San Diego, Calif., on the charge of "Scandalous conduct tending to the destruction of good morals" (2 specifications). After entering a plea of not guilty to both specifications, he was acquitted on specification 1 and found guilty on specification 2 and was sentenced to solitary confinement on bread and water for thirty (30) days with a full ration every third day and to lose thirty dollars ($30) per month of his pay for a period of six (6) months, total loss of pay amounting to one hundred eighty dollars ($180). The proceeding, findings, and sentence were approved by the convening authority and the U. S. S. *Savannah* was designated as the place of confinement.

Specification 2 of the charge "Scandalous conduct tending to the destruction of good morals" alleges that the accused

"* * *, did, on or about June 4, 1924, in an apartment occupied by himself * * * in the city of San Diego, Calif., knowingly and unlawfully permit the operation of a device for the purpose of extracting alcohol from shellac."

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[P. 5] The offense alleged in this specification does not, in the opinion of the Navy Department, constitute an act chargeable as "Scandalous conduct tending to the destruction of good morals." The specification as drawn was evidently intended to indicate a violation of act 3784, Statutes 1921, State of California, commonly known as the Wright Act, or else was intended to indicate a violation of the National Prohibition Act. In either case the offense alleged should have been charged as "Conduct to the prejudice of good order and discipline."

The specification under consideration alleges that the accused "did, in an apartment occupied by himself, in the city of San Diego, Calif., knowingly and unlawfully permit the operation of a device for the purpose of extracting alcohol from shellac." There is nothing in this specification which constitutes an offense either against the Wright Act or the National Prohibition Act. If Marshall had been charged with unlawfully operating a device for the purpose of manufacturing liquor or for unlawfully having in his possession property designed for the manufacture of liquor, the specification would have been in due form and technically correct, and a specification so worded could have been proved. It is possible that a specification could have been drawn charging the accused with conspiring to violate the National Prohibition Act, in that he was an accessory to the acts which transpired in his apartment. However, it would not have been competent for the court to substitute in the specification words sufficient to charge a conspiracy to violate the National Prohibition Act for it would have been necessary to have found the accused guilty of a specification totally different and distinct from the specification originally preferred (C. M. O. 11, 1925, 11).

In view of the foregoing it is the opinion of the Navy Department that the court erred in finding the charge and specification to be in due form and technically correct.

Therefore so much of the proceedings and findings as relates to the charge, specification 2, sentence and action of the convening authority thereon in the foregoing case will be set aside (File: A17-20/MM * * * (260611), G. C. M. Rec. No. 65135, August 10, 1926).

[P. 6] EFFECT OF COMMISSION ISSUED UNDER AUTHORITY OF ACT OF JUNE 4, 1920, UPON ENLISTED STATUS PREVIOUSLY HELD.

In the administration of a State bonus for veterans of the late war, the question has arisen as to the status of an enlisted man who was temporarily advanced to warrant officer, ensign, and lieutenant (j. g.) under authority of the act of May 22, 1917, and later commissioned as lieutenant (j. g.) in the Regular Navy under authority of the act of June 4, 1920. Information was requested as to whether or not a commission as lieutenant (j. g.) issued under the authority of the last-mentioned act operated as, or is equivalent to, a discharge under honorable conditions from the enlisted status previously held.

Held: In the opinion of the Navy Department whenever an enlisted man of the Regular Navy receives a permanent appointment as a commissioned officer in the Regular Navy, said permanent appointment operates to discharge him from his enlisted status under honorable conditions. In this connection attention is invited to a decision of the Comptroller of the Treasury, June 24, 1903, Supplies and Accounts memorandum (vol. I, pp. 222, 224), in which it was held that military service is divided into two distinct branches, the commissioned officers and enlisted men, and service in the one is incompatible with service in the other (File: MM/P14-5/P19-1 (260806) J, August 24, 1926).

ELIGIBILITY FOR RETIREMENT.

W. M. was commissioned as a passed assistant surgeon with the rank of lieutenant in the Regular Navy February 23, 1921, and tendered his resignation July 11, 1921, which was accepted, becoming effective July 27, 1921. Two years ago, subsequent to the separation from the naval service of the ex-officer, he had a break-down and is now in the Government hospital at Denver, Colo., with a diagnosis of tuberculosis. He requests to be advised as to whether or not he is eligible for retirement.

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Held: As the ex-officer is now not an officer in the Regular Navy he is not eligible for retirement (File: OO * * * /P19–2 (260731) J Du. September 22, 1926).

[P. 7] ENLISTED MEN: EMPLOYMENT OF AS LONGSHOREMEN AND STRIKEBREAKERS.

The secretary of the International Longshoremen's Association, San Diego, Calif., has complained to the Commandant of the Eleventh Naval District concerning the employment of two men as longshoremen and strikebreakers. It appears upon examination that these men admitted working while on liberty as longshoremen but there does not appear to be any evidence of either of them working as strikebreakers.

Held: From an examination of the National Defense Act (39 Stat. 188) it is the opinion of the Navy Department that the primary question for determmination raised in connection with the enforcement of this law is whether or not the duties being performed by the enlisted personnel for emolument, hire, or otherwise, interfere with the customary employment and regular engagement of local civilians in the respective arts, trades, or professions. When the employment of enlisted personnel interferes with the aforementioned employment of civilians then said enlisted men should be restrained from performing such duties. While it is impossible for the Navy Department to determine from the facts presented by the secretary of the International Longshoremen's Association and other attached papers, as to whether or not the two enlisted men involved were in fact violating the provisions of the National Defense Act, the Navy Department is of the opinion that enlisted personnel of the Navy should not be permitted to engage in any occupation for hire which can be construed as interfering with the customary employment and regular engagement of local civilians in their respective arts, trades, or professions (File: PS–1 (9)/NA11 (260810), August 31, 1926).

INCOME TAX: STATE OF MASSACHUSETTS, RESIDENCE IN CONNECTION WITH.

A member of the naval service recently addressed the Navy Department stating that the authorities of the State of Massachusetts contended that he was a resident of that State for the purpose of submitting income-tax returns on income exclusive of his pay and tax-exempt securities. The individual desired to establish by a statement of the Navy Department that he severed all connection with the State of Massachusetts in 1923 when his official address was changed to the State of Maryland.

Held: The domicile of an individual for the purpose of taxation is one to be determined between the individual and officials of the State in which the question of domicile has arisen, and it is not a question over which the Navy Department has any jurisdiction, consequently any opinion, decision, or statement given by the Navy Department on this question [P. 8] would have no force or effect in such case. The matter should be taken up with the attorney general of the State of Massachusetts (File: OO–* * * /LL14–1 (4) (260610) J, August 24, 1926).

LEAVE OF ABSENCE WITHOUT PAY: CIVILIAN MACHINIST ON SUCH STATUS MAY ACCEPT POSITION WITH THE WASHINGTON HEALTH SCHOOL UNDER THE BOARD OF EDUCATION OF THE DISTRICT OF COLUMBIA.

T, a machinist at the U. S. Navy Yard, Washington, D. C., was placed on leave without pay for a period of twelve months, effective at the close of work June 23, 1926, unless sooner recalled for duty. He was recalled from leave at which time he stated that he had been employed by the Washington health school under the Board of Education of the District of Columbia in a permanent position as engineer janitor at a salary of $1,320 per annum paid from the appropriation "Public Schools." In view of the Comptroller General's decision of March 6, 1925, to the effect that the employment of a person in two positions is prohibited when the aggregate rates of the two positions exceed $2,000 per annum a decision is requested as to whether or not the case of the above-

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referred-to civilian comes within the scope of the decision of the Comptroller General.

Held: It is the opinion of the Navy Department that the provisions of the act on which the Comptroller General's decision is based applies only to employees of the Federal Government and to members of the naval service and the Coast Guard, except retired officers and enlisted men of said services, for the reason that if Congress had intended that the provisions of the act restricting double salaries apply to employees of the District of Columbia it would have specifically so stated. In the absence of said specific provision in said act it follows that the employment of Mr. T by the District Government as an engineer-janitor from July 1, 1925, to November 15, 1925, at a salary of $1,320 per annum, did not affect his status as a Federal employee (File: LL * * * L16-4/A2-15(260701) August 27, 1926).

LINE OF DUTY AND MISCONDUCT.

VENEREAL DISEASE: STATUS OF MAN IN CASE OF.

A request was recently received in the Navy Department asking for an opinion in the following cases:

(*a*) "If a venereal disease was acquired before a man's entry into the service is his status not line of duty, not misconduct?"

(*b*) "If a man contracts a venereal disease in a legal relationship with a lawful wife, what is his status as to line of duty or misconduct?"

[P. 9] (*c*) "If a man has a venereal disease which was acquired before the passage of the act of 1916 is his status not line of duty, not misconduct?"

(*d*) "If a man is incapacitated for duty on account of venereal disease the origin of which was in a former enlistment, what is his status as to line of duty or misconduct?"

(*e*) "An officer or man of many years' service with no history of primary lesion and no suspicious scars is found to be luetic, what is his status as to line of duty or misconduct?"

(*f*) "What in general is the Bureau's attitude in regard to line of duty or misconduct in the case of extra genital primary sores where there appears to be no suspicion of perversion?"

(*g*) "What in general is the Bureau's attitude toward the matter of line of duty or misconduct in the case of remote manifestations such as tabes dorsalis or paresis, in the case where no history or scar can be elicited, and secondly in those cases where there is a history of primary lesion in the service, and finally where there is a history of primary lesion before entry into the service?"

(*h*) "Finally information is requested as to whether or not for the purposes of line of duty and misconduct, former service in the Marine Corps, Army, Coast Guard, and Public Health changes the status; whether they are to be considered for this purpose as though they were former enlistments in the Navy."

Held: In view of the foregoing the questions hereinbefore set forth are answered seriatim as follows:

(*a*) If a venereal disease is acquired by an individual prior to his entry into the naval service the Navy Department holds that the disability should be considered to have originated not in the line of duty and not due to his own misconduct, unless the absence from his regular duties occurs within one year following the appearance of the initial symptoms, in which case the holding would be not in the line of duty, due to his own misconduct, or not in the line of duty, not due to his own misconduct, depending upon whether the disease was innocently acquired or acquired due to his own misconduct. In those cases where the initial symptoms appear prior to entry into the naval service and more than one year before the absence from his regular duties of more than one day occurred the holding would be not in the line of duty, not due to his own misconduct.

[P. 10] (*b*) If a man in the naval service contracts a venereal disease in a legal relationship with his lawful wife the Navy Department holds the disability to be due to causes arising outside the naval service, and accordingly the origin of said disability should be not in the line of duty and not due to his own misconduct.

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(*c*) If a man in the naval service has a venereal disease which was acquired before the passage of the act of 1916 the Navy Department has repeatedly held that the origin of his disability should be considered as not in the line of duty and not due to his own misconduct, except in those cases where it is shown that the venereal disease was in fact incurred in the line of duty, said disability resulting from an infection innocently acquired while in a duty status.

(*d*) If an individual in the naval service is incapacitated for duty on account of a venereal disease the origin of which occurred in a former enlistment the Navy Department holds that said disability should be considered to have originated not in the line of duty and not due to his own misconduct in all cases except where the disability was innocently contracted, in which case the holding would be line of duty, or except where the disability was contracted due to own misconduct within less than one year prior to the date on which the absence occurred on account of which pay is checked, in which case the disability should be held to have originated not in the line of duty and due to his own misconduct. In those cases where the disability due to a venereal disease occurred in a prior enlistment more than one year prior to the date on which the absence took place the holding should be not in the line of duty and not due to his own misconduct.

(*e*) Where an officer or man of many years' service with no history of primary lesion and no suspicious scars is found to be leutic the Navy Department holds that his disability should be considered to have originated in the line of duty and not due to his own misconduct.

(*f*) In those cases of extra genital primary sores where there appears to be no suspicion of perversion the Navy Department holds that the disability should be considered to have originated in the line of duty and not due to his own misconduct.

(*g*) In the case of remote manifestations such as tabes dorsalis or paresis where no history of scars can be elicited the Navy Department holds that the disability should be considered to have originated in the line of duty and not due to his own misconduct. Secondly, in those cases where there is a history of primary lesion in the service the question of whether or not the origin should be held to be due to his own [P. 11] misconduct depends, first, upon whether the evidence discloses that the disease was contracted innocently while in the service or due to his own misconduct. In cases where the disease is shown to be due to his own misconduct the further question is presented as to whether the evidence shows that the disability was contracted within one year prior to the absence complained of. Finally in those cases where there is a history of primary lesion before entry into the service the Navy Department holds that the origin of the disability is not in the line of duty and not due to his own misconduct, except in those cases where the primary symptoms of the disease appear within one year of the date when the absence occurred, regardless of whether or not the primary symptoms originated prior to or subsequent to entry into the naval service.

(*h*) Former service in the Marine Corps, Army, Coast Guard, and Public Health Service, where the health record during said service fails to disclose any evidence of the disability complained of, is considered material in determining whether or not the disability originated after the individual entered the naval service. In fact, prior naval service and prior Army service and Marine Corps service for an individual in the Navy is considered from the standpoint of whether or not the medical history during his prior service discloses any evidence bearing upon the disability under consideration; and this question is answered accordingly.

As a general proposition it may be stated that in all cases where a disability is discovered for the first time after an individual enters the naval service it should be held to have originated in the line of duty where there is no evidence showing that it is due to causes outside the naval service, such as domestic relations, or due to his own misconduct. Of course, in those cases where the evidence relative to the origin of the disability tends to show that it is due to causes outside the naval service then the holding should be not in the line of duty, not due to his own misconduct; but where the evidence tends to show that the said disability is due to his own misconduct then the holding should be misconduct (File: P2–5 (2)/P13–2 (260803) J: AC, August 28, 1926).

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OATHS: AUTHORITY TO ADMINISTER.

The officer in charge of the Engineering Experiment Station, U. S. Naval Academy, Annapolis, Md., requested that he and the chief clerk assigned to that station be designated by the Navy Department as officials authorized to administer oaths in connection with the naval administration.

[P. 12] *Held:* In connection with so much of this request as relates to the chief clerk assigned to that station you are advised that there is no provision of law which empowers the Secretary of the Navy to authorize said chief clerk to administer oaths (A17-6(5)LL–Lay, Herman D. (260628), July 27, 1926), except where detailed to investigate frauds on or attempts to defraud the Government, or irregularities or misconduct of officers or agents of the United States (R. S. 183, as amended by the act of February 13, 1911, 36 Stat. 898), or when requested to administer oaths, required by law or otherwise, to accounts for travel or other expenses against the United States (act of August 24, 1912, 37 Stat. 487).

Since the Engineering Experiment Station is officially under the U. S. Naval Academy, it follows that the officer in charge is not one of those officers specifically designated in the provisions of the act of March 4, 1917, as authorized to administer oaths for the purpose of administration of naval justice and for other purposes of naval administration, but he does come within the provision authorizing the Secretary of the Navy to designate certain officers to administer oaths, and is accordingly authorized by the Secretary of the Navy to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration (File: A17–6 (5)/NP16 (260706) J: AC, July 30, 1926).

OATHS OF OFFICE: AUTHORITY TO ADMINISTER.

Authority was recently requested of the Secretary of the Navy for a chief clerk to administer oaths to civilians receiving appointment in the Government service in view of the fact that the recorder of a certain labor board had decided that in future oaths of office be not administered by the recorder of the labor board but that they be administered by a notary public.

Held: A careful examination of the laws relative to the administration of oaths in the Government service fails to disclose any provision thereof which empowers the Secretary of the Navy to authorize the chief clerk of the naval ordnance plant outside of the District of Columbia to administer oaths of office to civilians receiving appointment in the Government service. It follows from the foregoing that the Secretary of the Navy is without authority to authorize the chief clerk in question to administer oaths of office to civilians receiving appointments in the Government service (File: A17–6 (5)/LL– * * * (260628) J: AC, July 27, 1926).

[P. 13] TRANSFER OF LINE OFFICERS TO STAFF CORPS.

Certain ensigns of the line have completed the required course of instruction for transfer to the Construction and Civil Engineer Corps. An opinion was requested as to whether these officers might be transferred to their respective staff corps in the rank of lieutenant (j. g.) having in mind the fact that there is no rank of ensign provided by law in these respective Staff Corps, and of the further provision of section 7 of the act of June 10, 1926, which provides that "a line officer hereafter transferred to a Staff Corps shall retain the rank and date of commission in such rank held by him at the time of such transfer." If these officers might be transferred to the Staff Corps only after promotion in the line to the grade of lieutenant (j. g.) it was desired to consummate such promotion without requiring these officers to undergo the usual professional promotion examination.

Held: It is the opinion of the Navy Department that ensigns of the line may be transferred to a Staff Corps and when so transferred, they shall retain the rank of ensign and date of commission as ensign that was held by them at the time of such transfer. A line officer with the rank of ensign may not be transferred to a Staff Corps with the rank of lieutenant (j. g.). If it is desired to promote an ensign to the rank of lieutenant (j. g.) for the purpose of transferring him to a Staff Corps, in accordance with section 1493 Revised

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Statutes, and section 1496 Revised Statutes, it will be necessary for him to pass the prescribed statutory examinations, physical, mental, moral, and professional, for promotion. The professional examination may be such as prescribed by the Secretary of the Navy (File: OL/OD 260708) J:AC Br., July 24, 1926).

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[P. 3] Lieut. Commander Francis M. Collier, United States Navy, was tried by general court martial on August 3, 1926, at the Navy Yard, New York, by order of the Secretary of the Navy, and acquitted of the following charge: "Drunkenness." In acting on the record the Navy Department placed the following endorsement thereon:

"In the foregoing case of Lieutenant Commander Francis M. Collier, U. S. Navy, the court martial before which he was tried acquitted him of the charge of 'Drunkenness.'

"The evidence of the commanding officer and of the naval medical officers, who examined the accused is to the effect that the accused was intoxicated at about 9:50 a. m. on the morning of July 9, 1926. The captain also testified that the accused asked for an hour to straighten up. He said 'The accused stated to me that if I would give him one hour he would straighten out and be all right.' The medical officers who examined him stated that the accused said he had been up all night and had taken a few drinks, testifying in detail as to his condition, and expressing their opinion that the accused was under the influence of an intoxicant and unfit for the full performance of his duty. Unless these witnesses were guilty of deliberate perjury as to what the accused said and as to the symptoms displayed by the accused, it must be accepted that the accused was intoxicated at 9:50 a. m. The evidence to oppose this testimony was largely of a negative character, i. e., there is no evidence that the accused had not been drinking and the record is left with the admission, if the evidence of the medical officers is to be believed, that the accused had been drinking.

"While the members of the court martial have the power to judge the credibility of the witnesses, there is nothing in the evidence, or on cross-examination, to indicate that the testimony of these witnesses is unworthy of credence, and the character and standing of these witnesses and their official obligations would preclude the idea that they were guilty of deliberate and willful prejury, and there is nothing in the record that gives the slightest color that the testimony given by them was not straightforward and trustworthy. On the other hand, the testimony in rebuttal was wholly negative in its character, i. e., it tended to prove that the accused was not drunk at or before 5:30 a. m. and that he was sober or appeared to be sober after 10 o'clock a. m. To prove that a man was sober at 5:30 a. m. does not disprove that he was drunk at 9:50 a. m., and while [P. 4] it may be true that a man intoxicated at 9:50 a. m. would not ordinarily be sober at 10 or 10:30 a. m., nevertheless the acting chief of the Bureau of Medicine and Surgery reports that 'A person obviously "drunk" subjected to a sudden psychic shock, may within a few minutes apparently recover control of his mental actions and appear rational.' That the accused suffered a psychic shock is manifest when the discovery of his condition was made by the captain and indicated to him that his life position in the Navy was imperiled by his conduct.

"The testimony of the other witnesses at the mast at the time the accused was found by the captain to be intoxicated is purely negative in character. They did not prove that he was not intoxicated. This would merely indicate that his condition was not such as to attract the attention of the casual observer. The court having this matter before it was sworn to ascertain the facts to the best of its ability and was obligated to acquit the accused if they had a reasonable doubt of his guilt. That they have done so and performed their duty conscientiously is not doubted, but the foregoing facts are pointed out because they indicate that the court might have become confused by the volume of rebuttal testimony which in fact did not meet the direct testimony of the captain and medical officers, but only tended to raise an inference in favor of the accused, and that this inference

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because he was sober at 5:30 a. m. he was sober at 9:50 a. m., was of very little probative value and, indeed, its weight is almost negligible. The testimony to the effect that the accused was sober at a later period under ordinary circumstances might be of considerable value but in view of the inducement to sober up promptly was also of little weight when compared with the direct testimony of the captain and the two medical officers. As the members of the court were performing an official duty in weighing the evidence, the judgment of the court must be and will be approved. They had the power to weigh the evidence and decide the matter, rightly or wrongly, and in accordance with their judgment. In approving the record of this court it is not believed that the court rejected the testimony of the captain of the ship and the two medical officers as unworthy of belief but rather that they may not have fully appreciated the fact that the evidence in favor of the accused did not directly meet or controvert the evidence against the accused. If it were a physical impossibility for a man to be sober at 5:30 a. m. and drunk at 9:50 a. m., or if it were a physical impossibility or improbability to be drunk at 9:50 a. m. and sober at [P. 5] 10:30 a. m., then there would have been a direct conflict in the evidence and the court might have well discredited or discounted the affirmative evidence that the accused was intoxicated.

Subject to the above remarks the proceedings, findings, and acquittal in the foregoing case of Lieutenant Commander Francis M. Collier, U. S. Navy, are approved.

[P. 7] SPECIFICATION ALLEGING ACCUSED WRONGFULLY ENGAGED IN AN AFFRAY SHOULD SPECIFY THE ACTS CONSTITUTING SUCH AFFRAY.

J, seaman first class, United States Navy, was tried by general court martial on board the U. S. S. *Idaho*, on the charges of: (I) "Conduct to the prejudice of good order and discipline," and (II) "Assault." He was found guilty under charge I and not guilty of the offense alleged in the specification of charge II. The court sentenced the accused to be reduced to the rating of apprentice seaman, to be confined for a period of twelve (12) months, bad-conduct discharge and accessories. On May 4, 1926, the commander Battleship Divisions, Battle Fleet, United States Fleet, approved the proceedings, findings, and sentence, and designated the naval prison, Mare Island, Calif., as the place for the execution of so much of the sentence as relates to confinement.

The specification originally preferred against the accused reads as follows:

"In that J, now a seaman first class, U. S. Navy, while so serving on board of the U. S. S. *New Mexico*, did on or about March 8, 1926, on board said ship, engage in an affray with S, late coxswain, United States Navy, during the continuance of which affray the said J did feloniously, willfully, and without justifiable cause, strike, and push the said S, thereby causing the said S to fall to the deck of said ship and to strike his, the said S's head, upon the deck or some solid object of said ship, therein and thereby, then and there inflicting a mortal wound in and upon the head of the said S, of which mortal wound so inflicted, as aforesaid, the said S died at about eight forty-five p. m., on said date.

In its findings the court excepted the words "engage in an affray with S, late coxswain, United States Navy, during the continuance of which affray the said J did feloniously, willfully, and without justifiable cause, strike and push the said S, thereby causing the said S to fall to the deck of said ship and to strike" and substituted therefor the words "wrongfully engage in an affray with S, late coxswain, United States Navy, during the continuance of which affray between the accused and the said S, and as a direct result of the said affray the said S fell upon the said ship and struck."

The specification as found proved by the court inferentially imposes liability upon the accused for the death of S, whereas the evidence fails to show that the accused was responsible for the injury which resulted in S's death. The evidence shows that the accused and S were scuffling on the deck, both so much under the influence of liquor that they were unable to control their movements. The deceased fell to the deck through no act on the part of the accused and

sustained an injury to his head which subsequently resulted in his death. [P. 8] From a careful review of the evidence in this case the Navy Department is of the opinion that the evidence shows that the proximate cause of the injury sustained by S was the fall, which, in turn, was due, not to blows inflicted by J, because there was no evidence that J struck S, but to the abnormal condition of S. The Navy Department is consequently of the opinion that the evidence does not establish that S's death was the direct result of the alleged affray with the accused and J should not, therefore, be held for the offense found proved by the court.

The specification as found proved by the court, alleges merely that the accused wrongfully engaged in an affray without specifying the acts constituting the affray. It has been held in numerous cases that an indictment which simply charges that defendant did make an affray, without stating by what acts, is defective in that it states merely a conclusion (*State* v. *Woody*, 47 N. C. 335; *State* v. *Priddy*, 23 Tenn. 429).

In view of the foregoing the Navy Department set aside the findings, and sentence of the court and directed that J be released from confinement and transferred to the nearest receiving ship for general detail (File: 26262–12227A, G. M. C. Rec. No. 64904, August 4, 1926).

USE OF TWO OR MORE CHARGES IS NOT APPROVED WHERE IDENTICAL FACTS ARE MADE BASIS OF BOTH, WHERE NO AGGRAVATING CIRCUMSTANCES ARE SET FORTH UNDER ONE CHARGE WHICH DISTINGUISHES IT FROM THE OTHER.

WHERE PLEA OF GUILTY OF ACCUSED IS CHANGED TO PLEA OF NOT GUILTY BY COURT SUCH CHANGE OF PLEA VITIATES ALL PRIOR PROCEEDINGS ON THE SPECIFICATIONS TO WHICH IT RELATES.

J, fireman, second class, United States Navy, was tried by general court martial on board the U. S. S. *Memphis*, by order of the commander, Naval Forces, Europe, and convicted of (I) "Drunkenness," (II) "Treating his superior officer with contempt" (two specifications), and (III) "Conduct to the prejudice of good order and discipline" (two specifications) (using obscene language toward his superior officer). He was sentenced to be reduced to the rating of fireman third class; to be confined for a period of twelve (12) months, dishonorable discharge, and accessories. The commander, Naval Forces Europe, on August 23, 1926, approved the proceedings, findings, and sentence in this case, but directed that the execution of the sentence be held in abeyance during a probationary period of twelve (12) months.

Specification 1 of charge II alleges that the accused used certain words of contempt toward his executive officer. Specification 1 of charge III alleges that the accused, by uttering the same words, used obscene language toward his executive [P. 9] officer. Similarly, specification 2 of charge II alleges that the accused used certain words of contempt toward the officer of the deck. Specification 2 of charge III alleges that the accused, by uttering the same words, used obscene language toward the officer of the deck. No objection can be made to these specifications standing alone, but the same set of facts has been used in formulating the specifications of both charges. As a matter of policy the use of two or more charges is not approved where the identical facts are made the basis of both, and where there are no aggravating circumstances set forth under one charge which distinguish it from the other (sec. 188, Naval Courts and Boards).

Furthermore, the accused pleaded guilty to charges I and II and the specifications thereunder, but not guilty to charge III and the specifications thereunder. After all the evidence was in, the accused read a written statement in which he said that he had had some drinks at a saloon, and recalled nothing that happened afterward. The court thereupon rejected his plea of guilty to charge II and the specifications thereunder, and directed the judge advocate to change said plea to not guilty. The court further directed that the trial be reopened, and that the judge advocate and the accused be allowed to introduce new evidence in support of charge II and the specifications thereunder, if they so desired. The judge advocate and the accused stated that they had

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no further evidence to offer. No further evidence was offered and the court found the specifications proved and the accused guilty of the charge. The foregoing procedure was clearly contra to paragraph 2 of section 661, Naval Courts and Boards, which provide as follows:

> "A change of plea is, in effect, a recommencement of the trial on the specifications to which it relates, as a new plea has been put in issue. At whatever stage in the trial such change of plea is made it vitiates all prior proceedings on the specifications to which it relates, and the trial as to them must commence de novo. It is improper for the court, under such circumstances, to direct that the trial continue from the point where the plea was made."

In view of this provision of naval courts and boards the failure of the prosecution to present anew the evidence tending to establish the offenses alleged under charge II after the change of plea resulted in no evidence being adduced relative to this charge (Court-Martial Order 4, 1925, p. 14).

In view of the foregoing the Navy Department set aside the findings on charge II and the specification thereunder (File: MM–/A17–20(260819A), G. C. M. Rec. No. 65448, September 18, 1926).

[P. 10] WHERE CONFINEMENT IS REDUCED BY CONVENING AUTHORITY ACCESSORIES SHOULD ALSO BE REDUCED.

O, officer's steward, first class, United States Navy, was tried by general court martial on the U. S. S. _____ by order of the Commander in Chief, United States _____ Fleet, and convicted of the offense of "Desertion." He was sentenced by the court to be reduced to the rating of mess attendant, third class, confinement for twelve (12) months, dishonorable discharge, and accessories.

The convening authority on July 28, 1926, approved the proceedings, findings, and sentence, but reduced the period of confinement to six (6) months, without reducing the accessories. The Navy Department therefore reduced the accessories accordingly (MM– * * * /A16–20(260721)A, G. C. M. Rec. No. 65414; September 7, 1926).

WHEN ACCUSED IS GIVEN SENTENCE IN EXCESS OF LIMITATION OF PUNISHMENT THAT PORTION OF SENTENCE IN EXCESS OF THE LIMITATION PROVIDED IS A NULLITY. THAT PORTION WITHIN LIMITATION IS LEGAL.

R, private, United States Marine Corps, was convicted of (I) "Sleeping upon his watch," (II) "Breaking arrest," and (III) "Absence from station and duty without leave, and sentenced to four (4) years' confinement, dishonorable discharge, and accessories. The limitation of punishment in regard to confinement for charge I is one (1) year, for charge II is two (2) years, and for charge III is six (6) months, total three (3) years and six (6) months.

The Navy Department approved the proceedings, findings, and that part of the sentence not in excess of confinement for three (3) years and six (6) months, dishonorable discharge, and accessories (File: A17–20/ML– * * * (260821), G. C. M. Rec. No. 65539, September 29, 1926).

ABSENCE OF AN OFFICER NAMED AS A MEMBER OF A GENERAL COURT MARTIAL DOES NOT INVALIDATE THE PROCEEDINGS OF SUCH COURT MARTIAL AS LONG AS A LEGAL QUORUM OF FIVE (5) MEMBERS ARE PRESENT WHEN THE CASE IS TRIED.

D was tried and convicted by general court martial on the charge of desertion. In connection with this trial it is noted that Lieutenant Commander M, United States Navy, a member of the court was absent, having been ordered by the Bureau [P. 11] of Navigation, when directed by the commandant of the Eighth Naval District to proceed to certain places for temporary duty for the purpose of inspecting the radio traffic and radiocompass stations in the Eighth

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Naval District. Lieutenant Commander M failed to comply with the provisions of section 610, Naval Courts and Boards. There remained a quorum of five (5) members present when the case was tried.

Held: The proceedings were not invalidated (File: A17-20 * * * (260714)A, G. C. M. Rec. No. 65321, September 21, 1926).

ACCUSED SHOULD BE INFORMED WHEN ONE OR MORE SPECIFICATIONS ARE FOUND NOT PROVED.

K was tried by general court martial on four charges and was found guilty of two of them. The record of proceedings does not show that the accused was called before the court and informed of those charges of which he was acquitted.

Held: Section 685, Naval Courts and Boards provides as follows:

> "Should the court find one or more specifications proved and the others not proved, the accused shall be called before the court and informed of the specifications not proved."

Accordingly, K should have been called before the court and informed of those charges of which he was acquitted (File: A17-20/MM * * * (260609)A, G. C. M. Rec. No. 65328, August 23, 1926).

DEATH: ORIGIN NOT IN LINE OF DUTY AND DUE TO OWN MISCONDUCT.

An enlisted man absented himself from the U. S. S. *Cleveland* just prior to the sailing of the ship and was declared a deserter. After he surrendered himself he was tried by summary court martial for that offense and was ordered returned to the U. S. S. *Cleveland.* While en route under orders to join his ship the man in question committed suicide. From all the evidence that could be gathered it appeared that the man was dissatisfied with his duty on board ship, and chose suicide rather than return to it.

Held: In rare instances there are cases where an individual deliberately chooses what he considers to be the lesser of two evils. Where the facts in an individual case show that such be the motive inducing suicide it would appear to be a case not in the line of duty. As an example, where one who is in charge of accounts commits suicide at the time when such accounts are in such condition that a court martial is threatened. Applying this principle to the facts presented in this case, the Navy Department is of the opinion that the [P. 12] death of the man in question should be held to have originated not in the line of duty and due to his own misconduct, for the reason that he committed suicide rather than obey the orders directing him to return to the ship from which he had previously absented himself (File 26250-3835, September 2, 1926).

DISABILITY IN LINE OF DUTY AND NOT RESULT OF OWN MISCONDUCT.

B enlisted in the Marine Corps October 15, 1921, no defects being noted, and on September 5, 1924, he was examined and found physically qualified for extension of enlistment for three years. There were no admissions to the sick list during his first period of service. On May 7, 1925, he was admitted to the sick list, his disability being diagnosed as iridocyclitis, the origin of which was considered to be in the line of duty. He was transferred to the naval hospital, Washington, D. C., on the same date with the same diagnosis, where on May 25, 1925, his diagnosis was changed to keratitis as the result of a blood test disclosing syphilis, of which this disability was considered to be a sequela, the origin of which was considered to be not in the line of duty and not due to his own misconduct for the reason that the syphilis shown was presumed to be hereditary. He has been continued under treatment at the said hospital since that date, and on May 29, 1926, a board of medical survey convened in his case concurred in this diagnosis and recommended his discharge from the Marine Corps. Upon being informed by the

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medical officer in charge of his case that his disability was considered to have originated not in the line of duty, B made the following statement in rebuttal:

"From December 1, 1921, to May 9, 1923, I was stationed at Port au Prince, Haiti, with the Motor Transport Unit. My work was delivering ice to the officers and the enlisted personnel of the Marine Corps and the Navy. At other times I made trips to the hill camps.

"At all times I had two (2) natives on my truck to deliver the ice. I had to handle the same things to work with that they did and at times give them a hand to help out.

"At the motor transport garage there were natives working that give a hand to men working on their trucks. These men would have to wash and handle the same things that I would use. Working around trucks you often cut or tair (tear) the skin, and this will be open to any germs that may come your way.

"May 8, 1925, I was sent to the naval hospital, Washington. The vision in my right eye was gone. A Wassermann blood test showed positive. As I have not [P. 13] had a venereal disease in my life, and have always taken good care of myself I cannot help but think it that in some way at my work in Port au Prince I came in contact with it, as the large percent of that city has venereal disease."

In this case there is no history of signs of acquired syphilis although, as explained by B in his statement in rebuttal, opportunity for innocently acquiring this disease was apparently present. There is no evidence that said disability is congenital in origin, nor is there any evidence to show that it was acquired either innocently or otherwise either before or after his enlistment in the naval service, the only fact presented in the case being that said individual is now suffering from syphilitic infection and also suffering from keratitis, interstitial type, which is presumed to be a sequela of syphilis.

Held: Disability in the case of B should be held to have originated in the line of duty and not due to his own misconduct. (See ML–Pelz, Albert A A/P2–5 (2) (260519; File: ML * * * /P2–5 (2) 260614) J: AC, August 14, 1926).

DISABILITY NOT IN THE LINE OF DUTY AND DUE TO OWN MISCONDUCT.

G was admitted to the sick list on board the U. S. S. *Arctic*, diagnosis undetermined (fracture simple, base of fifth metacarpal bone left hand) origin not in line of duty, due to his own misconduct, fighting with another person in the naval service while intoxicated. G denied that he had been fighting and stated that the fracture occurred when he tripped and fell while assisting another man in the naval service to get out of the way of an automobile.

Held: As the result of the facts developed by the investigation conducted by the commanding officer, U. S. S. *Arctic*, the man's statement could not be corroborated. The Navy Department is therefore of the opinion that the disability under consideration had its origin not in the line of duty and due to own misconduct (MM– * * * /P2–5(2) (260723) J, August 19, 1926).

DISPOSITION OF PENSIONS PAID TO NAVAL PENSIONERS HOSPITALIZED IN NAVAL HOSPITALS THROUGH THE UNITED STATES VETERANS' BUREAU.

The act of July 2, 1926, precludes pensions of the veterans to whom it refers, while hospitalized in naval hospitals from being applied to the payment of board, maintenance, or for any other purpose incident to such hospitalization. The Commissioner of Pensions has advised that he will continue to pay to the commanding officer of naval hospitals pensions of naval pensioners admitted to naval hospitals through the Veterans' [P. 14] Bureau under the provision of the act above referred to, in view of which the Bureau of Medicine and Surgery has requested instructions as to what will be required to return to veteran pensioners the amount of pension paid into the naval hospital fund subsequent to July 2, 1926.

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Held: Should the Commissioner of Pensions continue to send to commanding officers of naval hospitals the pensions of men hospitalized by naval hospitals through the Veterans' Bureau, it is suggested that the commanding officers turn over to each pensioner the full amount of the said check received from the Commissioner of Pensions on account of his pension. This may be done by endorsing the check of the pensioner if an individual check, or by depositing the check, if in aggregate for all pensions, with the supply officer who will take same up in his account current and issue his check or make payment in cash to the individual pensioner for the amount of the pension to which he is entitled. The amount of pensions received on account of patients of the Veterans' Bureau should not be paid into the hospital fund and in the event that there has been credited to hospital fund any such pensions, the same procedure should be followed as directed above charging hospital fund with the amount paid to pensioners (File: 1V/LL6-9(260901)Du, October 25, 1926).

NAVAL RESERVE OFFICER ON INACTIVE STATUS: SERVICE OF, AS WITNESS BEFORE A COURT OF INQUIRY.

A judge advocate of a court of inquiry desired the presence of certain officers of the Naval Reserve as witnesses before said court, such officers then being on inactive duty. In view of the situation an opinion was requested regarding the following question:

(*a*) Whether these officers of the Naval Reserve, a component part of the United States Navy, may be directed as Reserve officers to appear as witnesses (summoned) before a naval court of inquiry, either on active or inactive duty, or with or without pay and mileage.

(*b*) Whether they may be subpenaed as civilian witnesses to appear before a naval court of inquiry and paid as such.

Held: Section 9 of the naval act of 1925 provides that the officers and men of the Naval Reserve may be ordered to active duty by the Secretary of the Navy in time of war or when in the opinion of the President a national emergency exists, and may be required to perform active duty throughout the war or until the national emergency ceases to exist, but that in time of peace, except as otherwise provided in said act, officers and men of the Naval Reserve shall only be ordered to or continued on active duty with their own consent. It follows from the [P. 15] foregoing that the desired officers cannot be ordered to active duty in order to appear as witnesses before a court of inquiry except with their own consent, and that even if his consent is obtained there is no appropriation from which an officer may be paid for services rendered while in attendance as a witness upon a court of inquiry. In the opinion of the Navy Department officers of the Naval Reserve on inactive duty in time of peace may be subpenaed as civilian witnesses to appear before a naval court of inquiry and paid as such (File: A17-24/Pc 432/P16-3 (22) (260813) J:AC, August 25, 1926).

NOT LINE OF DUTY NOT DUE TO OWN MISCONDUCT.

C was admitted to the sick list on board ship with injuries, multiple, right foot, which were considered to have originated not in the line of duty, due to his own misconduct, said injuries having occurred while absent without leave. The medical history of his injuries states that he was struck by an automobile while he was riding a motorcycle, a wheel of the automobile striking directly on the right ankle. A board of medical survey convened in the case concurred in the above diagnosis.

Held: From a careful examination of the facts no evidence is disclosed that the accident causing the injury was due to carelessness or misconduct. While the medical history states that he was absent without leave it also states that he was not under the influence of intoxicating liquor. Applying the case of Krener approved September 16, 1925, File 29372-388, the situation of which was identical with the present case, it accordingly follows that in the absence of facts showing that the present injury was the immediate result of the man's own misconduct, the Navy Department is of the opinion that the disability complained of should be held to have originated not in the line of

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duty and not the result of his own misconduct. (MM- * * * /P2-5(2) (260731) J:AC, August 29, 1926).

RANK AND RETIRED PAY: INCREASE OF ON THE RETIRED LIST, CONSTITUTIONALITY OF A PRIVATE ACT CONCERNING.

An opinion was recently requested of the Navy Department as to the constitutionality of Private Act 181 approved June 17, 1926, providing for the advancement on the retired list of the Navy of * * * U. S. Navy, retired. The act referred to provides as follows:

> "That ------ United States Navy, retired, shall have the rank and receive the pay and allowances of a lieutenant, junior grade, on the retired list of the United States Navy. Such rank shall take effect on August 7, 1925, and such pay and allowances shall be paid from and after such date."

[P. 16] *Held:* A consideration of the private act of June 17, 1926, discloses that what Congress there did was to advance ------ from the rank of ensign on the retired list to the rank of lieutenant (junior grade) on the retired list, without disturbing the grade (office) of ensign which he still holds on the retired list. It accordingly follows that this act does not contravene a provision of the Constitution relative to the manner in which appointments to Federal office must be made. Since there is no other provision of the Constitution which could be held to apply to this case in any way, the Navy Department is of the opinion that the private act under consideration is constitutional (File: OR- * * * /P17-2(260629) J:AC, July 24, 1926).

SERVICE IN UNITED STATES PUBLIC HEALTH SERVICE: COUNTING OF, FOR LONGEVITY PURPOSES.

Lieutenant F was appointed an acting assistant surgeon in the Public Health Service January 19, 1920, and served in such capacity until June 30, 1920. He was then commissioned an assistant surgeon in the Reserve Corps of the U. S. Public Health Service, entered on active duty on that appointment, and resigned, effective January 5, 1921. He was commissioned in the Medical Corps of the Regular Navy January 6, 1921, to rank from August 3, 1920. An opinion has been requested of the Navy Department as to how much of the service performed by Lieutenant F under the Bureau of Public Health Service may be credited to him under the joint service pay act, approved June 10, 1922.

Held: Applying the opinion of the Court of Claims in the case of *Woods* v. *United States* to the case of Lieutenant F, it is apparent that, if an officer is entitled to count service rendered as an interne in the Public Health Service, there can be no question as to an officer of the Navy who was in the naval service on June 30, 1922, counting service rendered in the Public Health Service in the capacity of an acting assistant surgeon and an assistant surgeon in the Reserve Corps of the Public Health Service on active duty in computing longevity pay as an officer of the Regular Navy. The Navy Department is, accordingly, of the opinion that Lieutenant F, Medical Corps, United States Navy, is entitled to count the service rendered as an officer of the Public Health Service from January 19, 1920, to January 5, 1921, in computing longevity pay as an officer in the Medical Corps of the Navy (00- * * * /P20-2(260908)J Du, September 22, 1926).

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[P. 4] Lieut. George P. Quinn (Medical Corps), United States Navy, was tried by general court martial on June 2, 1926, at the Navy Yard, Philadelphia, Pa., by order of the Secretary of the Navy, and acquitted of the following charge: "Drunkenness."

In acting on the record the Navy Department placed the following endorsement thereon:

> "In the foregoing case of Lieutenant George P. Quinn (Medical Corps), U. S. Navy, the court martial before which he was tried acquitted him of the charge of 'Drunkenness.'

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"The evidence of the executive officer and of the two commissioned officers of the line of the Navy, who examined the accused, is to the effect that the accused was intoxicated on May 21, 1926. The executive officer testified that he visited the accused's room at about 11:15 a. m. May 21, 1926, that a foul sour smell of vomiting similar to that occasioned by over-indulgence in liquor, was most pronounced; that the accused was in bed, his hair was matted, face flushed, and speech thick and hesitant; that the accused had difficulty focusing his eyes, and that the accused said, 'Commander, I will be perfectly frank with you, I am drunk.' The executive officer testified in detail as to his condition and expressed his opinion that the accused was drunk. The other two officers who visited the accused's room with the executive officer at about 1:40 p. m. May 26, 1926, testified in detail as to his condition, and expressed their opinion that the accused was under the influence of some intoxicant and was not able to perform his regular duties. The executive officer further testified that when the accused reported to him in his stateroom at about 3:30 p. m. the accused stated he had been to a 'get-together' dinner the previous evening and thought he had gotten hold of some bad liquor that had poisoned him, and that if given a chance to make good on the ship he would 'go on the water wagon.' Unless these witnesses were guilty of deliberate perjury as to what the accused said and as to the symptoms displayed by the accused, it must be accepted that the accused was intoxicated at 11:15 a. m. and 1:40 p. m. The evidence to oppose this testimony was largely of a hypothetical and a negative character, [P. 5] i. e., there is no evidence that the accused had not been drinking and the record is left with the admission, if the evidence of these witnesses is to be believed, that the accused was intoxicated.

"While the members of the court martial have the power to judge the credibility of the witnesses, there is nothing in the evidence or on cross-examination to indicate that the testimony of these witnesses is unworthy of credence, and the character and standing of these witnesses and their official obligations would preclude the idea that they were guilty of deliberate and wilful perjury, and there is nothing in the record that gives the slightest color that the testimony given by them was not straightforward and trustworthy. On the other hand, the testimony in rebuttal was either of a hypothetical or a negative character. The defense endeavored to prove by hypothetical questions to expert witnesses that the symptoms of the accused were those of a sick person. There was no positive evidence to the effect that the accused was sick except his own testimony, which of course must be given due weight; but while the fact that a witness is the accused does not condemn him as unworthy of belief, it does create in him an interest greater than that in any other witness, and to that extent affects the question of credibility. The defense attempted to prove that because the accused held sick call at about 8:30 a. m. and had been to breakfast previously that he was not intoxicated at 11:15 a. m. and again at 1:40 p. m. This testimony is purely of a negative character. Such testimony does not prove that because he was apparently sober at 8:30 a. m. he was not intoxicated at a later hour on the same date. This would merely indicate that his condition was not such as to attract the attention of the casual observer. The court having this matter before it was sworn to ascertain the facts to the best of its ability, and was obliged to acquit the accused if they had a reasonable doube of his guilt, but the foregoing facts are pointed out because they indicate that the court might have become confused by the volume of rebuttal testimony, which in fact did not meet the direct testimony of the executive officer and two line officers, who testified for the prosecution, but only tended to raise an inference in favor of the accused, and that this inference, because he was sober at 8:30 a. m. he was sober at 11:15 a. m. or 1:40 p. m., was of very little probative value, and indeed its weight is almost negligible. The testimony that the accused was sick when he had not had himself placed upon the sick list is of little weight when compared with the direct testimony of the executive [P. 6] officer and other prosecution witnesses. As the members of the court were performing an official duty in weighing the evidence, the judgment of the court must be and will be approved. They had the power to weigh the evidence and decide the matter, rightly or wrongly, and in accordance with their judgment. In

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approving the record of this court it is not believed that the court rejected the testimony of the executive officer and two line officers as unworthy of belief but rather that they may not have fully appreciated the fact that the evidence in favor of the accused did not directly meet or controvert the evidence against the accused. There was insufficient conflict in the evidence for the court to have discredited or discounted the affirmative evidence that the accused was intoxicated. Every drunk man is sick; that is, he is not well.

"Subject to the above remarks the proceedings, findings, and acquittal in the foregoing case of Lieut. George P. Quinn, Medical Corps, U. S. Navy, are approved."

Precept.—The name of the officer to whom it is addressed must also appear in the paragraph in which the members of the general court martial are designated as such by the convening authority.

Former jeopardy.—Cannot be pleaded when accused has been tried by an illegally constituted court martial.

W. H. D., private, United States Marine Corps, was tried by general court martial, convened by the commander, United States Naval Station, Guantanamo Bay, Cuba, and convicted on the charges of (I) "Absence from station and duty without leave," (II) "Disobeying the lawful order of his superior officer," (III) "Disrespectful in language to his superior officer while in the execution of his office," and (IV) "Conduct to the prejudice of good order and discipline," and sentenced to be confined for a period of 18 months, dishonorable discharge, [P. 7] and accessories. The proceedings, findings, and sentence were approved by the convening authority on September 24, 1926, but reduced that portion of the sentence which involves confinement to 9 months.

In reviewing the record of proceedings in this case it has been noted that the precept is addressed to "Lieutenant Commander J. E. M., Supply Corps, U. S. Navy," but the name of this officer does not appear in paragraph 2, which, in accordance with the usual form, reads as follows:

"The court is composed of the following members, any five of whom are empowered to act, viz."

Then follows a list of the officers comprising the court. Lieutenant Commander M sat at the trial in this case as is evidenced by the fact that his name appears among those present as members and that he signed the record of proceedings as president of the general court martial.

It is well settled that an officer cannot serve as a member of a general court martial unless he is designated as such by the convening authority (C. M. O. 114, 1918, 27). Inasmuch as the name of Lieutenant Commander M did not appear in that part of the precept designating the members constituting the court martial, it is evident that he was not actually designated as a member of this court martial by the convening authority, and he was not authorized, therefore, to sit as a member at this trial. The convening authority approved the proceedings, findings, and sentence in this case without commenting on the point in question, but his action in this regard cannot ratify and make good the presence of Lieutenant Commander M as a member at this trial. As trial by a court not legally constituted is not a trial which can be said to be "due process of law," the above irregularity results in invalidating the proceedings in this case (22 Op. Atty. Gen. 137).

The accused in this case may be tried again and he cannot plead former jeopardy, as the court had no jurisdiction by reason of improper membership, and action of the court is not a trial.

In view of the foregoing the proceedings, findings, and sentence in this case are set aside (File: MM- * * * /A17-20(260921)A, G. C. M. Rec. No. 65584, October 25, 1926).

SENTENCE INVOLVING CONFINEMENT AT HARD LABOR FOR MORE THAN THREE MONTHS.

The accused is to be reduced to the lowest rating of that branch of the service to which he belongs.

W. I. C., fireman, second class, United States Navy, was tried by general court martial at the United States Naval Operating Base, Hampton Roads, Va., and convicted of "Desertion."

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[P. 8] The court sentenced the accused to confinement for a period of 12 months, dishonorable discharge, and accessories, but failed to include in the sentence reduction in rating to fireman third class. In all cases involving confinement at hard labor for more than 3 months the accused is to be reduced to the lowest rating of that branch of the service to which he belongs (sec. 883, Naval Courts and Boards, note 28).

Subject to the foregoing proceedings, findings, and sentence of the general-court-martial case in the foregoing case of W. I. C., are, in the opinion of the Navy Department, legal (File: MM- * * * /A17-20(260920)A, G. C. M. Rec. No. 65689, October 29, 1926).

SENTENCE TO REDUCTION IN RATING AFTER ENLISTMENT HAS EXPIRED IS A NULLITY.

In reviewing the record of proceedings in the general court-martial case of C. H. B., fireman second class, United States Navy, it is noted that the court reduced the accused to the rating of fireman third class. Inasmuch as the enlistment of B expired on September 26, 1926, he is no longer an enlisted man in the Navy, though subject to the jurisdiction of a naval court martial for an offense committed while in the Navy (C. M. O. 9, 1925, p. 16). Not being an enlisted man in the Navy he can not hold an enlisted rating and consequently the action of the court in providing for reduction to fireman third class is a nullity.

Subject to the foregoing it is the opinion of the Navy Department that the proceedings, findings, and sentence are legal (File: MM- * * * /A17-20 (261012)A, G. C. M. Rec. No. 65719, November 3, 1926).

ST. ELIZABETHS HOSPITAL.

Retention in of retired officers and enlisted men of the Navy and Marine Corps and enlisted men who have been discharged either by expiration of enlistment or by reason of medical survey.

The Supreme Court of the District of Columbia has interpreted section 4843. Revised Statutes, as not empowering the [P. 9] superintendent of St. Elizabeths Hospital to detain in that institution persons who are not on the active list of the Army, Navy, Marine Corps, or Coast Guard and who have not been adjudged insane by civil courts of competent jurisdiction, notwithstanding that they were committed to said institution by the Secretary of War, the Secretary of the Navy, and Secretary of the Treasury, respectively, in supposed conformity with the aforesaid section of the Revised Statutes, or by the Director of the Veterans' Bureau under authority of an opinion rendered by the Attorney General (31 Op. Atty. Gen. 431, Apr. 14, 1919). Such persons have accordingly been released from said hospital upon habeas corpus proceedings in their behalf, without any inquiry by the court into their mental condition, but solely on the ground that the order of the executive officer under which they were being held was not adequate authority in law for their detention. This has resulted in some instances in setting at large persons who were regarded by the Superintendent of St. Elizabeths Hospital as a menace to the community.

Steps have been taken by the United States attorney to have the Court of Appeals review the aforesaid action of the Supreme Court of the District of Columbia. Pending a decision by the Court of Appeals, the Navy Department should not hereafter commit to St. Elizabeths Hospital persons who are not on the active list of the Navy unless they have previously been adjudged insane by civil courts of competent jurisdiction; that inmates of said hospital who are not now on the active list of the Navy, but who are held under commitment of the Secretary of the Navy, should be released, without institution of habeas corpus proceedings in their behalf if they or their relatives or friends desire such action to be taken, unless in the opinion of the superintendent they would be a menace to the community, in which event their relatives or friends, if known, should be advised to institute the necessary proceedings to have them adjudged insane, pending which action they should be retained in the hospital unless otherwise ordered by the Supreme Court of the District of Columbia in habeas corpus proceedings instituted in their behalf; and that in any case in which habeas corpus proceedings shall hereafter be instituted in behalf of patients who were

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committed to St. Elizabeths Hospital by the Secretary of the Navy and whose release would be a menace to the community, the corporation counsel for the District of Columbia should be promptly informed of the pendency of such proceedings to the end that he may have the said patients taken into custody immediately upon their release and recommitted to the hospital in accordance with laws applicable to insane patients at large in the District of Columbia.

It was the opinion of the United States attorney that the courts do not question the jurisdiction of the Secretary of the [P. 10] Navy to commit to St. Elizabeths Hospital under section 4843, Revised Statutes, persons on the active list of the Navy who have been found by the medical department of the Navy to be insane and that there is no occasion for the Navy Department to alter its existing practice in such cases (File: OR/NH22–St. Eliz. (260716) D/3, November 11, 1926).

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[P. 3] Ensign Marshall M. Dana, United States Navy, was tried by general court martial on board the U. S. S. *Black Hawk* on July 6, 1926, by order of the commander in chief, United States Asiatic Fleet, and convicted of the following charges:

Charge I.—Culpable inefficiency in the performance of duty.

Charge II.—Disregard of orders.

Charge III.—Neglect of duty.

The court sentenced Ensign Dana to lose 25 numbers in his grade. On August 1, 1926, the convening authority approved the proceedings, findings, and sentence.

The Navy Department in taking action on the record on November 26, 1926, placed the following endorsement thereon:

> "Marshall M. Dana, ensign, United States Navy, was tried by general court martial on board the U. S. S. *Black Hawk* by order of the commander in chief, United States Asiatic Fleet, and convicted of (I) 'Culpable inefficiency in the performance of duty' (two specifications), (II) 'Disregard of orders', and (III) 'Neglect of duty.'
>
> "There is no authority in the Articles for the Government of the Navy or in Naval Courts and Boards for the use of the charge 'Disregard of orders.' This irregularity is not in itself fatal, and not having been objected to by the accused, may be considered as having been waived (sec. 195, note 19, Naval Courts and Boards).
>
> "The specification under the second charge reads as follows:
>
> "'In that Marshall M. Dana, now an ensign, United States Navy, while so serving as commissary officer on board the U. S. S. *Sicard*, to which duty he had been regularly assigned, did, at divers times, to the relator unknown, assign to Alfred J. Keeler, then a ship's cook, first class, United States Navy, duties which are prohibited by Destroyer Squadron Order No. 6–25 from being assigned to any enlisted man, to wit, administration of the general mess, having custody of the monthly ration record, and preparing the monthly ration record of ship.'
>
> "The accused objected to this specification on the ground that it contained no allegation as to time, except 'at divers times, to the relator unknown.' The court overruled the objection by the accused and found the specification in due form and technically correct. The time of the commission of an offense must be averred in the specification. It must be stated with sufficient precision clearly to identify the offense and enable the accused to understand what particular act or omission he is called upon to defend (Naval Courts and Boards, sec. 206).
>
> [P. 4] "In view of the error of the court in overruling the objection by the accused, it is recommended that the finding on charge II and the specification thereunder be set aside."

Subject to the foregoing, the Navy Department approved the proceedings, findings on charge I and specifications thereunder, the findings on charge III and the specifications thereunder, the sentence, and the action of the convening authority, but reduced the sentence to the loss of 20 numbers.

[C. M. O. No. 12—1926]

Lieutenant (j. g.) Ferdinand C. Dugan, United States Navy, was tried by general court martial on board the U. S. S. *Huron* on September 11, 1926, by order of the commander in chief, United States Asiatic Fleet, on the following charges:

Charge I.—Conduct unbecoming an officer and a gentleman.

Charge II.—Drunkenness.

Charge III.—Assaulting another person in the Navy.

Lieutenant Dugan was convicted on the first and second charge and acquitted on the third charge, and he was sentenced to be placed at the foot of the lieutenants (j. g.) list of present date and to there remain until he shall have lost 400 numbers in his grade.

The convening authority on September 21, 1926, approved the proceedings, disapproved the findings on the third charge and specification thereunder for the reason that, in his opinion, they are not in accord with the evidence adduced, and approved [P. 5] the findings on the first charge and the specifications thereunder, the second charge and the specification thereunder, and the sentence. On November 5, 1926, the Chief of the Bureau of Navigation placed the following remarks on the record: "In the opinion of this bureau the sentence is inadequate for offenses for which the accused in this case has been found guilty." Which remarks were on November 9, 1926, approved by the Navy Department.

Lieutenant Commander Robert Gatewood, United States Navy, was tried by general court martial on board the U. S. S. *Pennsylvania* on October 2, 1926, by order of the Commander Battleship Divisions, Battle Fleet, United States Fleet, and was convicted of the charge "Absence from station and duty after leave had expired." The court sentenced Lieutenant Commander Gatewood to lose 100 numbers in his grade and to lose $50 per month of his pay for a period of six months, total loss of pay amounting to $300. The convening authority on November 2, 1926, in approving the proceedings, findings, and sentence placed the following endorsement upon the record:

> "The record of proceedings in this case shows that a member of the court was called as a witness and testified for the prosecution, but the record does not indicate, as required by section 624, Naval Courts and Boards, that at the completion of his testimony the accused requested that he be not considered challenged. Accordingly the convening authority returned the record to the court for revision and directed the court to supply the omission, if clerical, but if an omission in fact to so indicate in the record of proceedings in revision.
>
> "The record of proceedings in revision sets out that the accused did not expressly request that the member [P. 6] who had testified as a witness for the prosecution be not considered as challenged. The record in revision further states that it was the opinion of the court that the testimony of the member was neither material to the issue nor prejudicial to the accused.
>
> "In the opinion of the convening authority, the court erred in not excusing from further attendance the member who testified for the prosecution and thus eliminate any possibility of invalidating the proceedings; but as the evidence given by him was neither material to the issue nor in any way prejudicial to the accused, the error is not considered fatal.
>
> "It is further noted in the record of proceedings in revision that Commander Frederick E. Porter, Medical Corps, United States Navy, was not present at the meeting in revision, and his absence is explained by a dispatch from his commanding officer to the effect that he had been detached and had left the ship. No orders had been issued by the convening authority relieving this officer as a member of the court; therefore his absence was irregular, but as a legal quorum was present this irregularity does not invalidate the proceedings.
>
> "Subject to the foregoing remarks, the proceedings, findings, sentence, and proceedings in revision of the general court martial in the attached case of Lieutenant Commander Robert Gatewood, United States Navy (*Oklahoma*), are approved. He will be released from arrest and restored to duty."

[C. M. O. No. 1—1927]

[P. 7] WHEN SENTENCE OF CONFINEMENT IS REDUCED THE ACCESSORIES SHOULD BE CORRESPONDINGLY REDUCED.

C. W. W., private, United States Marine Corps, was tried by general court martial at the United States Naval Station, Guantanamo Bay, Cuba, by order of the Commandant, United States Naval Station, Guantanamo Bay, Cuba, and convicted of "Desertion." He was sentenced by the court to be confined for a period of 12 months, dishonorable discharge, and accessories.

The convening authority November 18, 1926, approved the proceedings, findings, and sentence but reduced the period of confinement to 9 months without reducing the accessories. The Navy Department reduced the accessories to correspond with the sentence as reduced (File: MM– * * * /A17–20(261117)A, G. C. M. Rec. No. 65927, December 6, 1926).

DISCLOSURE OF CONFIDENTIAL INFORMATION.

Recently certain officers of the Navy were summoned to appear as witnesses in a case on trial in the Supreme Court of the District of Columbia, and as a consequence the Navy Department addressed the following letter to such officers:

> "It appearing that you are under subpena as a witness in the case of the *United States* v. *X and Y*, now [P. 8] on trial in the Supreme Court of the District of Columbia, you are advised that confidential information contained in official records of the Government may not be disclosed, directly or indirectly, by an officer of the Navy who may have had access thereto in virtue of his office and duty; and that the giving out of such records or any copies thereof or any information contained therein or any confidential information otherwise acquired by an officer in the course of his official duty is contrary to public policy and not to be permitted" (File: OO– * * * /A17–15(261130)D/3, December 4, 1926).

FLAGS, ISSUING OF, FOR DRAPING COFFINS OF DECEASED NAVAL PERSONNEL.

Are the members of the Reserve, if on any of the various kinds of duty quoted in section 10 of the act of February 28, 1925, in the service of the United States within the meaning of the act of June 30, 1914 (38 Stat. 406)?

The act of June 30, 1914 (38 Stat. 406), was amended by act of March 4, 1925, section 27 (43 Stat. 1278), and as so amended is now embodied in the United States Code, title 34, section 551. The law on this subject should be liberally construed; as to this the legislative policy is indicated by section 8 of an act approved July 2, 1926 (Public, No. 448, Sixty-ninth Congress), "To amend the World War veterans' act, 1924," which makes provision for issuing to next of kin flags furnished by the Government and used in draping the caskets of veterans of any war who die after their discharge or resignation from the service. Members of the Naval Reserve are not "in the service of the United States" while on inactive duty or when engaged in drill or other equivalent instruction or duty; but while on active duty, or on "authorized training duty, with or without pay," or "when employed in authorized travel to and from such duty," the Navy Department decided that they may properly be regarded as in the service of the United States within the meaning of title 34, section 551, United States Code, hereinbefore quoted, and accordingly that the Navy Department is authorized to issue free of cost, in accordance with that section, flags actually used in draping the coffin of any member of the Naval Reserve who dies while so employed on active duty or authorized training duty or in authorized travel to and from such duty (File: QP/P6–4(3)(260913)D/3, December 9, 1926).

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[P. 4] PRECEPT: THE NAME OF THE OFFICER TO WHOM IT IS ADDRESSED MUST ALSO APPEAR IN THE PARAGRAPH IN WHICH THE MEMBERS OF THE GENERAL COURT MARTIAL ARE DESIGNATED AS SUCH BY THE CONVENING AUTHORITY.

FORMER JEOPARDY: CANNOT BE PLEADED WHEN ACCUSED HAS BEEN TRIED BY AN ILLEGALLY CONSTITUTED COURT MARTIAL.

[C. M. O. No. 1—1927]

G. F. D. and C. F. L., seamen, first-class, United States Navy, were tried in joinder by general court martial on board the U. S. S. *Cincinnati* convened by the commander, Scouting Fleet, United States Fleet, and convicted on the charge of "Theft." They were sentenced to be confined for a period of 18 months, dishonorable discharge, and accessories. The convening authority on December 9, 1926, approved the proceedings, findings, and sentences and designated the naval prison, Portsmouth, N. H., as the place for the execution of so much of the sentences as relates to confinement.

In reviewing the record of proceedings, it has been noted that the precept is addressed to Lieutenant Commander J. M. M., U. S. Navy, but the name of this officer does not appear in paragraph 2, which, in accordance with the usual form, reads as follows:

> "The court is composed of the following members, any five of whom are empowered to act, viz:"

Then follows a list of the officers comprising the court. Lieutenant Commander M. sat at the trial in this case, as is evidenced by the fact that his name appears among those present as members, and that he signed the record of proceedings as president of the general court martial.

It is well settled that an officer cannot serve as a member of a general court martial unless he is designated as such by the convening authority (C. M. O. 114, 1918, 27). Inasmuch as the name of Lieutenant Commander M. did not appear in that part of the precept designating the members constituting the court martial, it is evident that he was not actually designated as a member of this court martial by the convening authority, and he was not authorized, therefore, to sit as a member at this trial. The convening authority approved the proceedings, findings, and sentences in this case without commenting on the [P. 5] point in question, but this action in this regard cannot ratify and make good the presence of Lieutenant Commander M. as a member at this trial. As trial by a court not legally constituted is not a trial which can be said to be "due process of law," the above irregularity results in invalidating the proceedings in this case (22 Op. Atty. Gen. 137).

The accused in this case may be tried again and they cannot plead former jeopardy, as the court had no jurisdiction by reason of improper membership, and action of the court is not a trial.

In view of the foregoing, the Navy Department set aside the proceedings, findings, and sentences (File: MM-D/A17-20(261206)A, G. C. M. Rec. No. 66043, January 7, 1927).

WHERE CONFINEMENT IS REDUCED BY CONVENING AUTHORITY ACCESSORIES SHOULD ALSO BE REDUCED.

A, officer's steward, third-class, United States Navy, was tried by general court martial at the United States Naval Station, Cavite, P. I., by order of the commandant sixteenth naval district, and convicted of the charge of "Disrespectful in language to his superior officer while in the execution of his office." He was sentenced by the court to be reduced to the rating of mess attendant, third-class, to be confined for a period of 12 months, dishonorable discharge, and accessories.

The convening authority on November 8, 1926, approved the proceedings, findings, and sentence, but reduced the period of confinement to three months without reducing the accessories. The Navy Department therefore reduced the accessories accordingly (File: MM-A/A17-20(261030) A, G. C. M. Rec. No. 66075, January 6, 1927).

NAVAL DISPENSARIES: THERE IS NO AUTHORITY OF LAW FOR FURNISHING SUBSISTENCE AT GOVERNMENT EXPENSE TO OFFICERS UNDERGOING TREATMENT IN.

A ruling has been requested as to whether a naval dispensary is considered analogous to a naval hospital insofar as the statutes governing checkage for subsistence furnished officers who are patients therein are concerned.

[P. 6] The real question asked is whether or not checkage for subsistence furnished Lieutenant H. during the period he was receiving treatment in a naval

[C. M. O. No. 2—1927]

dispensary, as distinguished from a regularly established naval hospital, can legally be made against his accounts.

The United States Code, title 24, section 3 (sec. 4808, R. S.), authorizes a deduction of 20 cents per month to be made from the pay of officers and enlisted men of the Navy and Marine Corps for the support of naval hospitals; and United States Code, title 24, section 16 (sec. 4812, R. S.), directs that there shall be deducted from their accounts one ration per day during their continuance in a naval hospital, both of which deductions are to be credited to the naval hospital fund for the support of naval hospitals. No reference whatever is made to naval dispensaries in the above quoted statutes.

The Navy Department decided that a naval dispensary cannot be considered analogous to a naval hospital within the meaning of the statutes governing checkage for subsistence furnished officers who were patients therein, and in the specific case presented there is no authority of law for checking the accounts of Lieutenant H. for subsistence furnished him while a patient in the naval dispensary at the naval station, Guantanamo Bay, Cuba, and crediting such amount to the naval hospital fund. There is no authority of law, however, for furnishing subsistence at Government expense to officers undergoing treatment in naval dispensaries. Therefore, Lieutenant H. should reimburse the particular appropriation or fund charged with the cost of subsistence furnished this officer while he was a patient in the naval dispensary at Guantanamo Bay, Cuba (File: OO-H-/L16-8 (261022) K Du, January 24, 1927).

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[P. 5] PRECEPT: THE NAME OF THE OFFICER TO WHOM IT IS ADDRESSED MUST ALSO APPEAR IN THE PARAGRAPH IN WHICH THE MEMBERS OF THE GENERAL COURT MARTIAL ARE DESIGNATED AS SUCH BY THE CONVENING AUTHORITY.

FORMER JEOPARDY: CANNOT BE PLEADED WHEN ACCUSED HAS BEEN TRIED BY AN ILLEGALLY CONSTITUTED COURT MARTIAL.

ACQUITTAL: SHOULD BE ANNOUNCED IN OPEN COURT.

F. S., fireman, first class, United States Navy, was tried by general court martial convened by the Commander Scouting Fleet, and acquitted on the charge of "Drunkenness." The proceedings, findings, and acquittal were approved by the convening authority on December 9, 1926. In reviewing the record of proceedings in this case it has been noted that the precept is addressed to Lieutenant Commander X, United States Navy, but the name of this officer does not appear in paragraph 2, which, in accordance with the usual form, reads as follows:

> "The court is composed of the following members, any five of whom are empowered to act, viz:"

Then follows a list of the officers comprising the court. Lieutenant Commander X sat at the trial in this case, as is evidenced by the fact that his name appears among those present as members and that he signed the record of proceedings as president of the general court martial.

It is well settled that an officer cannot serve as a member of a general court martial unless he is designated as such by the convening authority (C. M. O. 114, 1918, 27). Inasmuch as the name of Lieutenant Commander X did not appear in that part of the precept designating the members constituting the court martial, it is evident that he was not actually designated as a member of this court martial by the convening authority, and [P. 6] he was not authorized, therefore, to sit as a member at this trial. The convening authority approved the proceedings, findings, and acquittal in this case without commenting on the point in question, but his action in this regard cannot ratify and make good the presence of Lieutenant Commander X as a member at this trial. As trial by a court not legally constituted is not a trial which can be said to be "due process of law," the above irregularity results in invalidating the proceedings in this case (22 Op. Atty. Gen. 137).

The accused in this case may be tried again and he cannot plead former jeopardy, as the court had no jurisdiction by reason of improper membership, and action of the court is not a trial.

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It is further noted that the record does not show that section 685, Naval Courts and Boards, was complied with. Upon completion of the trial the record shows that the court was closed and that the judge advocate was recalled and directed to record the finding of the court. Following this the record shows that the court adjourned to await the action of the convening authority. In view of the requirements of section 685, above referred to, the court should have reopened and directed that the judge advocate read aloud, in the presence of the accused, the finding of the court.

In view of the foregoing the proceedings, findings, and acquittal in this case are set aside (File: MM–S–/A17–20(261206) A, G. C. M. Rec. No. 66046, January 7, 1927).

ACCUSED, WHEN DEPRIVED OF A FAIR AND IMPARTIAL TRIAL, THE CONVICTION WILL BE SET ASIDE.

S, private, United States Marine Corps, was tried by general court martial convened at the United States receiving ship, San Francisco, Calif., and convicted of "Scandalous conduct tending to the destruction of good morals," the specification alleging that he gave false testimony before a board of investigation which was convened for the purpose of inquiring into the breaking into and theft committed at the Rodman Naval Club Canteen at the United States naval hospital, Mare Island, Calif.

Subsequent to the trial of the accused one P, hospital apprentice, second class, United States Navy, was tried by a general court martial on board the receiving ship, San Francisco, Calif., and acquitted of the same charge and specification for which the accused was convicted. During the P trial an important and material witness was produced and identified S as the person with whom he had a conversation at Vichey Springs at about 9 o'clock on the evening of July 7, 1926, the accused thereby establishing an alibi. Another material witness testified [P. 7] for the defense in the P trial who was not available to testify when S was tried.

It is noted in reviewing the record of proceedings in the case of S that reasonable effort was made by both the judge advocate and counsel for the accused to locate these witnesses for the defense but were unsuccessful in their attempt to have them appear before the court at the time S was tried.

In view of the fact that the accused was deprived of a fair and impartial trial by reason of the impracticability to receive the testimony of certain important and material witnesses, whom the accused had requested to be produced but could not be located, and further in view of the doubt cast upon the veracity of one of the witnesses of the prosecution by the testimony of a witness for the defense in the P trial, the findings and sentence in the case of S are disapproved and he will be restored to duty (File: MM–S–/A17–20(270122) A, G. C. M. Rec. No. 65899, February 12, 1927).

DESERTION: MARK OF, REMOVAL.

Recently an application for the removal of the mark of desertion now appearing on the rolls in the case of F. H. C., fireman, first class, United States Navy, has been received. It appeared that C first enlisted in the United States Navy on June 22, 1896, and received an honorable discharge on January 10, 1899. He reenlisted on July 10, 1899, and deserted on June 10, 1900. He is therefore still carried as a deserter at large in the records of the Navy Department. In view of the time that has elapsed since his desertion, he would not, if he returned to naval jurisdiction, be brought to trial for the offense, but would be discharged as undesirable in order to clear his record. The undesirable discharge, however, would not remove the mark of desertion now appearing on the records. The Navy Department is empowered to remove the mark of desertion in the following cases:

(1) "Those coming under the provisions of the act of August 14, 1888 (25 Stat. 442, U. S. C., title 34, sec. 1012), which apply to persons who served during the Civil War.

[P. 8] (2) "Those in which it is conclusively shown that such charge was erroneously entered."

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Inasmuch as the case of C does not come within either of the above mentioned, the Navy Department cannot remove the mark of desertion now appearing against him (File: MM-C-/P13-8(2) (270206)N-SG, February 15, 1927).

OATHS: AUTHORIZATION OF OFFICERS COMMANDING VESSELS OF THE NAVY TO ADMINISTER.

The War Department recently requested information as to whether a naval officer before whom an oath of office, dated October 27, 1926, was subscribed, had the general power of a notary public or of a consul of the United States in the administration of oaths. In response, the Navy Department advised that the oath of office referred to appears to have been taken before Commander A, United States Navy, who on October 27, 1926, was serving as a commissioned officer in the United States Navy, in command of the U. S. S. *Smith Thompson*.

The provisions of law under which Commander A is authorized to administer oaths are found in United States Code, title 34, section 217 (sec. 1433 R. S.), and United States Code, title 34, section 1200, article 69 (act of January 25, 1895, 28 Stat. 639, as amended), which provide, relative to this subject, respectively, as follows:

> "The commanding officer of any fleet, squadron, or vessel, acting singly, when upon the high seas or in any foreign port where there is no resident consul of the United States, shall be authorized to exercise all the powers of a consul in relation to mariners of the United States.
>
> "Judges advocate of naval general courts martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, and the adjutant and inspector, assistants adjutant and inspector, commanding officers, recruiting officers of the Marine Corps, and such other officers of the Regular Navy and Marine Corps, of the Naval Reserve, and of the Marine Corps Reserve, as may be hereafter designated by the Secretary of the Navy, are authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration.

An examination of United States Code, title 34, section 217, above quoted, shows that the commanding officer of a naval vessel is only authorized to exercise the powers of a consul in relation to mariners of the United States, and then only when [P. 9] upon the high seas or in a foreign port where there is no resident consul of the United States.

Consideration of the provisions of United States Code, title 34, section 1200, article 69, above quoted, discloses that officers commanding vessels of the Navy, of which Commander A was one on October 27, 1926, are authorized to administer oaths only for purposes of the administration of naval justice and for other purposes of naval administration.

It will be noted from the foregoing that Commander A on October 27, 1926, did not have the "general power of a notary public or of a consul of the United States in the administration of oaths" except in relation to mariners of the United States (File: OO-A-/A17-6(5) (261214)J-SG, February 8, 1927).

ENTRY ERRONEOUSLY MADE OF DISABILITY IN THE MEDICAL RECORD OF AN ENLISTED MAN SHOULD BE REMOVED.

The correspondence and papers in the case of H show that an erroneous entry of syphilis was made in his medical record on May 13, 1925, and on July 16, 1925. It is, therefore, the opinion of the Navy Department that the aforesaid entries may and should be corrected to conform to the medical opinion expressed by the Bureau of Medicine and Surgery in the correspondence and papers above mentioned (File: MM-H-/P2-5(2) (270110)N-SG, February 8, 1927).

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MISCONDUCT: WHEN DISABILITY IS ACQUIRED AS A RESULT OF, AN ENLISTED MAN SHOULD BE REQUIRED TO MAKE GOOD THE TIME LOST BECAUSE OF ABSENCE FROM DUTY DUE TO THAT DISABILITY.

R enlisted in the United States Navy on November 14, 1922, and on November 27, 1922, he was admitted to the sick list with gonococcus infection of the epididymis, which was considered to be not due to his own misconduct, having existed prior to enlistment. On November 29, 1922, he was transferred to the naval hospital, Norfolk, Va., with the same diagnosis, the medical officer stating: "Since no entry is made of patient having had gonorrhoea on enlistment sheet, it is assumed he did not have disease and checkage is ordered." In rebuttal R stated that he had had no liberty since his enlistment and that if he had had gonorrhoea before enlistment, he had no knowledge of it.

United States Code, title 34, section 183, act of July 1, 1918 (40 Stat. 717), provides that—

> "Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of injury, sickness, or disease resulting [P. 10] from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of injury, sickness, or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct."

The Comptroller General of the United States, in a decision addressed to the Secretary of War on August 7, 1922, held that an enlisted man in the Army is not entitled to pay while absent from duty on account of disease resulting from misconduct, whether such disease was contracted before or after enlistment (2 Compt. Gen. 84).

It may be assumed that Congress was cognizant of the difference of opinion when the act of May 17, 1926 (Public, No. 230, 69th Cong.), was passed which provides that anyone absent from duty for more than one day at a time because of the effects of a venereal disease due to his own misconduct shall not be entitled to pay for the period of such absence, provided, "That such absence is within a period of one year following the appearance of the initial symptoms of such venereal disease and regardless of whether the appearance of the initial symptoms occurs prior or subsequent to the date of entry into the service." The foregoing act clearly indicates that the legislative intent was that a disease could be considered due to misconduct even though the disability was acquired prior to enlistment.

The mere fact that the disability was contracted prior to the man's entry into the naval service does not in itself change what would otherwise be considered as a disability due to own misconduct into one which would be considered as having been innocently acquired.

A further consideration to be noted is that the Comptroller General could, under his decision of August 7, 1922, supra, refuse to allow payment of reenlistment allowance to a man who had not made up the time lost due to a disease which was the result of his own misconduct.

The Navy Department decided in view of the foregoing, that the disability in this case was acquired due to his own misconduct and that R should, therefore, be required to make good the time lost because of absence from duty due to that disability (File: MM–R–O/P2–5(2)(270103)N–SG, February 8, 1927).

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[P. 4] DISABILITY: NOT DUE TO OWN MISCONDUCT.

B, F2c, U. S. N., received a knife wound in the left eye on December 19, 1926, on board the U. S. S. ------, which wound necessitated the removal of his eye. The wound was inflicted by S, F2c, U. S. N. It appeared that S, while under the influence of intoxicating liquor, engaged in a fight with another en-

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listed man, N, and that B stepped in and stopped the fight. S later attacked B, apparently for having stopped the fight, and stabbed with a knife B, who was backing away from him, causing the disability now under consideration. It is evident that B was trying to avoid a fight at the time. The medical officer found both S and B to be under the influence of intoxicating liquor, but there is nothing which showed that B was acting in other than the manner of a reasonable and sober person. S was tried and convicted for the offense committed by him. In view of the foregoing, the Navy Department held that B's disability should be held to have been incurred not as the result of his own misconduct (File: MM- * * * W/P2-5 (2) (270217) N-SG, February 28, 1927).

DISABILITY: DUE TO OWN MISCONDUCT.

R was examined by a board of medical survey on November 1, 1918, which found him to be suffering with gonococcus infection of the joints. The board considered the disability as due to own misconduct and, in accordance with its approved recommendation, he was discharged from the naval service on November 14, 1918. It appears from the facts contained in the Chief of the Bureau of Medicine and Surgery second endorsement of March 23, 1927, that R gave history of having had gonorrhoea followed by rheumatism prior to his enlistment in the Navy. The question presented is whether the disability which manifested itself after enlistment and which was a recurrence of the gonorrhoea acquired before entry into the naval service should be considered as due to own misconduct.

In the Ramsdell case, File: MM-Ramsdell, Harold O/P2-5 (2) (270103), this same question was considered, and the opinion in the Cederberg case, File 29372-122 of 17 October, 1922, which stated that a disease acquired by misconduct prior to enlistment should be held to have originated not due to own misconduct, [P. 5] was expressly overruled. In paragraph 6 of the Ramsdell case it was stated:

> "The mere fact that the disability was contracted prior to the man's entry into the naval service does not in itself change what would otherwise be considered as a disability due to own misconduct into one which would be considered as having been innocently acquired."

In view of the foregoing, it is the opinion of the Navy Department that R's disability was due to own misconduct and, accordingly, that there is no error on this point in his medical record nor in the character of his discharge (File: MM- * * * W/P2-5 (2) (270323) N-SG, March 29, 1927).

RETIRED PAY, CREDIT FOR LONGEVITY UNDER THE ACT OF MARCH 2, 1903.

RETIRING BOARD: FINDINGS HAVING BEEN APPROVED BY THE PRESIDENT AND HIS ORDERS IN THE CASE DULY EXECUTED, THE CAUSE OF RETIREMENT OF THE PERSON CONCERNED CANNOT SUBSEQUENTLY BE ALTERED.

Captain N, U. S. Marine Corps, was retired, the retiring board having found him "incapacitated for active service by reason of chronic bronchitis." The proceedings and findings of the marine retiring board in this case were approved by the President on July 18, 1920, who directed that Captain N be retired from active service in conformity with the provisions of sections 1622 and 1251 of the Revised Statutes and those of the act of May 22, 1917, and Captain N was retired accordingly. His present pay on the retired list amounts to $1,800 per annum which is 75 per centum of the pay of a captain on the active list under the act of May 11, 1908 (35 Stat. 108) which fixed the annual base pay of a captain on the active list at "two thousand four hundred dollars." The provision of law under which Captain N seeks credit for longevity pay in computing his pay on the retired list is contained in the Army Appropriation Act approved March 2, 1903 (32 Stat. 932), under which law officers of the Marine Corps retired on or after March 2, 1903, are precluded from receiving any further increase of longevity pay in excess of that which had accrued to their credit at date of retirement, except in the case of officers retired on account of wounds received in battle, in which case the base pay plus longevity is used as a basis for com-

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puting the retired pay of any such officer, and it is for this reason that Captain N seeks credit for longevity pay under the said act of March 2, 1903. The Navy Department decided that in view of the fact that since once the findings of a retiring board have been approved by the President, and his orders in the case duly executed, the cause of such retirement cannot subsequently be altered, Captain N is not entitled to credit for longevity pay under the act of March 2, 1903, in computing his pay on the retired list (File: OO- * * * /P2-5 (2) (270119)K Ds, March 15, 1927).

[P. 6] CONFINEMENT: PAY STATUS DURING.

An enlisted man was convicted by general court martial and sentenced, as approved by the Navy Department, to confinement for a period of three months, and to lose pay amounting to $30 a month for a period of six months. The dishonorable discharge adjudged in this case was mitigated to a bad-conduct discharge, which was remitted subject to six months' probation. The place designated for confinement was the station where the man was detailed (receiving ship, San Francisco). In view of the fact that he was in the pay status of his rating of coppersmith, second-class, during the period of his confinement, and performed the duties of his rating during that time, the man's commanding officer has requested to be advised whether or not such period of confinement should be counted as time "not served" under the instructions contained in the "Pay Bill Instructions."

The instructions contained on page B14 of the "Pay Bill Instructions" provide as follows:

> "Nonperformance of duty because imprisoned does not include time spent under arrest awaiting trial, or time spent in confinement after trial under sentences of courts martial or deck courts, where the punishment inflicted does not involve confinement at a naval prison (or at a receiving ship or station designated as a naval prison), but involves confinement only to the limits of a ship or station to which attached or confinement in the brig of such ship or station."

Under date of August 4, 1925 (File 26267–466–E) the Secretary of the Navy designated certain naval stations and receiving ships as places of confinement for court-martial prisoners, but did not include therein the Receiving Ship at San Francisco, Calif. Inasmuch as the man in this case served the period of confinement adjudged at the station where he was detailed, and during that time was in the pay status of his rating, and performed the duties thereof, the Navy Department decided that his case comes within the pay bill instructions quoted above, and that the period of confinement served by him accordingly, should be considered as time served for the purpose of pay and reenlistment allowance. The Navy Department decided further that even if the Receiving Ship at San Francisco had been designated as the place of confinement for general court-martial prisoners while this man was serving his sentence, his status would not have been affected thereby, since his sentence was to confinement at the station where detailed and he would not therefore, come within the status of "Receiving Ship Court-Martial Prisoners" (File: MM- * * * /A17–20 (261129) K Du, March 15, 1927).

[P. 7] MARINES: ARE NOT SUBJECT TO THE ARTICLES OF WAR UNLESS DETACHED FOR SERVICE WITH THE ARMY BY ORDER OF THE PRESIDENT.

On January 12, 1927, F, private, U. S. Marine Corps, was tried before an Army summary court martial at Camp Holabird, Md., where he was serving as a student at the U. S. Army Quartermaster Corps Motor Transport School. The law is very clear that marines are not subject to the Articles of War unless detached for service with the Army by order of the President, and the Navy Department decided that the court before which F was tried was without jurisdiction to try him, and that the trial and sentence are nullities, and checkage against his accounts in accordance with the terms of the sentence cannot properly be made (File: MM- * * * /A17–21 (270314) C; March 30, 1927).

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EVIDENCE: TENDING TO INCRIMINATE.

A board of investigation was recently convened at the Marine Barracks, Quantico, Va., to investigate a certain occurrence, and in the course of the proceedings a witness, Major X, U. S. Marine Corps, was asked the question "Was anyone in the defendant's quarters on the night in question under the influence of liquor?" The witness requested that he be allowed to refrain from answering this question on the ground that it might tend to incriminate him, and his request was granted by the board. Another witness, Captain Y, U. S. Marine Corps, was asked the question, "You have testified that there was no drunkenness at the party in question—was there any indulgence of intoxicating liquor by any persons present to your observation?" In response to this question the witness requested "that he be allowed to refrain from answering on the ground that it might tend to incriminate him," which request was granted by the board. The requests of the two witnesses quoted above are not objections to testifying on the ground that the evidence would tend to incriminate them, but are requests that they be allowed to refrain from answering on the ground that the evidence might tend to incriminate them. This form of objection is not permissible. The witnesses neither objected to giving the testimony nor averred that it would be incriminatory. No man can be the judge as to whether or not his answer would tend to incriminate him. That question is one for the court to decide, and if it is not apparent that the answer to the question would tend to incriminate the witness, the matter should be sufficiently developed so that the court can rule intelligently upon the question. In this case it should have been made clear that the presence of the witnesses at a party where someone was under the influence of liquor or where intoxicating liquor was being used would in some way incriminate them, before the board allowed the witnesses to refrain from answering the questions on the ground of self-incrimination.

[P. 8] If in the opinion of the board the answers to the questions would incriminate the witnesses, the questions should have been reframed so that the answers would not incriminate them. In the case of Captain Y the question asked was broad enough to include the proposition as to whether or not the witness himself had been drinking intoxicating liquor, and it should have been reframed so as to exclude that proposition (File: KP59/A17–25(261016)D, January 17, 1927).

INTERESTED PARTY BEFORE A BOARD OF INVESTIGATION.

The record of a board of investigation recently held shows that Commander C, U. S. Navy, and Lieutenant (j. g.) D, U. S. Navy, at their own request and because they had an interest in the subject matter of the investigation were allowed by the board to be present during the course of the investigation to examine witnesses, and to introduce new matter pertinent to the investigation in the same manner as a defendant. The convening authority in his endorsement states that the board made an error in procedure in permitting the recorder to call these witnesses to the stand on the ground that they had been granted the privileges of defendants by the board, and as such, could be called as witnesses only at their own request. In the opinion of the Navy Department a party to the investigation in the capacity of an interested party, made so at his own request and not by the convening authority or by the Court, is not in the status of a defendant as defined in section 1049, Naval Courts and Boards, but the board may permit him to be present during the course of the investigation, examine witnesses and introduce new matter pertinent to the investigation. This does not carry with it the privilege of testifying only at his own request. This privilege is accorded a defendant (or a person in a status similar to that of a defendant, such as a candidate before an examining board) by the provisions of section 1121, Naval Courts and Boards, and is applicable only to one against whom there is an implication of guilt. There is no such implication against the party who has only an interest in the proceedings and such party does not have the rights of a defendant except in so far as stated above.

Subject to the above remarks, the proceedings, findings, opinion, and recommendations of the board of investigation, subject to the remarks of the convening authority are legal (File: DD317/A17–25 (261130) D, December 22, 1926).

[C. M. O. No. 4—1927]

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[P. 3] Lieutenant Commander Lorain Anderson, U. S. Navy, was tried by general court martial on board the U. S. S. *Dobbin* on December 10, 1926, by order of the Commander Destroyer Squadrons Scouting Fleet, U. S. Fleet, and was fully acquitted of the following charges:

Charge I.—Culpable inefficiency in the performance of duty.

Charge II.—Neglect of duty.

The convening authority on January 7, 1927, approved the proceedings, the finding and acquittal on the specification of the first charge, and on the first charge, the finding on the first specification of the second charge, and disapproved the finding and acquittal on the second specification of the second charge and on the second charge for the reason that the finding is not in accordance with the facts adduced from the evidence submitted. On March 30, 1927, in taking action on the record the Navy Department placed the following endorsement thereon:

> "The Navy Department agrees with the views of the Chief of the Bureau of Navigation, concurred in by the Chief of Naval Operations, that the findings of the court in the foregoing case of Lieutenant Commander Lorain Anderson, U. S. Navy, were in accordance with the evidence adduced and that the convening authority erred in disapproving the finding and acquittal on specification 2 of charge II."

Marine Gunner Chas. H. Eurton, U. S. Marine Corps, was tried by general court martial at the Marine Barracks, Quantico, Va., on November 22, 1926, by order of the Secretary of the Navy, and acquitted of the following charges:

Charge I.—Conduct to the prejudice of good order and discipline.

Charge II.—Drunkenness.

On January 31, 1927, the Navy Department approved the proceedings, findings, and acquittal with the following remarks:

> "In reviewing the record in this case it is noted that the record of proceedings has been prepared with a lack of [P. 4] care, having numerous typographical errors and lacking neatness. Typographical corrections in the testimony were not made in red ink and initialed by the judge advocate as required by section 773 of Naval Courts and Boards.
>
> "It is further noted that the judge advocate waived his right to make an opening or closing argument. In cases where the facts and circumstances are complicated or where there is a conflict in the testimony it is the duty of the judge advocate to prepare an argument and summarize the testimony in order to present to the court the case for the prosecution."

Subject to the foregoing remarks, it is the opinion of the Navy Department that the proceedings, findings, and acquittal are legal.

Pay Clerk Oscar W. F. Hicks, U. S. Navy, was tried by general court martial at the Navy Yard, Philadelphia, Pa., on March 9, 1927, by order of the Secretary of the Navy, and was found guilty by plea of the following charges:

Charge I.—Embezzlement of money of the United States intended for the naval service thereof.

Charge II.—Violation of a lawful regulation issued by the Secretary of the Navy.

Charge III.—Absence from station and duty without leave.

The court sentenced Pay Clerk Hicks to be reduced to the rating of apprentice seaman, to be confined for a period of 24 months, then to be dishonorably discharged from the U. S. naval service, and to suffer all the other accessories of said sentence as prescribed by section 883, Naval Courts and Boards. On March 19, 1927, the Navy Department returned the record to the court with the following remarks:

> "In reviewing this case it is noted that the court sentenced the accused to be reduced to the rating of apprentice seaman. This sentence is illegal. Attention is invited to article 9 of the Articles for the Government of the

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Navy which states 'Any officer who absents him- [P. 5] self from his command without leave, may, by the sentence of a court martial, be reduced to the rating of an ordinary seaman.' The designation of the rating 'ordinary seaman' was changed to 'seaman second class' by the act of August 29, 1916 (39 Stat. 575).

"The court will reconvene for the purpose of correcting this illegality."

The court in revision decided to revoks its former sentence and substitute therefor the following sentence:

"The court therefore sentences him, Oscar W. F. Hicks, Pay Clerk, U. S. Navy, to be reduced to the rating of seaman second class, to be confined for a period of twenty-four (24) months, then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence, as prescribed by section 883, Naval Courts and Boards."

The Navy Department on April 13, 1927, approved the proceedings and findings, and the proceedings and sentence in revision, and reduced the period of confinement adjudged with corresponding accessories to twelve (12) months, which sentence was on April 14, 1927, confirmed by the President.

Lieutenant Harry H. Hill, U. S. Navy, was tried by general court martial on board the U. S. S. *Arkansas* on February 2, 1927, by order of the Commander in Chief, U. S. Fleet, on the following charges:

Charge I.—Assaulting another person in the Navy.
Charge II.—Conduct to the prejudice of good order and discipline.
Charge III.—Conduct unbecoming an officer and a gentleman.
Charge IV.—Drunkenness.

The court acquitted Lieutenant Hill on the first and second charges, convicted him on the third and fourth charges, and sentenced him to lose 25 numbers in his grade. The convening authority on February 11, 1927, in acting on the record placed the following endorsement thereon:

"In reviewing the foregoing case of Harry H. Hill, lieutenant, U. S. Navy, the Commander in Chief, U. S. Fleet, is constrained to disagree with the court in its acquittal as to the first charge. From the testimony it appears that the accused was guilty of either an assault or a battery, and as the former includes the latter the specification under this charge has been proved.

"The first specification of the second charge has not been proved, but the second specification appears to have been proved. It may have been contended that the accused should have been tried under a different charge for this offense, and he could have been properly charged [P. 6] with an assault or a battery, or both, but this does not alter the fact that his heedless and improper actions resulted in the unlawful knocking down of a woman who had every right to be where she was, and to pursue her vocation under full protection of the law. In view of this the Commander in Chief, U. S. Fleet, does not concur as to the acquittal under the second charge.

"The action of the court as to the third charge and its specification is approved, but it appears that the exclusion of the words 'indecently and without regard for the public morals' detracts from its logic. Had the accused appeared in a bathing suit he would have been without trousers, but this costume would not necessarily have been improper, and would not have constituted a scandal to public decency.

"The action of the court as to the fourth charge and its specification is approved.

"In this connection the Commander in Chief, U. S. Fleet, would say that he considers the uniform of the American naval officer to have been lowered in dignity before the Cuban people, and the prestige of the Nation that uniform represents to have been placed in needless jeopardy. Furthermore, it is his opinion that, in failing to convict as to the first and second charges, the court has gone on record to the effect that at least a majority of its members condoned the offenses with which the accused was therein charged

and, in awarding a punishment entirely inadequate for the offenses of which he was found guilty, deprecated the gravity of those offenses and lowered the standard of moral ethics that has been a heritage of the American Navy.

"The unanimous recommendation to clemency appears to have been based on grounds of 'the excellent professional reputation of the accused' rather than upon those of uprightness of personal character. Mention was made of every character witness who spoke of his professional attainments, but the only witness who spoke only of his moral attainments was omitted; this was Commander Robert E. Miller, Chaplain Corps. (See p. 52.) This seems to be rather a negative recommendation in view of the nature of the offenses for which the accused was tried, and found guilty.

"The Commander in Chief, U. S. Fleet, is also of the opinion that, in awarding a punishment inadequate to the offenses in the case, the court arrogated the exercise of clemency, and deprived the reviewing authorities of a right that is vested solely in themselves.

"Subject to the above, the proceedings, findings, and sentence of the general court martial in the foregoing [P. 7] case of Harry H. Hill, lieutenant, U. S. Navy, are approved, but the recommendation to clemency is not approved. He will be released from arrest and restored to duty."

Second Lieutenant Lyman G. Miller, U. S. Marine Corps, was tried by general court martial on board the U. S. Receiving Ship, San Francisco, Calif., on January 25, 1927, by order of the Secretary of the Navy and was acquitted on the charge of "Conduct unbecoming an officer and a gentleman." On April 6, 1927, the Navy Department approved the proceedings, finding, and acquittal with the following remarks:

"Second Lieutenant Lyman G. Miller, U. S. Marine Corps, was tried by general court martial on January 25, 1927, on board the U. S. Receiving Ship, San Francisco, Calif., by order of the Secretary of the Navy and was acquitted of the charge 'Conduct unbecoming an officer and a gentleman,' the specification of the charge alleging that the said Miller had cheated while undergoing a final written examination on the subject of bookkeeping and accounting, pursuant to his duties in connection with the U. S. Marine Corps Institute bookkeeping and accounting course. The testimony given by Percy S. Macdonald, bookkeeper at the post exchange, Marine Barracks, Mare Island, a witness for the prosecution, is to the effect that the accused had come to him and asked him to aid him in the solution of three of the questions contained in his final examination paper; that he and the accused sat down together and between them worked out the solutions to the three questions, writing same down on scratch paper; that he, Macdonald, then took the scratch paper and 'typed the entire course on a typewriter.' Macdonald further testified that he did not actually work out the answer to any question himself, but that in his opinion he had helped the accused. This testimony was not rebutted by the defense, but was in substance affirmed by the accused, who took the witness stand. The accused while on the stand sought to justify or excuse his actions on the ground that he had no intent to cheat, and gave testimony tending to show that he was not aware of the fact that he was violating any instructions or duty by his method of conduct in taking the said examination. Inasmuch as the court acquitted the accused, it is apparent that the court must have concluded that the accused, although he had received aid in the preparation of his examination paper, did so without the intent to cheat.

"The prosecution offered in evidence a paper (page 12 of the record) which purported to be a carbon copy of a [P. 8] letter from the Marine Corps Institute to the accused giving instructions governing the aforementioned examination (exhibit 5). Paragraph 2 of exhibit 5 provides in tenor as follows:

" 'You should begin on the final examination at such a time as you will be free from any conflicting duties as you are expected to complete the entire examination without interruption, or communication with any person. You may, however, refer freely to the textbooks of your course, to reference books, or to any other papers or data available.'

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"The accused objected to the admission of this document into evidence. The court overruled the objection and received the document in evidence, but received it in evidence only for 'the purpose of presenting before the court part of the routine which is part of the Marine Corps Organization, particularly as that refers to the examinations of the type referred to in the specification.' The court further stated that in the introduction of this document it is in no way to be construed as having any bearing on the question of whether or not the accused received the original of this document.

"In the opinion of the Navy Department the court erred in limiting the purpose for which the above-mentioned document was received in evidence to the very narrow limit allowed. It appears from the record that Captain Thomas E. Bourke, U. S. Marine Corps, registrar of the Marine Corps Institute, was placed on the witness stand, that he was the legal custodian of the file correspondence jacket of the accused kept at the Marine Corps Institute, that the paper offered in evidence was a part of the file kept in the said filing jacket, that said paper purported to be the original of a letter forwarded to the accused under date of March 20, 1925, that in the regular course of business an original letter of instructions is mailed to each and every person together with the examination questions and at the same time, and that a copy of such letter is filed in the file jacket of the person to whom the questions are sent. Further, it appears that the judge advocate requested the accused to produce the original of the letter and that the accused replied that he did not have it. From the foregoing it is the opinion of the Navy Department that the aforementioned paper should have been admitted in evidence as a copy of an original which had been mailed to the accused. Having shown that the original was unavailable, this copy then represented the best evidence available. Not only was this carbon copy, a copy kept in the due course of business, but it also was a public document and thus was admissible under the rules [P. 9] governing the admission of such documents. (See N. C. & B., sec. 376 and related sections.) If this document had been properly received by the court, it would have created a presumption that the original was duly received by the accused.

" 'If a letter is sent by the post, it is presumed from the known course in that department of the public service that it reached its destination at the regular time, and was received by the person to whom it was addressed, if living at the place and ususally receiving letters there. So, where a letter was put into a box in an attorney's office, and the course of business was that a bellman of the post office invariably called to take the letters from the box, this was held sufficient to presume that it reached its destination (Greenleaf, 16th edition, section 40; also see N. C. & B., sec. 376 and related sections)."

"Of course the presumption created is a rebuttable one, and the court could have concluded from the testimony of the accused that such presumption was rebutted, even if the document had been properly admitted for its full worth."

Subject to the foregoing remarks, it is the opinion of the Navy Department that the proceedings, findings, and acquittal in this case are legal.

Second Lieutenant Robert L. Skidmore, U. S. Marine Corps, was tried by general court martial on board the U. S. Receiving Ship, San Francisco, Calif., on February 2, 1927, by order of the Secretary of the Navy and acquitted of the charge "Conduct unbecoming an officer and a gentleman." On April 6, 1927, the Navy Department approved the proceedings, finding, and acquittal with the following remarks:

"Second Lieutenant Robert L. Skidmore, U. S. Marine Corps, was tried by general court martial on February 2, 1927, on board the U. S. Receiving Ship, San Francisco, Calif., by order of the Secretary of the Navy and was acquitted of the charge 'Conduct unbecoming an officer and a gentleman,' the specification of the charge alleging that the said Skidmore had cheated while undergoing an additional final written examination on the subject of bookkeeping and accounting, pursuant to his duties in connection with the U. S. Marine Corps Institute bookkeeping and accounting course. The testi-

mony given by Percy S. Macdonald, bookkeeper at the post exchange, marine barracks, Mare Island, a witness for the prosecution, is to the effect that the accused asked him for assistance [P. 10] in solving some of the examination questions propounded by the Marine Corps Institute, and that he and the accused worked out the answers to the questions together. This witness also gave testimony to the effect that he had previously worked out some of these same questions with another officer, that he had retained some written notes made at that time, and that these notes were somewhat more in detail than the answers worked out by him and the accused. The evidence before the court further shows that the answers submitted by the accused to four of the total of six questions propounded by the Marine Corps Institute in the said additional examination are identical with answers submitted by Second Lieutenant Lyman G. Miller, U. S. Marine Corps, in his examination paper, and that all the material points in the answers to the remaining two questions are the same as contained in the answers submitted by the said Miller. The accused took the witness stand in his own defense, gave testimony, and introduced evidence tending to show that he was not aware of the fact that he was violating any instructions or duty by reason of receiving aid in the preparation of his examination paper, from the said Macdonald. Inasmuch as the court acquitted the accused, it is apparent that the court must have concluded that the accused, although he had received aid in the preparation of his examination paper, did so without the intent to cheat. The members of the court were performing an official duty in weighing the evidence. They had the power to weigh the evidence and decide the matter, rightly or wrongly, and in accordance with their own judgment.

"Subject to the foregoing remarks the proceedings, findings, and acquittal in this case are legal."

[P. 11] CONFESSIONS: EXTRAJUDICIAL CONFESSIONS MADE BY WITNESSES OTHER THAN THE ACCUSED ARE ADMISSIBLE ONLY FOR THE PURPOSE OF IMPEACHING THE CREDIBILITY OF SUCH WITTNESSES.

O, seamen, first class, U. S. Navy, was tried by general court martial and convicted of (I) "Sodomy" (two specifications), and (II) "Scandalous conduct tending to the destruction of good morals" (two specifications).

In support of charge I and specifications thereunder the prosecution introduced in evidence extrajudicial confessions of C, seaman second class, U. S. Navy, admitting that the act of sodomy was committed on him by the accused on February 22 and March 3, 1926, as charged. Aside from C's confessions, there is no evidence in this case that sodomy was committed on C by the accused.

Evidence introduced in support of charge II and specifications thereunder consisted of extrajudicial confessions of W and J, seamen second class, U. S. Navy, who confessed that the accused attempted on certain dates to commit with them the act of sodomy, and also the testimony of W. All these confessions were sworn to before an officer duly empowered to administer oaths.

On the witness stand C and J flatly contradicted all the material allegations contained in their confessions, claiming that they had been induced by threats or promises to make such allegations. The testimony of W, however, was essentially the same as his confession.

The important question arising in this case relates to the confessions of C and J and their consideration as evidence against the accused, i. e., whether they may be considered only as impeaching the credibility of the testimony of these witnesses on the stand, or whether they may be considered as evidence of facts stated therein. In this connection 40 Cyc., page 2764, citing a long list of cases, has the following to say:

> "Proof of inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment and not as substantive evidence of the truth of the matters stated, and it is the duty of the court to instruct the jury that they can consider the evidence for this purpose only, if such instruction is requested by the party who apprehends that such proof may be treated by the jury as substantive evidence against him."

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In the case of *Illinois Central Railroad Co.* v. *Wade* (69 N. E. Reporter 565), the court remarked as follows:

> "That the statements of witness made out of court, orally or in writing, if contradictory on a material point to his sworn statements as a witness, may be introduced in evidence, not as substantive proof of the truth of such statements, but as tending to discredit the witness, has been so frequently declared by courts and law writers, and is so universally understood and accepted, that the [P. 12] citation of authorities in support of the proposition is considered entirely unnecessary."

It is further noted that, except as to specification 1 of charge II, no evidence whatever was introduced to prove the corpus delicti. "The confession itself cannot be used to establish the corpus delicti. The corroboration must be outside of the confession." (Sec. 354, Naval Courts and Boards). The prosecution failed to corroborate the confessions of C and J by any substantial evidence.

> "The corpus delicti, so called, or the fact that the alleged criminal act was committed by someone, is a separate fact to be proved. The rule with regard to proof of the corpus delicti proceeds from the reason that the general fact without which there could be no guilt, either in the accused or in anyone else, must be established before anyone can be convicted of the perpetration of the alleged criminal act which caused it; as, in cases of homicide the death must be shown, in theft it must be proved that the goods were lost by the owner, and in arson that the house had been burned; for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive, or of theft when the owner had not lost the goods, or of arson when the house was not burned. But where the general fact is proved the foundation is laid, and it is competent to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally" (sec. 324, Naval Courts and Boards).

"It is a well-settled principle of the law of evidence that the uncorroborated extrajudicial admissions and confessions will not sustain conviction" (C. M. O. 4, 1922, 8). In this case there was no corroborative evidence introduced in support of charge I and specifications thereunder, and specification 2 under charge II, and the prosecution has, therefore, failed legally to prove the offenses alleged.

In view of the foregoing, the findings on charge I and specifications thereunder, and specification 2 under charge II are disapproved. It is the opinion of the Navy Department that the proceedings, findings on specification 1 under charge II, and the sentence are legal (File: MM– * * * /A17–20 (260923) A, G. C. M. Rec. No. 66228, March 28, 1927).

CONFESSIONS: EXTRAJUDICIAL CONFESSIONS MADE BY WITNESSES OTHER THAN THE ACCUSED ARE ADMISSIBLE ONLY FOR THE PURPOSE OF IMPEACHING THE CREDIBILITY OF SUCH WITNESSES.

CORPUS DELICTI: CONFESSION ITSELF CANNOT BE USED TO ESTABLISH.

J. M., hospital apprentice first class, U. S. Navy, was recently tried by general court martial and convicted of "Sodomy."

[P. 13] In support of the charge the prosecution introduced an extrajudicial confession of the accused, accompanied with evidence of its voluntary character, in which the accused admitted the facts alleged in the specification. This confession was sworn to by the accused in the presence of an officer duly empowered to administer oaths.

The other evidence introduced to support the charge consisted of a similar confession by one B, fireman third class, U. S. Navy, in which it is stated the alleged act was committed on him by the accused, as charged. The prosecution also offered the testimony of the persons who were present when the confessions were made to prove that they were made voluntarily, and not, as testified to by witnesses for the defense, that the were made under duress.

The prosecution failed to introduce any substantive evidence whatever to corroborate the confession of the accused, or, in other words, to prove the corpus delicti. But on the contrary, the witnesses B and the accused testified posi-

tively and unequivocally that the alleged act had not been committed by the accused and that all statements in their so-called confessions conflictingly opposed thereto were untrue.

> "The corpus delicti, so called, or the fact that the alleged criminal act was committed by someone, is a separate fact to be proved. The rule with regard to proof of the corpus delicti proceeds from the reason that the general fact without which there could be no guilt, either in the accused or in anyone else, must be established before anyone can be convicted of the perpetration of the alleged criminal act which caused it; as, in cases of homicide the death must be shown, in theft it must be proved that the goods were lost by the owner, and in arson that the house had been burned; for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive, or of theft when the owner had not lost the goods, or of arson when the house was not burned. But where the general fact is proved the foundation is laid, and it is competent to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally" (sec. 324, Naval Courts and Boards).

In this case it is not shown that sodomy had been committed. The corpus delicti of the crime cannot be proved by confession (Court-Martial Order 2, 1921, 18). Nor can it be proved by the person who was present at the making of the confession and who has no independent knowledge of the facts, for he cannot testify as to the circumstances surrounding the commission of the crime but only that a confession was made.

It is a well-settled principle of the law of evidence that the uncorroborated extrajudicial admissions and confessions of a defendant will not sustain conviction (Court-Martial Order 4, [P. 14] 1922, 8). In this case there was no corroborative evidence introduced in support of the charge and the prosecution has, therefore, failed legally to prove the offense alleged under the charge.

In view of the foregoing, it is the opinion of the Navy Department that the proceedings are legal, except in several instances of erroneous rulings by the court in the admission or rejection of evidence, but that the evidence offered to prove the offense in this case is insufficient and the findings and sentence are therefore set aside. (File: MM- * * * /A17-20(260923)A, G. C. M. Rec. No. 66239, March 9, 1927).

DESERTION: ENTRIES IN SERVICE RECORD INTRODUCED IN EVIDENCE TO ESTABLISH PRIMA FACIE CASE OF. INTENT TO PERMANENTLY ABANDON THE NAVAL SERVICE AS WELL AS UNAUTHORIZED ABSENCE MUST BE SHOWN IN ORDER TO ESTABLISH DESERTION.

B. M., now an apprentice seaman, U. S. Navy, was tried by general court martial on the following charges: (I) "Desertion" (two specifications), and (II) "Breaking arrest." Specifications 1 and 2, charge I, and specification under charge II were found proved and the accused was found guilty of those charges.

Under specification 2, charge I, the accused was tried for "Desertion," the specification alleging that the unauthorized absence began on or about February 5, 1927, and was terminated by his being delivered on or about February 9, 1927. The accused pleaded not guilty, but the court found the specification proved. The only evidence introduced at the trial in any way touching this offense was a copy of a page from the current service record book of the accused showing that he broke arrest and left the station at or about February 5, 1927, which evidence was sufficient to establish the unauthorized absence. No other evidence was introduced by the prosecution with regard to this specification and none was offered by the defense.

The Navy Department has held that a prima facie case of desertion is established when the prosecution proves the unauthorized absence and the fact of apprehension and delivery or surrender of the accused, with an absence of such duration as to justify an inference that the accused intended permanently to abandon the naval service. (See Naval Digest, 1916, p. 178, sec. 102.) As the evidence adduced in this case, however, does not show when the accused surrendered or was delivered to the naval authorities, the specification was found proved without any evidence to support the allegation of the delivery of the

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accused. Furthermore, there is no proof of absence of long duration to justify an inference that the accused intended permanently to abandon the naval service.

In view of the foregoing the finding under specification 2, charge I, is disapproved. The record of proceedings is not re- [P. 15] turned to the court, as the finding under specification 1 supported the finding of guilty under charge I.

Subject to the above remarks the proceedings, findings, and sentence in the above case are, in the opinion of the Navy Department, legal (File: MM– * * * /A17–20 (270217) A; G. C. M. Rec. No. 66635, March 16, 1927).

ENLISTED MEN: STATUS OF AS TO THEIR LEGAL RESPONSIBILITY FOR NECESSITIES FURNISHED DURING A PERIOD OF ENLISTMENT.
JUDGMENT: EFFECT OF WHEN OBTAINED AGAINST AN ENLISTED MAN.

In a recent letter the writer requested to be advised on the following questions:

"(*a*) Status of enlisted men as to their legal responsibility for necessities furnished during a period of enlistment.

(*b*) Can legal service be obtained upon an enlisted man the same as in the case of a civilian?

(*c*) If judgment is obtained, can earnings from the Government be attached?

(*d*) If judgment is obtained, can money be attached on deposits in their name with any bank?"

The questions submitted are answered seriatim as follows:

(*a*) All necessities for enlisted personnel of the Navy are furnished by the Federal Government. In those cases, however, where a member of the enlisted personnel of the Navy, as the head of a family, is charged with the support of his wife or minor child or children, he is responsible for the necessities furnished them in the same manner as any person not in the naval service would be responsible.

(*b*) Commanding officers, afloat or ashore, are authorized to permit the service of subpena or other process upon the person named in the process, but such service will not be allowed without permission from the commanding officer being obtained. In cases in which service by mail is legally sufficient, the papers may be addressed to the commanding officer, with the request that they be delivered to the man named therein. This, of course, applies only where the man is within the jurisdiction of the authority issuing the process.

(*c*) The pay of an enlisted man of the Navy cannot be attached, even if a judgment has been obtained against him.

(*d*) If a judgment has been obtained against an enlisted man in the Navy, money on deposit in his name with any bank [P. 16] within the jurisdiction of the judgment may be attached, the same as in the case of a civilian (File: QR/P13–11 (270304) J–SG, April 26, 1927).

PAY: ILLEGAL CHECKAGE OF.

A, private, U. S. M. C., was admitted to the sick list with fracture, simple, right fifth metacarpal, which was incurred while fighting, and which was considered to be due to own misconduct. His pay was checked for the time absent from duty because of this injury. In view of the provisions of U. S. C., appendix, title 34, sections 882a and 882b (act of May 17, 1926, 44 Stat. 557), which requires loss of pay from absence from duty due to a disease as distinguished from an injury, the checkage of pay in this case was illegal. In accordance with the provisions of U. S. C., title 34, section 183 (40 Stat. 717) the enlistment of A will not be regarded as complete until he has made good the time in excess of one day lost because of the injury resulting from his own misconduct (File: MM– * * * /L16–4 (4) (270411) N–SG, April 22, 1927).

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UNOFFICIAL FUNDS OR PROPERTY: OFFICERS OF THE SUPPLY CORPS AND PAY CLERKS NOT TO BE CHARGED WITH.

The Superintendent of the Naval Academy has requested information as to whether or not the order of the Secretary of the Navy to the Chief of the Bureau of Supplies and Accounts of February 5, 1924, File 27223–118, renders a supply officer ineligible to act as treasurer of a non-Government activity such as Naval Academy officers' club, or officers' golf or tennis clubs. In view of the fact that this order clearly states that hereafter no officer of the Supply Corps or pay clerk shall be charged with the handling or custody of, or accountability for, any funds or property other than such as is placed in his hands by operation of law or by operation of Navy Regulations, the Navy Department decided that such officers are prohibited from acting as treasurer of such clubs (File NC2/ OO– * * * /P19–3 (270223) J–SG, April 14, 1927).

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[P. 3] Lieutenant James L. Fisher, U. S. Navy, was tried by general court martial on board U. S. S. *Shawmut* on April 11, 1927, by order of the Commander Control Force, U. S. Fleet, and was convicted on the charge "Through negligence suffering a vessel of the Navy to be run upon a shoal." The court sentenced the accused to lose 10 numbers in his grade. In taking action on the record on April 26, 1927, the convening authority placed the following endorsement thereon:

"The convening authority is in receipt of two letters, hereto attached, from Lieutenant Fisher, the accused in this case, inviting the attention of the convening authority to what he contends are serious errors of procedure by the general court martial before which he was tried, which were prejudicial to his interests and resulted in an unfair trial.

"After a careful review of the proceedings, the convening authority notes that a witness for the prosecution erased and obliterated from the chart in evidence before the court certain pencil lines that had been plotted to fix the position at which the *S–21* was grounded. The bearings from which this position had been plotted were already a matter of record before the court, having been testified to by Lieutenant D. H. Wilson, witness for the [P. 4] prosecution, who had plotted originally the position in question on the chart. With this information, the position could be accurately restored, and the convening authority believes the court action was proper in not sustaining the objection of the accused and further that the interests of the accused were not unfairly prejudiced by such action.

"Claims of Lieutenant Fisher that further obliteration of the markings on the chart by successive witnesses for the prosecution while giving evidence before the court constituted a fatal error, the convening authority believes to be without merit.

"Lieutenant Fisher further claims an error by the court in refusing to allow the defense to introduce as evidence before the court the findings of a court of inquiry held to investigate the grounding of the *S–21*. The convening authority believes the action of the court proper in sustaining the objection of the judge advocate to the introduction of such material as evidence.

"Lieutenant Fisher further invites the attention of the convening authority to an error in the record on page 53, answer to question 5. The convening authority believes the error noted, if an error it be, to be inconsequential and has not resubmitted the record to the court.

"The convening authority is of the opinion a fair trial was accorded the accused, and, subject to the above remarks, the proceedings, finding, and sentence of the general court martial in the foregoing case of Lieutenant James L. Fisher, U. S. Navy, are approved.

"In view, however, of unanimous recommendation by the court of the accused to the clemency of the reviewing authority, and the grounds on which that recommendation is based, the sentence is reduced to the loss of three numbers.

"Lieutenant Fisher will be released from arrest and restored to duty."

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Captain Robert S. Hunter, U. S. Marine Corps, was tried by general court martial at U. S. Naval Operating Base, San Diego, Calif., on March 15, 1927, by order of the Secretary of the Navy, and was acquitted on the charge of "Drunkenness." The Navy Department on May 7, 1927, disapproved the findings of the court with the following rewarks:

"Captain Robert S. Hunter, U. S. Marine Corps, was tried by general court martial on March 15, 1927, at the U. S. Naval Operating Base, San Diego, Calif., by order of the Secretary of the Navy, and was acquitted of the charge 'Drunkenness,' the specification of the charge [P. 5] alleging that the said Hunter was, on or about February 2, 1927, at the U. S. Marine Corps Base, San Diego, Calif., under the influence of intoxicating liquor and thereby incapacitated for the proper performance of duty. Lieutenant Fleete S. Steele, Medical Corps, U. S. Navy, the medical officer of the day at the U. S. Marine Corps Base, San Diego, Calif., February 2, 1927, a witness for the prosecution, testified that, about 6:30 p. m. February 2, 1927, he examined the accused upon orders from Brigadier General Smedley D. Butler, U. S. Marine Corps, and found him under the influence of intoxicating liquor and unfit for the proper performance of his duties. Upon cross-examination this witness testified that the accused 'was probably fit to perform some duties; that is, duties of a routine nature that probably would not require judgment or some established duty.' He further stated that upon examining the accused in General Butler's office he told General Butler that the accused was not drunk and that he could not make a report that would sustain a conviction on the charge of drunkenness. The inconsistency of this statement with his testimony was explained by his later testimony to the effect that the definition of drunkenness previously entertained by him had been altered since the case arose, which was the reason he had told General Butler he did not consider the accused drunk but considered him under the influence of liquor.

"Lieutenant Commander Earl Richison, Medical Corps, U. S. Navy, executive officer of the medical department, U. S. Marine Corps Base, Naval Operating Base, San Diego, Calif., a witness for the prosecution, testified that about 7:20 p. m., February 2, 1927, he examined the accused and found him under the influence of intoxicating liquor to such an extent that he could not properly perform his duties.

"A third witness for the prosecution, Captain John D. Lockburner, U. S. Marine Corps, testified that he saw the accused at about 6:45 p. m. on February 2, 1927, and that the accused was, in his opinion, under the influence of liquor.

"All of these witnesses testified in detail as to the demeanor, appearance, and condition of the accused upon which they based their opinion as to his sobriety.

"There was only one witness for the defense, Captain Hal N. Potter, U. S. Marine Corps, who testified that at about 1 p. m. on February 2, 1927, he saw the accused in the post exchange and that at that time 'he was apparently quite sober but he was a bit peeved about something.'

"From the evidence adduced it seems clear that the accused was under the influence of liquor between 6:30 p. [P. 6] m. and 7:20 p. m. on February 2, 1927. The testimony of the one witness for the defense has little or no bearing on the case because the fact that a person is quite sober at 1 p. m. does not prevent or render it impossible that he could be drunk at 6:30 p. m. It would, therefore, appear from the finding of the court that the conclusion must have been reached that although the accused was under the influence of intoxicating liquor, he was not thereby incapacitated for the proper performance of duty.

"The members of the court were in the performance of an official duty in weighing the evidence, and they had the power to decide the matter, rightly or wrongly, and in accordance with their judgment.

"The testimony of the two medical officers who examined the accused was wholly to the effect that he was under the influence of liquor and incapacitated for the proper performance of his duties. The third witness for the prosecution testified that the accused was under the influence of liquor but as he was not asked the question whether the accused was thereby incapacitated for duty, his testimony contains no direct statement in that

respect; however, from the physical condition of the accused described by this witness, it was evident that the accused was not in proper condition to perform his duties.

"While the members of the court martial have the power to judge the credibility of the witnesses, this power is not arbitrary and they are bound by oath to try the case according to the evidence. There is nothing in the evidence, or on cross-examination, to indicate that the testimony of those witnesses is unworthy of credence, and the character and standing of those witnesses and their official obligations would preclude the idea that they were guilty of deliberate and wilful perjury and there is nothing in the record that the testimony given by them was not straightforward and trustworthy, and there is no justification for the rejection of this testimony. It is not believed the court rejected the testimony of the three officers for the prosecution as unworthy of belief.

"The findings of the court are disapproved. Captain Hunter will be released from arrest and restored to duty."

[P. 7] Lieutenant (j. g.) Hiram P. Shaw, U. S. Navy, was tried by general court martial on board the U. S. S. *Melville* on April 4, 1927, by order of the Commander Destroyer Squadrons, Battle Fleet, U. S. Fleet, and was convicted on the following charges:

Charge I.—Drunkenness.

[P. 8] *Charge II.*—Conduct unbecoming an officer and a gentleman.

Charge III.—Conduct to the prejudice of good order and discipline.

The court sentenced the accused to lose 75 numbers in his grade. On April 7, 1927, the convening authority in approving the record placed the following endorsement thereon:

"In reviewing the attached case it is noted that throughout the record, oral arguments of the judge advocate and counsel for the accused upon the admissibility of evidence, were recorded verbatim. Oral arguments of such nature should not be made a part of the record (sec. 663, Naval Courts and Boards).

"The judge advocate in numerous instances asked questions of witnesses which called for opinions upon the specific issues which the court was sworn to determine from its own opinions. A witness not qualified as an expert can only give his opinion on facts cognizable by the senses; what a witness thinks in respect to matters in issue is matter of opinion which he should not be allowed to state. In two instances the judge advocate asked enlisted men, a gunner's mate first class and a coxswain, 'Did the accused disgrace himself as a gentleman and compromise his position as an officer in this instance?' Besides calling for an opinion on the issue, a naval officer's judgment should prevent him from asking this kind of a question of an enlisted man.

"Numerous hypothetical questions were asked of the medical officer who examined the accused at the time of the alleged offenses but this witness had not qualified as an expert as required by Sections 426 and 427, Naval Courts and Boards.

"The record contains a preponderance of evidence tending to establish the guilt of the accused on all charges and specifications, and the above errors, though material, are not of sufficient gravity to invalidate the proceedings.

"The counsel for the accused sought mainly to bring before the court evidence of an extenuating nature and the previous good character and reputation of the accused. The court evidently gave considerable weight to this evidence in adjudging its sentence, which the convening authority regards as wholly inadequate for the offenses of which the accused was found guilty. Drunkenness in itself is an offense of the gravest nature and when, as in this case, it is combined with other offenses of a serious and disgraceful character, committed in a foreign country, the court should exercise the most exacting care in performing its sworn and important duty of adjudging a sentence adequate to the nature and degree of the offenses committed,

[P. 9] Previous good character and reputation of the accused cannot justify

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his misconduct on this accasion and further, by his own admission, the accused associated on shore and partook of intoxicating liquor with an enlisted man from his ship. This act alone, no matter what the actuating motives, shows a low conception of discipline and improper standards of conduct on the part of this officer. The court, without authority, has assumed the right of exercising clemency in adjudging this sentence and has thus invaded the province of the convening authority.

"Subject to the above remarks, and in order that the accused may not escape all punishment, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (junior grade) Hiram P. Shaw, U. S. Navy, are approved. He will be released from arrest and restored to duty."

VOIR DIRE: EXAMINATION ON.

H, seaman first class, U. S. Navy, was tried by general court martial under date of April 19, 1927, on a certain charge. He was convicted and sentenced to ten years' confinement, dishonorable discharge and accessories. The Navy Department in approving the record placed the following remarks thereon:

"In reviewing the record of proceedings in this case, it is noted that witnesses were examined on their voir dire on pages 3 and 31 by the accused, and on page 51 by the court. The examinations on voir dire were not made under oath as prescribed in section 855, footnote 47, and section 823, footnote 44, Naval Courts and Boards, 1923. The accused did not object to these examinations being made not under oath, and considering the fact that substantially the same testimony elicited on voir dire was introduced during the regular examination of these witnesses which was conducted under oath, it is not believed that any injustice was done to the accused."

Subject to the above remarks, it is the opinion of the Navy Department that the proceedings, findings, and sentence in the foregoing case are legal (File: MM/A17-20 (261201), G. C. M. Rec. No. 67022, May 9, 1927).

SPECIFICATIONS: DEFECTIVE.

In reviewing the record of proceedings in the general court-martial case of W, radioman third class, U. S. Navy, it is noted that certain specifications, in their inception, were defective, as follows:

Charge I reads:

"Threatening to assault his superior officer while in the execution of the duties of his office."

[P. 10] Specification 3 thereunder fails to allege particulars as to G's name, i. e., first name and middle initial, if any, or that G was a superior officer and in the execution of the duties of his office.

Charge IV reads:

"Disrespectful in language to his superior officer while in the execution of his office."

Specification 3 thereunder fails to allege the disrespectful words used by the accused. The specification also charges threatening words without alleging the particular words used; and in this connection it is noted that the charge refers to using "disrespectful" words and not "threatening" words.

Page 2 of the record shows that the court found the charges and specifications in due form and technically correct. The court erred in this respect as relating to the above specifications. (See Naval Digest, 1916, 64 (35).)

Oral statements forming the gist of the offense must be set out in as nearly the exact words as possible, but should also be qualified by the words "or words to that effect," since proof will generally vary as to a word or words, particularly if some time has elapsed since the incident (sec. 207, Naval Courts and Boards, 1923).

Section 198, Naval Courts and Boards, 1923, requires that each specification under a charge, by itself, support that charge; otherwise the specification is

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fatally defective. In this connection, though, paragraph 1 of section 210, Naval Courts and Boards, 1923, reads as follows:

> "If a specification, while defective because of failure to allege some particular fact or element essential to the offense, nevertheless contains sufficient information fairly to apprise the accused of the offense intended to be charged, then, if the accused make no objection to the specification on the ground of such omission, and if the evidence adduced supply the omission, a finding by the court will cure such defect in the specification, unless it appear from the record that the accused was in fact misled by such failure, or that his substantial rights were in fact prejudiced thereby or unless the existence of such omitted fact or element is negatived by the language of the defective specification."

The specifications 3, charge I and III, charge IV above noted were properly subject to objection, but inasmuch at they contained sufficient information to apprise the accused of the charges against him, and that evidence adduced at the trial supplied the omissions, the findings on those specifications will be approved. (See Naval Digest, 1921, p. 22, par. 9.)

[P. 11] Subject to the foregoing remarks, in the opinion of the Navy Department, the proceedings, findings, and sentence of the general court martial in this case are legal (File: MM/A 17–20 (270218) A, G. C. M. Rec. No. 66821, May 22, 1927).

CONVENING AUTHORITY: MAY NOT REMIT THE UNEXECUTED PORTION OF A DECK COURT SENTENCE.

A convenient authority has recently requested a decision of the Navy Department as to whether or not a convening authority after he has approved the sentence of a deck court and forwarded the record may legally remit the unexecuted portion of the sentence if at any time he deems such procedure desirable and for the best interests of the service. In answer to the above inquiry the Navy Department stated:

> "(1) that a reviewing authority may remit or mitigate, in whole or in part, the terms of a sentence as adjudged by a court; (2) that once properly approved the judgement of the court becomes final and that the power of such reviewing officer over the sentence has been exhausted; (3) that remission or mitigation of the sentence after the approval by a convening authority has been held to be illegal; (4) that the sentence must be executed in accordance with its terms; but (5) that the Secretary of the Navy as final reviewing authority may properly remit or mitigate such sentence should he deem such action to be advisable, upon presentation of suitable reasons for doing so. In view of the foregoing, it is the opinion of the Navy Department that the action suggested in the reference would not be in accordance with the law and would be contrary to established precedent."

(File A17–17/A17–22 (270419), May 3, 1927.)

OFFICIAL SEAL: NOT AUTHORIZED FOR USE BY OFFICERS OF THE NAVAL SERVICE IN ADMINISTERING OF OATHS.

An officer who has been authorized by the Secretary of the Navy to administer oaths for the purpose of naval administration and for the administration of naval justice has requested that an "official seal" be furnished him. The Navy Department [P. 12] in response to this request informed the officer concerned that he was not entitled to make use of such seal in connection with the administration of oaths for the purpose of the administration of naval justice and for other purposes of naval administration because such use has not been authorized, and that in the absence of such authorization, an official seal should not be furnished him for that purpose (File: S32–9 (4)/ND14–(270302) J–SG, May 7, 1927).

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CIVILIAN CHAUFFEURS OF NAVY TRUCKS: RE: LIABILITY FOR FAILURE TO OBTAIN STATE CHAUFFEUR'S LICENSE.

The Commandant, Fifth Naval District, has requested information as to whether or not a civilian chauffeur in the employ of the Federal Government is amenable to a State law which requires that all civilian chauffeurs shall secure a State license before operating on the highways of the State. The Commandant has been advised by the Motor Vehicle Commissioner of the State of Virginia that he was aware of no law which exempts chauffeurs of Government-owned vehicles from obtaining a license. Further, that this is a personal license required by the law of Virginia of every operator of a machine where he is paid for such service. The Motor Vehicle Commissioner further stated as his belief, that in the civil service examinations taken by chauffeurs of Government vehicles, they are compelled to state whether they have complied with the State law as to driver's license. The Navy Department in response to the above request stated that in the opinion of the Navy Department the decision of the Supreme Court of the United States in the case of *Johnson* v. *Maryland*, 254 U. S. 51, is conclusive on the question submitted, namely, that a civilian chauffeur in the employ of the Federal Government is not amenable to a State law which requires that all civilian chauffeurs shall secure a State license before operating on the highways of the State (NY6/LA23 (270218) J–SG, April 29, 1927).

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[P. 3] Chief Machinist Carl S. Chapman, U. S. Navy, was tried by general court martial by order of the commander Battleship Divisions, Battle Fleet, U. S. Fleet, on board the U. S. S. *Arizona*, on April 29, 1927, and was convicted on the following charges:

Charge I.—Neglect of duty.

Charge II.—Conduct to the prejudice of good order and discipline.

The court sentenced the accused to be dismissed from the United States Naval Service. On May 20, 1927, the convening authority approved the proceedings, findings, and sentence. On June 3, 1927, the Judge Advocate General of the Navy placed the following endorsement on this record:

> "In reviewing the record of proceedings in the general court-martial case of Chief Machinist Carl S. Chapman, U. S. Navy, it is noted that the prosecution introduced in evidence certain depositions in support of charge II. The depositions were not in support of charge I, which was proved independently by other evidence. In view of the fact that the depositions which were used did not enter into the proof of the charge of 'neglect of duty,' this office is of the opinion that even were the Navy Department [P. 4] inclined to reaffirm the policy outlined in C. M. O. 11, 1916 (Nav. Dig. 1916, deposition 12), this case would not fall within its terms.
>
> Subject to the above remarks, the proceedings, findings, and sentence in the foregoing case, and the action of the convening authority thereon, are legal.
>
> Respectfully referred to the Chief of the Bureau of Navigation for comment as to disciplinary features."

On June 6, 1927, in acting on the record, the Bureau of Navigation placed the following endorsement thereon:

> "From: The Chief of the Bureau of Navigation.
>
> "To: Secretary of the Navy.
>
> "Subject: Chief Machinist Carl S. Chapman, U. S. N.—Trial by general court martial convened on board the U. S. S. *Arizona*, April 29, 1927.
>
> (1) Forwarded.
>
> "(2) The paragraph in Naval Digest 1916 deposition 12, referred to in preceding endorsement states that a sentence involving dismissal was not approved by the department as a matter of policy, the prosecution having relied upon depositions to prove the offenses alleged. It is the opinion of this bureau that the act of February 16, 1909 (35 Stat. 622), sufficiently restricts the use of depositions before naval courts by authorizing their use only in cases not capital, or where imprisonment or confinement exceeding one year is imposed. Any further restriction announced to the service for guidance of courts martial is considered bad.

"(3) In view of the great expense and inconvenience to the Government caused by the personal appearance of each witness to prove each allegation of an offense, this bureau strongly recommends that the paragraph in Naval Digest referred to above be deleted and the service so informed. Courts martial are under a statutory duty to adjudge an adequate sentence and their judgment in this particular should not be restricted by any departmental policy. The question of reducing the sentence finally made effective should properly be reserved in the convening and reviewing authorities under their powers to mitigate, reduce, or to set aside and this bureau recommends for approval this procedure in lieu of the policy announced in Naval Digest, 1916.

"(4) This bureau recommends approval of the proceedings, findings, and sentence in the foregoing case."

On June 14, 1927, the Secretary of the Navy approved the remarks of the Judge Advocate General and the Chief of the Bureau of Navigation. On June 17, 1927, the sentence was confirmed by the President.

[P. 5] Pay Clerk Frederic L. Evans, U. S. Navy, was tried by general court martial by order of the commander, Fleet Base Force, U. S. Fleet, on board the U. S. S. *Relief* on April 25, 1927, and was convicted on the following charges:

Charge I.—Drunkenness.

Charge II.—Violation of a lawful regulation issued by the Secretary of the Navy.

The court sentenced the accused to lose six months' seniority in the date of his warrant as pay clerk; to lose corresponding rank in the list of pay clerks of the Navy; and to lose $50 of his pay per month for a period of six months, total loss of pay amounting to $300.

On May 3, 1927, the convening authority approved the proceedings, the finding of guilty on the second charge, and the sentence, but remitted the loss of pay and disapproved the finding of guilty on charge I with the following remarks:

"As regards the finding on the first charge—

"The evidence adduced by the prosecution is not, in the opinion of the convening authority, sufficient to establish the drunkenness alleged by charge I and the specification to charge I. It does not establish proof of an intoxication sufficient to have sensibly impaired the rational and full exercise of the mental and physical faculties of the accused. (See C. M. O. 1, of 1922.)"

[P. 8] Pay Clerk Myron A. Poole, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy at the U. S. Naval Operating Base, San Diego, Calif., on April 6, 1927, on the following charges:

Charge I.—Falsehood.

Charge II.—Conduct unbecoming an officer and a gentleman.

Charge III.—Embezzlement of money of the United States intended for the naval service thereof, and an additional charge "Embezzlement of money of the United States intended for the naval service thereof."

The court convicted the accused on the first and second charges, and acquitted him on the third charge and on the additional charge.

The court sentenced the accused to be dismissed from the U. S. naval service. On May 12, 1927, the Secretary of the Navy approved the proceedings, findings, and sentence subject to the following remarks:

"In reviewing the record of proceedings in the general-court-martial case of Pay Clerk Myron A. Poole, U. S. Navy, whose trial was commenced April 6, 1927, at the U. S. Naval Operating Base, San Diego, Calif., it is noted on page 14 of the record that the judge advocate introduced in evidence over the objection of the accused a statement purporting to have been signed by one Eads, who was then a witness on the stand. The objection of the accused was not sustained and the statement was admitted in evidence, marked exhibit 6. The statement contained matter which the witness was testifying to on the stand.

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The court erred in allowing the admission in evidence of the written statement of the witness Eads, as the contents of such statement was not the best evidence obtainable. The witness was present in court and could testify as to any matter contained in the statement and therefore its contents was not the best evidence. The admission of the statement in this instance was highly irregular and contrary to all legal procedure. (See Court-Martial Order 114, 1918, 30.)

"The contents of the statement mentioned above agreed in most part with the testimony of the witness Eads on the stand and therefore the only apparent reason for the introduction of the statement was for matter of evidence of the contents thereof. Had the contents of the statement contradicted the testimony of the witness, it could have been introduced for impeachment purposes, but not as evidence as to its contents (40 Cyc., p. 2764).

"In the case of *Illinois Central Railroad Co.* v. *Wade* (69 N. E. Reporter 565), the court remarked as follows:

'That the statements of a witness made out of court, orally or in writing, if contradictory on a material point to his sworn statements as a witness, may be introduced in evidence, not as substantive proof of the truth of [P. 9] such statements but as tending to discredit the witness, has been so frequently declared by courts and law writers, and is so universally understood and accepted, that the citation of authorities in support of the proposition is considered entirely unnecessary.'

"The error on the part of the court in allowing the admission of the written statement in evidence did not prejudice the rights of the accused inasmuch as the witness testified with but slight difference as to the contents of that statement."

On May 12, 1927, the sentence was confirmed by the President.

F, coxswain, U. S. Navy, was tried and convicted by general court martial of (I) "Absence from station and duty without leave," (II) "Drunkenness," and (III) "Assault" (upon a native Nicaraguan), and sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of four (4) months, then to be discharged from the U. S. naval service with a bad-conduct discharge. The convening authority approved the proceedings, findings, and sentence. It is noted that the convening authority did not consider the sentence adequate for the offenses.

In reviewing the above case, it is noted that in the specification under charge III, found proved, it was alleged the accused "did assault one Louis S. Ortiz, civilian," but the court found the words "Louis S. Ortiz" not proved, and substituted the words "Maria Martinez," which words were proved. In other [P. 10] words, the court did not find the accused guilty of the offense alleged, but of an entirely different offense; that is, an assault upon a different person. Section 181, Naval Courts and Boards, provides:

* * * "that a specification shall set forth in simple and concise language, facts sufficient to constitute the particular offense charged and in such a manner as to enable a person of common understanding to know what is intended."

Section 200, Naval Courts and Boards, provides:

"It is not sufficient that the accused be charged generally with having committed an offense, * * *, but the particular acts or circumstances attending a specific offense must be distinctly set forth in the specification. * * * All facts, circumstances, and intent must be set forth with certainty and precision and the accused charged directly and positively with having committed the offense."

Section 205, Naval Courts and Boards, provides:

"In the case of offenses against the person or property of individuals, the christian name and surname, with the rank and station or duty of such person, if he has any, must be stated at length, if known. If not known, the party injured must be described as a person 'by name to the relator unknown.'"

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In Winthrop's Military Law and Precedents, 2d edition, volume I, page 188–189, it is stated that—

> "The purpose and province of the charge are: (1) To so inform the accused as to the precise offense attributed to him that he may intelligently admit, deny, or plead specially to the same; and may be enabled to plead his conviction or acquittal upon any subsequent prosecution on account of the same act; (2) To advise the court and the reviewing authority of the nature of the accusation, and of the article or other statute upon which it is based, so that the former may rightfully and judiciously try, determine, and (upon conviction) sentence, and the latter may understandingly pass upon the proceedings. Such being the nature and object of the charge, it may be said generally as to its requisites: (1) That it must be laid under the appropriate article or statute; (2) that it must specify the material facts necessary to constitute the alleged offense. * * * In these requisites, and especially in the second, the charge resembles the indictment.
>
> "The indictment should contain such a specification of acts and descriptive circumstances as will on its face fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet, to give him a fair and reasonable opportunity to prepare his defense, and to avail himself of a conviction or [P. 11] acquittal as a bar to further prosecution arising out of the same facts (31 Corpus Juris—Indictments 180).
>
> "It is a general rule that in an indictment the nature of the offense and the party upon whom it was committed should be stated with such certainty that the accused may know what he is called upon to answer. A person charged with a crime has a right to be informed, in plain, intelligible language free from reasonable doubt of the specific act which he is alleged to have committed" (Joyce on Indictments, sec. 250).

The general rule is that the name of the person upon whom the assault was committed, if known must be accurately set out in the indictment or information (5 Corpus Juris. Assault and Battery, sec. 269, citing *State* v. *Seeley*, 30 Ark. 162; *Johnson* v. *State*, 46 Ga. 269; *Stockton* v. *State*, 25 Tex. 772).

In connection with the above, it is to be noted that section 205, Naval Courts and Boards, provides that if the name of the person against whom the offense was committed is not known, he must be described as a person "by name to the relator unknown." By no process of reasoning can this be reasonably interpreted to mean that where an accused is on trial charged with having committed an assault upon Mr. X., the court may, by amending the specification, find the accused guilty of assaulting Mrs. Y.

> "Where an accused was charged with an assault upon A, the specification may not be amended upon trial to allege an assault upon B. So to amend a specification would be to allege a wholly different and not included offense" (Digest of Opinions of J. A. G. of Army, January 1919, p. 42–C. M. 124780).

Inasmuch as the accused was not legally tried for having assaulted Maria Martinez, he may yet be tried for this offense and cannot maintain a plea of former jeopardy in case he is so tried. The counsel for the accused in this case could have properly moved the court to exclude all testimony given at the trial pertaining to an assault on Maria Martinez, stating as his grounds for such motion that such evidence was irrelevant inasmuch as the accused was not on trial for having assaulted Maria Martinez, and it would have been error for the court to overrule such motion if same had been timely made.

In view of the above, the finding on charge III is set aside (File: MM * * * /A17–20 (270450) A, G. C. M. Rec. No. 67038, June 1, 1927).

Confessions.—Uncorroborated extrajudicial admissions and confessions will not sustain conviction.

Corpus delicti.—The confession itself cannot be used to establish. The corroboration must be outside of the confession.

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[P. 12] D, seaman second class, U. S. Navy, was tried by general court martial on the charge of "Sodomy" (1 specification). He was found guilty and sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of five (5) years, dishonorable discharge and accessories.

In support of the charge and specification thereunder the prosecution introduced in evidence the oral testimony of the witnesses L and B, who both denied emphatically that the act of sodomy had been committed by the accused upon B. The prosecution also introduced in evidence an extrajudicial confession made by the witness B and an extrajudicial confession made by the accused. In both of these confessions the fact that sodomy was committed by the accused upon B on September 4, 1926, was admitted. Aside from these confessions there is no evidence in this case that sodomy was committed by the accused. The confessions of B and the accused were sworn to before an officer duly empowered to administer oaths.

On the witness stand B and the accused flatly contradicted all the material allegations contained in their confessions, claiming they had been obtained from them under duress.

The important question arising in this case relates to the confessions and their consideration as evidence against the accused, i. e., whether they may be considered only as impeaching the credibility of the testimony of the witnesses on the stand or whether they may be considered as evidence of facts stated therein. In this connection, 40 Cyc., page 2764, citing a long list of cases, has the following to say:

> "Proof of inconsistent statements of a witness can be introduced and considered only for the purpose of impeachment and not as substantive evidence of the truth of the matters stated, and it is the duty of the court to instruct the jury that they can consider the evidence for this purpose only, if such instruction is requested by the party who apprehends that such proof may be treated by the jury as substantive evidence against him."

In the case of *Illinois Central Railroad Co.* v. *Wade* (69 N. E. Reporter 565), the court remarked as follows:

> "That the statements of a witness made out of court, orally or in writing, if contradictory on a material point to his sworn statements as a witness, may be introduced in evidence, not as substantive proof of the truth of such statements, but as tending to discredit the witness, has been so frequently declared by courts and law writers and is so universally understood and accepted that the citation of authorities in support of the proposition is considered entirely unnecessary."

[P. 13] It is further noted that no evidence whatever was introduced to prove the corpus delicti.

> "The confession itself cannot be used to establish the corpus delicti. The corroboration must be outside of the confessions" (sec. 354, Naval Courts and Boards).

The prosecution failed to corroborate the confessions.

> "The corpus delicti, so called, or the fact that the alleged criminal act was committed by some one, is a separate fact to be proved. The rule with regard to proof of the corpus delicti proceeds from the reason that the general fact without which there could be no guilt, either in the accused or in anyone else, must be established before anyone can be convicted of the perpetration of the alleged criminal act which caused it; as, in cases of homicide the death must be shown, in theft it must be proved that the goods were lost by the owner, and in arson that the house had been burned; for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive, or of theft when the owner had not lost the goods, or of arson when the house was not burned. But where the general fact is proved the foundation is laid and it is competent to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally" (sec. 324, Naval Courts and Boards).
>
> "It is a well-settled principle of the law of evidence that the uncorroborated extrajudicial admissions and confessions will not sustain conviction" (C. M. O. 4, 1922, 8).

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In this case there was no corroborative evidence introduced in support of the charge and specifications thereunder, and the prosecution has therefore failed legally to prove the offenses alleged.

In view of the foregoing the finding and sentence are disapproved.

The accused will be released from arrest and restored to duty (File: MM * * * /A17–20 (261027), G. C. M. Rec. No. 66929, April 28, 1927).

SENTENCE INADEQUATE.

B, seaman, second-class, U. S. Navy, was tried by general court martial and found guilty by plea on the charge of "Theft." The court sentenced the accused to be dishonorably discharged from the U. S. naval service. The Bureau of Navigation in commenting on the record placed the following endorsement thereon:

> "This Bureau desires to invite attention to the totally inadequate sentence adjudged by the court for the offense [P. 14] of which this man has been found guilty; that is, stealing sixty ($60) dollars from another enlisted man.
>
> "The limit of punishment for this offense as prescribed by the President of the United States is eighteen (18) months and a dishonorable discharge. When one considers the prison sentence that attaches to conviction for theft in civil life, the necessity for a more severe punishment in a military organization, especially aboard ship where the necessary living conditions give greater opportunity and temptation to steal, maintenance of discipline demands that adequate punishment be adjudged.
>
> "In this case there seems to have been no extenuating circumstances. The accused plead guilty and offered no statement; yet the court, under a statutory duty to adjudge an adequate punishment, merely sentenced the accused to a dishonorable discharge with no period of confinement whatever. Under these circumstances, this Bureau considers that there has been a gross miscarriage of justice. It recommends approval of the proceedings, findings, and sentence only in order that the accused may not entirely escape punishment and that the service may be rid of him.
>
> "A court martial is the only tribunal in naval procedure empowered to give adequate punishment for serious offenses. Fear of punishment is one of the principal deterrents against crime. It is, therefore, vital to the discipline of the Navy that officers serving on courts martial take their responsibilities seriously with a full realization of the effect their decisions will have upon the naval personnel and the important service which they render toward maintaining proper standards of conduct and efficiency.
>
> "It is further recommended that the Department's action in this case be published to the service and that each member constituting the court martial in the instant case be furnished with a copy thereof."

The Navy Department approved the proceedings, findings, and sentence subject to the remarks of the Bureau of Navigation (File: MM * * * /A17–20 (270405), G. C. M. Rec. No. 67045, May 16, 1927).

SPECIFICATION: DEFECTIVE.

In reviewing the record of proceedings in the general court-martial case of P, private, U. S. Marine Corps, it is noted that the specification under charge VI—"Conduct to the prejudice of good order and discipline" reads in part as follows:

> "* * * using vulgar, obscene, and threatening language * * *."

[P. 15] The specification did not allege the language used, and was therefore defective.

Oral statements forming the gist of the offense must be set out in as nearly the exact words as possible, but should also be qualified by the words "or words to that effect," since proof will generally vary as to a word or words, particularly if some time has elapsed since the incident (sec. 207 N. C. B. 1923).

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Section 198 N. C. B. 1923, requires that each specification under a charge, by itself, support that charge; otherwise the specification is fatally defective. In this connection, though, paragraph 1 of section 210 N. C. B., 1923; reads as follows:

> "If a specification, while defective because of failure to allege some particular fact or element essential to the offense, nevertheless contains sufficient information fairly to apprise the accused of the offense intended to be charged, then, if the accused make no objection to the specification on the ground of such omission, and if the evidence adduced supply the omission, a finding by the court will cure such defect in the specification, unless it appear from the record that the accused was in fact misled by such failure, or that his substantial rights were in fact prejudiced thereby, or unless the existence of such omitted fact or element is negatived by the language of the defective specification."

The specification referred to was properly subject to objection, but as it contained sufficient information to apprise the accused of the charge against him, as the evidence adduced at the trial supplied the omission, and as the accused made no objection to the specification, the defect contained therein may be considered as having been impliedly waived by the accused (Naval Digest, 1921, p. 22, par. 9).

It is further noted that the language of specifications 1 and 2 under charge V "Violation of a lawful order of the Secretary of the Navy," indicates that the offenses alleged are violations of articles 118 and 119, Navy Regulations. These specifications should more properly have been laid under the charge "Violation of a lawful regulation issued by the Secretary of the Navy." (See sample specifications under sec. 249, N. C. B., 1923.)

Specification 2 under charge V further alleges, in part, as follows:

> "willfully, maliciously, and without proper authority, have concealed about his person a deadly and dangerous weapon, namely, a pistol."

The word "maliciously" was improperly used, as malice is not an essential element necessary to be proved to constitute the offense of "Violation of a lawful order of the Secretary of the Navy." In place of the word "maliciously," the word "knowingly" as given in sample specification 11 in section 249, N. C. B., 1923, should have been used. The term "malicious" not only [P. 16] implies willfulness but it also implies a wrongful intent at least. (See the Law of Crimes, Clark and Marshall, p. 141). Under a charge of violating orders or regulations no specific intent need be shown (sec. 249, N. C. B., 1923).

The word "maliciously" may be rejected as surplusage, or treated as struck out, as without it the pleading remains adequate (N. C. B., 1923, sec. 208).

Subject to the foregoing remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case, and the action of the convening authority thereon, are legal (File: MM * * * /A17-20 (270302)A, G. C. M. Rec. No. 66954, May 9, 1927).

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[P. 3] Lieutenant John B. Cooke, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy, on board the U. S. Receiving Ship, San Francisco, Calif., on June 7, 1927, and was acquitted of the following charges:

Charge I.—Embezzlement of the property of the United States intended for the naval service thereof.

Charge II.—Wrongfully and knowingly disposing of property of the United States intended for the naval service thereof.

Charge III. Falsehood.

In approving the proceedings the Navy Department on July 22, 1927, placed the following endorsement on record:

> "Lieutenant John B. Cooke, U. S. Navy, was tried by general court martial on June 7, 1927, on board the U. S. Receiving Ship, San Francisco, Calif., by order of the Secretary of the Navy on (I) 'Embezzlement of the property of the United States intended for the naval service thereof' (five specifications), (II) 'Wrongfully and knowingly disposing of property of the United

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States intended for the naval service thereof' (seven specifications), (III) 'Falsehood,' and additional charge of 'Conduct unbecoming an officer and a gentleman,' and was acquitted of all charges.

"In support of charge III 'Falsehood,' the prosecution substantiated the fact that the accused receipted to naval authorities for one motorboat for use at a summer camp which he was operating at Stubbs, Lake County, Calif.; that the boat was used at the camp during one season, and that when the camp was disbanded the accused made a conditional sale of the boat to one Charles H. Stubbs, an inhabitant of Stubbs, Calif., the condition of the sale being that if the accused could not obtain title, which was then in the U. S. Government, he would return the money to Stubbs. In explaining why the boat had not been returned to naval authorities, Lieutenant Cooke, on or about December 20, 1926, addressed a letter to the Commandant, U. S. Navy Yard, Mare Island, Calif., the first sentence of which is as follows: 'The subject motorboat is still at the submarine [P. 4] camp Clear Lake, Calif., having been left in charge of a caretaker.' The evidence clearly shows that the boat had not been left with a caretaker, but had been conditionally sold. The letter of the accused completely concealed the fact that he intended to attempt to secure title to the boat and then complete the conditional sale and leave the boat with Mr. Charles H. Stubbs as the latter's property, but gave the impression that only a temporary housing had been obtained until a convenient opportunity could be afforded to convey it back to a Government reservation.

"In the opinion of the Navy Department no reasonable construction can be placed on the statement of the accused other than that it was made to mislead the recipient and to conceal the true status under which the boat had been left at Stubbs. It is the opinion of the Navy Department that the accused should have been convicted on charge III.

"In support of the additional charge of 'Conduct unbecoming an officer and a gentleman,' the prosecution proved that the amount due was the result of a judgment against the accused for athletic goods obtained from A. G. Spaulding, and that the amount had never been paid. The accused stated that the bill was for athletic goods obtained for enlisted men while he was athletic officer of the U. S. S. *New York*, and that the executive officer refused to allow the amount, whereupon the liability was placed on him. It is not understood how the court arrived at an acquittal on this charge unless it was believed that this debt was legally contracted by the accused on behalf of the athletic fund of the U. S. S. *New York*, in support of which no evidence was offered by the defense. In the opinion of the Navy Department, the facts clearly indicate the guilt of the accused.

"The proceedings of the general court martial and the findings and acquittal on charges I and II, in the foregoing case of Lieutenant John B. Cooke, U. S. Navy, are in the opinion of the Navy Department, legal. The findings and acquittal on charge III and the additional charge, not being in accordance with the evidence adduced, are, in the opinion of the Navy Department, illegal. It is, therefore, recommended that they be disapproved."

[P. 5] Chief Machinist John E. Sullivan, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy, at the U. S. Navy Yard, Philadelphia, Pa., on July 6, 1927, and was convicted of the following charges:

Charge I: Drunkenness.

Charge II: Treating his superior officer with contempt.

The court sentenced Chief Machinist Sullivan to lose fifty dollars ($50) per month of his pay for a period of six (6) months, total loss of pay amounting to three hundred dollars ($300). The convening authority, on July 19, 1927, approved the proceedings, findings, sentence, and the following remarks of the Chief of the Bureau of Navigation:

"It is evident that the court in this case failed in its duty to award an adequate punishment for the offense of which it found the accused guilty. The limit of punishment for each of the two offenses as prescribed by the President is dismissal, yet the court with no evidence offered by the defense whatever awarded the punishment only of loss of pay of $300.

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"In recommending approval of the proceedings, findings, and sentence in this case this Bureau does so only in order that the accused may not entirely escape punishment.

"It is further recommended that the attention of the court be directed to the Department's final action in this case."

[P. 6] "The attention of all officers in administrative authority is directed to chapter 4, U. S. Navy Regulations, Administration and Discipline, especially to article 197 and subsequent articles, which prescribe the procedure for the investigation of reports against officers and other persons for grave misconduct, it being apparent from the frequency which these articles are violated in correspondence addressed to the Department that many officers are not familiar with their contents.

"The careful inquiry prescribed by article 197 contemplates that the commanding officer shall obtain from all eyewitnesses statements setting forth all the pertinent facts, call upon the accused for such statement as he may desire to make together with any statements his witnesses may make, and then make his own recommendation to higher authority at to what further action he may consider appropriate. If disciplinary measures are recommended, such action must be supported by the statements forwarded.

"The lack of thoroughness in conducting this inquiry often results in a return of papers for further information or an unnecessary recourse to a more formal investigation or court martial. This article contemplates that commanding officers conduct the inquiry and not resort to a formal board of investigation or a court of inquiry unless the conditions should be such as are described in section 1042, Courts and Boards.

"In cases where an officer or other person is reported for such a grave offense as to lead to the belief that he may attempt to escape when confronted with the facts, the commanding officer must take such precautions as may seem necessary to prevent same, if he considers that the report is in all probability true. A failure to do this in a recent case caused a needless expenditure of time and funds on the part of the Navy Department and the Department of Justice in apprehending the fugitive and finally bringing him to justice.

"The large number of acquittals of officers and enlisted men during recent months clearly indicates that the preliminary investigation of such cases has not been so thorough as to [P. 7] leave no doubt in the mind of the commanding officer that the information he has had reduced to written statements is sufficient to prove the case.

"One difficulty which appears to trouble the service at large is: What evidence is sufficient to establish a case? For instance (in the case of drunkenness), the following are a few of the means that may be used to establish facts from which drunkenness may be shown:

"(*a*) Testimony of a medical officer who has made an examination of the accused at the time in question. Where possible, it is deemed advisable to have a doctor make an examination as soon as possible after the condition of the accused is noted. The testimony of a medical officer is desirable, although it is not necessary in order to establish drunkenness.

"(*b*) 'Incapacity for the proper performance of duty,' is not a question that must be proved by direct testimony of a medical officer or other person in authority, but is a fact that the court itself may find to be proved by taking into account all the testimony as to the condition of the accused at the time in question. In other words, if evidence is offered to satisfactorily prove that the accused is under the influence of intoxicating liquor, the court then is justified in arriving at a finding on its own initiative that the accused is incapacitated for the proper performance of duty.

"(*c*) A finding of 'under the influence of intoxicating liquor' may also be arrived at by testimony of competent witnesses as to the condition of the accused at the time, such as the odor of intoxicating liquor on his breath, that the accused was unsteady in gait, that he was incoherent in speech, that his eyes were red and swollen and his sight impaired, that he was either wholly or partially oblivious of conditions about him, or other conduct or symptoms indicating intoxication.

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"Attention of the service is directed, in this connection, to Naval Digests, 1916 and 1921, Court Martial Orders up to date, and Naval Courts and Boards, 1923."

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[P. 3] Ensign Robert R. Moore, U. S. Navy, was tried by general court martial by order of the Commander, Special Service Squadron, on board the U. S. S. *Cleveland*, on June 13, 1927, and was found guilty by plea on the following charge, "Maltreatment of a person subject to his orders."

The court sentenced the accused to lose 25 numbers in his grade. On June 21, 1927, the convening authority approved the proceedings, findings, and sentence with the following remarks:

> "The convening authority is of the opinion, after reviewing the record of proceedings of the general court martial in the foregoing case of Ensign Robert R. Moore, U. S. Navy, that the sentence awarded is entirely inadequate to the charge to which he plead guilty.
>
> "Ensign Moore plead guilty to maltreatment of a person subject to his orders. Not only did he plead guilty to having committed this offense once but to having committed it a second time after sufficient opportunity for due consideration. [P. 4] An officer who deliberately maltreats a person under his orders cannot be trusted to command and is therefore unfitted for the naval service.
>
> "Subject to the foregoing remarks, the proceedings and findings are approved, and in order that Ensign Robert R. Moore, U. S. Navy, may not escape punishment entirely, the sentence is approved.
>
> "He will be released from arrest and restored to duty."

On July 7, 1927, the Chief of the Bureau of Navigation fully concurred in the remarks of the convening authority and recommended that the recommendation for clemency be disapproved.

On July 11, 1927, the Secretary of the Navy approved the remarks and recommendation of the Chief of the Bureau of Navigation.

Lieutenant (j. g.) Philip A. Rodes, U. S. Navy, was tried by general court martial by order of the Commander Special Service Squadron, on board the U. S. S. *Cleveland*, on June 13, 1927, and was found guilty by plea on the following charges:

Charge I.—Conduct to the prejudice of good order and discipline.

Charge II.—Maltreatment of a person subject to his orders.

The court sentenced the accused to lose 50 numbers in his grade.

On June 21, 1927, the convening authority approved the proceedings, findings, and sentence with the following remarks:

> "The convening authority is of the opinion, after reviewing the record of proceedings of the general court martial in the foregoing case of Lieutenant (junior grade) Philip A. Rodes, U. S. Navy, that the sentence awarded is entirely inadequate to the charge to which he plead guilty.
>
> "Lieutenant (junior grade) Rodes plead guilty to having maltreated a person subject to his orders, to having approved the maltreatment of a person subject to his orders by an officer under his command and to having issued an order in unseemly and unofficerlike language. In the opinion of the convening authority an officer guilty of the above-recited offenses is utterly unfit for the naval service.
>
> "Subject to the foregoing remarks, the proceedings and findings are approved, and in order that Lieutenant (junior grade) Philip A. Rodes, U. S. Navy, may not escape punishment entirely, the sentence is approved.
>
> "He will be released from arrest and restored to duty."

On July 7, 1927, the Chief of the Bureau of Navigation fully concurred in the remarks of the convening authority and recommended that the recommendation for clemency be disapproved.

On July 11, 1927, the Secretary of the Navy approved the remarks and recommendation of the Chief of the Bureau of Navigation.

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[P. 5] CORPUS DELICTI: FACTS WHICH FORM THE BASIS OF THE CORPUS DELICTI MUST BE PROVED EITHER BY DIRECT OR CIRCUMSTANTIAL EVIDENCE BEYOND A REASONABLE DOUBT.

K. D. I., gunner's mate, first class, U. S. Navy, was tried by general court martial commencing June 20, 1927, on board the U. S. S. _____ under the charge "Wrongfully and knowingly disposing of property of the United States intended for the naval service thereof" (six specifications). Five specifications were found proved, and the accused was found guilty of the charge, and sentenced to be reduced to the rating of apprentice seaman, to be confined for a period of twelve (12) months, dishonorable discharge, and accessories.

[P. 6] In reviewing the record of proceedings in this case the questions inquired into were, (*a*) that the act charged was really committed, (*b*) that the accused committed it, and (*c*) that the accused had the requisite criminal intent at the time. With regard to (*a*), the establishment of the corpus delicti, this must be proved in all the graver offenses before a particular person can be convicted of the crime. Section 324, Naval Courts and Boards, 1923, gives specific instances in which this is required, among which is the offense of "theft," in which it must be proved that the goods were lost by the owner. In this respect the present case may be likened to "theft"—namely, that the goods that the accused is charged with wrongfully and knowingly disposing of were actually lost by the United States. The judge advocate, in an attempt to show a "loss" by the Government, introduced as a witness one W. H. C., a technical stockman employed in the Supply Department, Navy Yard, _____, in charge of building No. 409, which is known as scrap material yard. The import of this witness' testimony was to negative the fact that the material covered by the specifications was ever sold as scrap. This witness stated that if the material was sold as other than junk, the sale would have been handled by a person named T who was in charge of another department of the yard. T was not called as a witness, so the possibility existed that the material came into the possession of the accused through that source. Other witnesses were introduced to show that the material was "Navy material," or at least that it had at one time been the property of the United States.

The testimony introduced was not sufficient to definitely establish the loss. This could have been established, for example, by direct testimony of a person in charge that such material had been in his custody and subsequently disappeared, or by the books of the supply department, or by inventory. The facts which form the basis of the corpus delicti must be proved by either direct or circumstantial evidence beyond a reasonable doubt.

In view of the preceding remarks, the findings and sentence were set aside (File: MM– * * * /A17–20(270620), G. C. M. Rec. No. 67381, August 3, 1927).

DUPLICATION OF CHARGES IS NOT TO BE AVAILED OF WHEN THE OFFENSE FALLS CLEARLY WITHIN THE DEFINITION OF A SPECIFIC ARTICLE.

W. H. B., fireman second class, U. S. Navy, was tried by general court martial on May 27, 1927, on board the U. S. S. _____, by order of the Commander in Chief, _____, on [P. 7] (I) "Drunkenness," (II) "Conduct to the prejudice of good order and discipline," (III) "Assaulting another person in the Navy" (3 specifications), (IV) "Scandalous conduct tending to the destruction of good morals" (10 specifications), (V) "Striking another person in the Navy" (4 specifications), (VI) "Using provoking words toward another person in the Navy," and (VII) "Sodomy." He was convicted of all charges and sentenced to confinement for twenty (20) years, dishonorable discharge and accessories.

Specification 1 of charge III and specification 1 of charge IV were preferred to provide for exigencies of proof. Specification 1 of charge II alleges that—

> "_____, on board the U. S. S. _____, did, on or about March 25, 1927, in the log room on board said ship, willfully, maliciously, and without jusifiable cause, assault one J. A., then a fireman, third class, U. S. Navy."

The first specification of charge IV is identical with the above except that "with intent to commit the crime of sodomy," is added. However, when specification 1 of charge III is left out of consideration, the sentence of twenty (20) years confinement and dishonorable discharge is still not in excess of the limitation of punishment prescribed for the remaining offense.

The law permits as many charges to be preferred as are necessary to provide for every possible contingency in the evidence. Where the offense falls apparently equally within the scope of two or more articles of the Articles for the Government of the Navy, or where the legal character of the offense cannot be precisely known or defined until developed by the proof, it is quite proper in important cases to specify the offense under two or more charges (C. M. O. 19, 1911, pp. 3–4; 1 Winth. 204–205). There is no rule of law which prohibits the formulation of the same charge under more than one article (Op. Atty. Gen., Nov. 12, 1912; C. M. O. 4, 1913, p. 46; C. M. O. 42, 1914, p. 7).

The Navy Department's instructions merely mean that as a matter of policy the rule which permits such duplication of charges is not to be availed of when the offense falls quite clearly within the definition of a specific article, where there are no aggravating circumstances distinguishing it from the ordinary case contemplated by such article, and when there is no necessity to resort to multiplicity or plurality of charges.

Subject to the foregoing remarks, it is the opinion of the Navy Department that the proceedings, findings, and sentence are legal (File: MM- * * * /A17-20 (270527), G. C. M. Rec. No. 67447, August 2, 1927).

[P. 8] SENTENCE: CONTRARY TO NAVY DEPARTMENT'S POLICY.

In reviewing the record of proceedings in the general court-martial case of P. W. R., private, U. S. Marine Corps, it is noted that the sentence reads as follows:

> "The court therefore sentences him, P. W. R., private, U. S. Marine Corps, to be confined for a period of four (4) months, and to lose twenty-one dollars ($21) per month of his pay for a period of four (4) months total loss of pay amounting to eighty-four dollars ($84), then to be discharged from the United States naval service with a bad-conduct discharge."

The convening authority in acting on this case designated a naval prison as the ultimate place of confinement.

The sentence above quoted, while legal yet in certain respects is contrary to the Navy Department's policy as follows:

(*a*) To lose $21 per month for four months: This amounts to total loss of pay. It is the practice to except from such loss of pay the amount of $3 per month.

(*b*) The period of confinement is four months and the convening authority has designated a naval prison: It is the policy of the Navy Department not to send a man to prison where his sentence includes confinement for less than six months, but to have him serve his time either aboard a receiving ship or his place of duty.

(*c*) Sentence does not include "accessories": In cases involving prison confinement, it is customary to include in the sentence "accessories" in order to provide for hard labor and loss of pay, thereby putting the accused on the same footing with other prisoners.

The form of sentence involving confinement, loss of pay, and discharge is given in section 883, Naval Courts and Boards, 1923.

Subject to the above remarks, the proceedings, findings, and sentence are legal (File: MM- * * * /A17-20 (270706), G. C. M. Rec. No. 67514, August 11, 1927).

DISCIPLINARY ACTION MAY LEGALLY BE TAKEN AGAINST AN ENLISTED MAN WHO HAS BEEN TRANSFERRED TO U. S. NAVAL RESERVE.

An opinion was recently requested of the Navy Department as to whether disciplinary action could legally be taken against [P. 9] S., chief turret captain, class F-4.D, USNR. S, after the completion of 20 years' naval service, was transferred to class F-4.D, Naval Reserve on May 30, 1926.

[C. M. O. No. 8—1927]

The correspondence in this case showed that S had uttered three checks totaling $65, which checks were not honored by the bank on which drawn because S did not have sufficient funds to his credit. Furthermore, that S was indebted to a civilian in the sum of $25, borrowed during the year 1925 while he was still an enlisted man in the Regular Navy.

The correspondence further showed that although the Bureau of Navigation and the Commandant, ------ Naval District, made repeated efforts to have S meet his obligations, his debts remained unpaid, and that he either failed to answer official correspondence or made statements concerning his indebtedness which were later proved to the satisfaction of the Bureau of Navigation to be false. The correspondence further showed that the Commandant, ------ Naval District, was of the opinion that the above-named man was deliberately avoiding his obligations and that the Commandant had, on three prior occasions recommended this man for disciplinary action.

Held: U. S. C., title 34, section 755, provides in part as follows:

> "* * * That enlisted men heretofore or hereafter transferred to the Fleet Naval Reserve from the Regular Navy in accordance with law shall at all times be governed by the laws and regulations for the government of the Navy and shall not be discharged from the Naval Reserve without their consent except by sentence of a court martial or in accordance with the provisions of section 784 of this chapter: * * *"

Section 784 of chapter 15, U. S. C., title 34, to which reference is made in the matter above quoted, applies only to men who enlist in the Regular Navy after July 1, 1925, and accordingly has no application to the case of S.

From an examination of the provisions of U. S. C., title 34, section 755, supra, it will be noted that S is at all times governed by the laws and regulations for the government of the Navy for any offenses which he may commit against the Articles for the Government of the Navy or laws or regulations made pursuant to the law governing the Navy.

The records of the Navy Department show that on February 23, 1927, H, chief water tender, Fleet Naval Reserve, class F–3–C, was tried by general court martial at the U. S. Naval Operating Base ------, for offenses committed by him while in an inactive status in the Fleet Naval Reserve, the jurisdiction of a naval general court martial in such cases being sustained.

In view of the foregoing, the Navy Department decided that disciplinary action can be legally taken against S and that he [P. 10] may be tried by general court martial for the offenses referred to above (File: MM- * * * /P13-11 (270716) J-SG, August 4, 1927).

PAYMENT OF CIVIL EMPLOYEES AT A NAVY YARD BY CHECK.

A decision was recently requested of the Navy Department as to the legality of paying the entire force of civil employees at a navy yard by check instead of cash.

Held: Existing law on the subject of pay of civil employees at navy yards and naval stations provides that the rates of pay of such employees shall be paid from lump appropriations and shall be fixed by the Secretary of the Navy on a per annum or a per diem basis as he may elect (U. S. C., title 34, sec 503, et seq.; act of March 3, 1909, 35 Stat. 754, as amended by act of August 29, 1916, 39 Stat. 558). However, there appears to be no provision of law which requires that the pay or salary of employees at navy yards or naval stations shall be paid in any particular form, i. e., whether by cash or by check. In the absence of any such law, the Navy Department is of opinion that it would be legal for the disbursing officer to pay the entire force of civil employees at that yard by check (File: LL/L16-4 (270808) K Du, August 22, 1927).

[C. M. O. No. 9—1927]

C. M. O. 9—1927

[P. 3] Lieutenant (j. g.) Horace L. de Rivera, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy, at the U. S. Navy Yard, Boston, Mass., on June 6, 1927, and was acquitted of the charge: "Violation of a lawful regulation issued by the Secretary of the Navy."

On June 30, 1927, the Judge Advocate General of the Navy placed the following endorsement on the record:

"Horace L. de Rivera, Lieutenant (junior grade) U. S. Navy, was tried by general court martial by order of the Secretary of the Navy on the charge of "Violation of a lawful regulation issued by the Secretary of the Navy" (2 specifications); specification 1, liquor in possession on board ship (U. S. S. *Tracy*) and specification 2, using alcoholic liquor for drinking purposes on board ship; and was acquitted.

"The commanding officer of the *Tracy* testified that when he returned on board about 9 p. m., May 22, 1927, and passed the room occupied by the accused he saw the accused and three civilian guests, two ladies and one man; that lemons were strewn around deck, and guests had glasses in their hands. On return to his cabin witness sent for the accused and asked him if there was drinking going on, and the accused replied "No." A few minutes later the accused returned and stated he thought perhaps he had misunderstood the question, that there was drinking going on, but that he himself had not been drinking. Witness then ordered accused to turn over any liquor that he had in his possession. As there was some delay, witness walked over to the room and saw accused breaking bottles out of a drawer and putting them in a suitcase. A few minutes later accused turned over a suitcase containing two bottles of Scotch whisky, one bottle of benedictine, and one bottle of champagne. Witness further testified that according to admission of accused, liquor was served in his room and could not have been without his orders, or knowledge; and as he was the officer on duty, and the only officer on board, he should have prevented the serving of liquor in his room.

"The only witness called by the defense, ------, testified that he, his wife and a lady friend of his wife, were dinner guests of accused on board the *Tracy* on the evening of May 22, 1927; that the witness brought four bottles of liquor, the same bottles in evidence, aboard in his bag, which he intended to use on a party ashore later; that these bottles were not removed from his bag until the accused was ordered by his commanding officer to turn in [P. 4] the liquor in his room. Then the accused transferred the liquor from the bag of the witness to a suitcase belonging to the accused and delivered it to his commanding officer. The witness further testified that he and the two ladies each had a small drink while in the room of the accused, the witness putting a little liquor from his pocket flask into lemonade, but that the accused refused to take a drink.

"It is evident from the above that there was liquor in the room of the accused, and that the accused had knowledge of this fact. While the accused was not charged with ownership of this liquor, it was unmistakably within his constructive possession, although according to the witness, ------, not in his (the accused's) actual possession, when it was in his room aboard ship with his knowledge; and he, being the duty officer, and in fact for the time being the commanding officer, it was manifestly his duty to take immediate steps to have this liquor removed from the ship, which he did not do. It is believed from the above that there was sufficient evidence in this case to have supported a finding of guilty on the first specification.

"The members of a court martial have the power to judge the credibility of witnesses and weigh evidence and the court having this matter before it was sworn to ascertain the facts to the best of its ability, and was obliged to acquit the accused if they had a reasonable doubt of his guilt. However, in the opinion of this office, the facts clearly indicate the guilt of the accused. There is no conflict of testimony in this case and the facts clearly indicate the accused was guilty of specification 1. It is incomprehensible as to how the court could have arrived at an acquittal.

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"The proceedings of the general court martial in the foregoing case of Lieutenant (j. g.) Horace L. de Rivera, U. S. Navy, are, in the opinion of this office, legal. The findings and acquittal, not being in accordance with the evidence adduced are, in the opinion of this office, illegal. It is therefore, recommended that they be disapproved.

"Referred to the Chief of the Bureau of Navigation for his information."

On July 7, 1927, in acting on the record, the Chief of the Bureau of Navigation placed the following endorsement thereon:

"From: The Chief of the Bureau of Navigation.
"To: The Secretary of the Navy.
"Subject: Lieutenant (j. g.) Horace L. de Rivera, U. S. N., trial by general court martial convened at the Navy Yard, Boston, Mass., June 6, 1927.

[P. 5] "Reference: (*a*) article 118 (2), U. S. Navy Regulations.

"1. Forwarded, concurring in the remarks of the Judge Advocate General.

"2. From a review of the record in this case it appears that Lieutenant (j. g.) de Rivera was clearly guilty of a violation of reference (*a*), in that while temporarily in command of the U. S. S. *Tracy* he permitted a civilian guest of his to bring intoxicating liquor on board, and to drink and serve same to himself and other guests.

"3. It is therefore recommended that this officer be brought to trial by general court martial at the Navy Yard, Boston, Mass., for neglect of duty in violating the above regulation.

"4. Attention is invited to the statement of Lieutenant (j. g.) de Rivera in regard to this matter. As this officer is being ordered to the U. S. S. *Galveston*, due to sail for southern waters in about six weeks, it is requested that effort be made to complete this trial before the sailing of that vessel.

"5. It is further recommended that the Department of Justice be requested to prosecute ------ in civil courts for violation of the Volstead Act, he having by his own evidence before this court admitted that he had in his possession and had transported intoxicating liquor to the U. S. S. *Tracy* on the evening of May 22, 1927."

On July 8, 1927, the Secretary of the Navy approved the proceedings in this case, subject to the remarks and recommendations of the Judge Advocate General and the Chief of the Bureau of Navigation, but disapproved the finding and acquittal.

Machinist Charles F. Grover, U. S. Navy, was tried by general court martial by order of the Commandant, Sixteenth Naval District, at the U. S. Naval Station, Cavite, P. I., on July 8, 1927, and was convicted on the following charges:

Charge I.—Drunkenness.

Charge II.—Conduct unbecoming an officer and a gentleman.

Charge III.—Unlawfully striking another.

The court sentenced the accused to be dismissed from the United States naval service.

On July 16, 1927, the convening authority placed the following endorsement on the record:

"The proceedings, findings, and sentence of the general court martial in the foregoing case of Charles F. Grover, Machinist, U. S. Navy, are approved.

"The court erred in not sustaining the objection of the judge advocate concerning the testimony of Commander [P. 6] Lawrence, who failed to qualify as an expert. This did not prejudice the interests of the accused.

"Subject to the above remarks, the proceedings and findings are approved, but in view of the previous good record of the accused, and his ability as an officer as shown by the testimony of his commanding officer, and as personally known to the convening authority, he is recommended for clemency."

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On September 2, 1927, the Judge Advocate General of the Navy, in reviewing the record, placed the following endorsement thereon:

> "In reviewing the record of proceedings in the above case, it is noted that during the cross-examination of a witness for the prosecution, the judge advocate objected to a question on the ground that it was a 'leading question,' and that the court sustained the objection. As indicated in section 491, Naval Courts and Boards, 1923, leading questions may be freely used on cross-examination. As the information sought to be derived from that particular question was elicited on subsequent cross-questioning, the error did not operate to the substantial injury of the accused, and does not, therefore, invalidate the proceedings.
>
> "Subject to the foregoing remarks, it is the opinion of this office that the proceedings, findings, and sentence of the general court martial in the foregoing case, and the action of the convening authority thereon, are legal."

On September 15, 1927, the Secretary of the Navy approved the proceedings, findings, and sentence, and the remarks of the Judge Advocate General, but mitigated the sentence of dismissal so as to place Machinist Grover at the foot of the list of machinists in the Navy and to so remain there until he shall have lost three years' seniority in his grade.

[P. 7] DISCHARGE: GRATUITY OF $25.

On the following facts a decision was recently requested of the Navy Department on the legality of the payment of $25 discharge gratuity to J. E. J., hospital apprentice, 2d class, U. S. Navy.

J. E. J. was sentenced by general court martial to reduction to the rating of hospital apprentice, 2d class, and to be confined for a period of 12 months at a naval prison. He was discharged from confinement on January 20, 1927, with an ordinary discharge, pursuant to instructions received from the Navy Department in order to enable him to reenlist in the Navy. At the time of his discharge J was paid a discharge gratuity of $25 in addition to a cash payment of $62.65, which latter amount represented money due and unpaid him at the date of conviction and no part of which was necessary to cover expenses incident to discharge.

Held: U. S. Code, Title 34, section 197 (sec. 10, act of March 4, 1925) 43 Stat. 274, provides:

> "Persons discharged from the naval service by dishonorable discharge, bad-conduct discharge, or any other discharge for the good of the service, may, upon discharge, be paid a sum not to exceed $25: *Provided*, That the said sum shall be fixed by, and in the discretion of, the Secretary of the Navy, *and shall be paid only in cases where the person so discharged would otherwise be without funds to meet his immediate needs.*" [Italics supplied.]

Under existing law prisoners when discharged are furnished transportation and subsistence to their homes or places of enlistment, in addition to a civilian suit of clothing, if necessary. The discharge gratuity of $25 is also paid if they are otherwise without funds to meet their immediate needs following discharge. A person discharged with a cash payment of $62.65 is not considered as coming within the class of persons entitled to the discharge gratuity of $25 (File: MM–* * * /L16–9(13)(270824)K, September 9, 1927).

MISCONDUCT: PAY FORFEITED; $5 MONTHLY ALLOWANCE.

An opinion was recently requested of the Navy Department upon certain questions arising under the provisions of U. S. [P. 8] Code, title 34, appendix, section 882d (sec. 4 of the act of May 17, 1926) as follows:

> (*a*) Whether, under section 4 of the act of Congress approved May 17, 1926, a member of the naval service can be paid $5, if otherwise due, in cases where he had drawn clothing during the month to the value of either less or more than $5?

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(*b*) Whether, under section 4 of the act of Congress approved May 17, 1926, a member of the naval service can be paid $5 cash if his account is received overpaid or is otherwise checked for any reason—miscellaneous checkage, court-martial fine, etc.?

Held by the Navy Department:

(*a*) That the value of clothing and small stores issued to an individual during a period in which his pay was being forfeited in accordance with the provisions of the Act of May 17, 1926, should be charged against the sum of $5 allowed during such period.

(*b*) That the overpayment for the indebtedness to the United States of an individual does not prohibit payment to him of the sum of $5 per month authorized by section 4 of the act of May 17, 1926, for each full month during which his pay is forfeited while in a misconduct status, in accordance with the terms of said act.

(File P13–10/L16–4 (4) (270726) K, September 2, 1927.)

PAY: SUBMARINE DUTY.

The following questions were presented to the Navy Department and a decision thereon requested:

(*a*) As to whether the account of A. R. R., seaman 2c, U. S. N., who is regularly attached to the U. S. S. _____ and carried on the crew pay roll of that vessel, may be credited with additional pay at the rate of $5 per month for service on a submarine while on temporary duty on board that vessel during the period July 1 to 31, 1927.

(*b*) As to whether J. D. N., chief electrician's mate, U. S. N., a qualified submarine man, who is regularly attached to the U. S. S. _____ and carried on the crew pay roll of that vessel, may be credited with additional pay at the rate of $1 per day for each day submerged while on temporary duty on board a submarine.

(*c*) As to whether F. M. L., chief ship fitter, U. S. N., who is regularly attached to a submarine and carried on the pay roll of that vessel, may be credited with additional pay [P. 9] at the rate of $5 per month for submarine duty while on temporary duty on board the U. S. S. _____ during the period July 1 to 31, 1927.

Held: Enlisted men in the status of those in questions (*a*) and (*b*) are entitled to the additional submarine pay authorized by the Executive order of January 1, 1901, published in Navy Department General Order No. 20, of same date, and the Executive order of November 8, 1905, published in Navy Department General Order No. 9 of November 9, 1905.

The man named in query (*c*) is not entitled to additional pay at the rate of $5 per month for the period July 1 to 31, 1927, for the reason that during such period although regularly attached to a submarine he performed temporary duty on board the U. S. S. _____ and was not, therefore, during that time, "serving on board a submarine" (File: SS/MM (270823) K, September 2, 1927).

UNIFORM: WEARING OF BY EX-SERVICE MEN.

Permission was recently requested of the Navy Department for certain ex-service men to wear uniforms not of their former rank or rating in a pageant representing the different classes of men in the Navy.

Held: Such wearing of the uniform is prohibited by the provisions of the act of June 3, 1916 (39 Stat. 216, as amended; U. S. Code, title 10, sec. 1393; File: JJ55–3/LV (270910) J, September 24, 1927).

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[P. 3] Machinist John J. Daniels, U. S. Navy, was tried by general court martial by order of Commander Train Squadron One, Fleet Base Force, United States Fleet, on board the U. S. S. *Antares* on August 23, 1927, on the following charges:

Charge I.—Absence from station and duty after leave had expired.

Charge II.—Negligence in obeying orders.

Charge III.—Conduct unbecoming an officer and a gentleman.

The court found the accused guilty by plea on charge I and convicted him on charges II and III, and sentenced him to be dismissed from the United States naval service.

On September 3, 1927, the convening authority placed the following remarks on the record:

"In reviewing the record of proceedings of the general court martial in the attached case of Machinist John J. Daniels, U. S. Navy, the convening authority notes that the accused pleaded in bar of trial to the first charge and specification on the ground that offenses were allowed to accumulate. In support of this plea the accused introduced the testimony of his commanding officer which was to the effect that the offense under the first charge had been committed on or about March 28, 1927, and that the accused had been placed under suspension shortly thereafter as punishment, in accordance with an agreement between Commander Train Squadron One and the witness testifying. The accused then took the stand and testified that during the last week in July 1927, he was informed by Commander Train Squadron One that, because of the marked improvement of the accused's vessel in engineering, the charge of absence over leave would be dropped. The accused further testified that Lieutenant Commander R. A. Awtrey, U. S. Navy, was present at the interview. Rear Admiral C. L. Hussey, U. S. Navy, was at that time in command of Train Squadron One, and Lieutenant Commander Awtrey was attached to his staff. Both these officers were detached on or about August 1, 1927, and were not available as witnesses in rebuttal at the trial. It is obvious, however, that if the Commander Train Squadron One had determined to punish the accused by suspension in March, as testified by the defense witness, he would not still be considering punishment for the same offense in July. Furthermore, an examination of the correspondence in connection with the case of the accused discloses that the Secretary of the Navy, File: OO—Daniels, John J./P13–2(270609) of June 15, 1927, directed that a thorough inquiry be made into the conduct of the above-named officer with a view to his trial by general [P. 4] court martial, and that the charges to be investigated consisted not only of 'Absence over leave' but also of the following: 'Bastardy' and 'Adultery' committed in the State of Massachusetts, 'Falsehood,' 'Violation of a lawful regulation of the Secretary of the Navy,' and 'Conduct unbecoming an officer and a gentleman' in failing to contribute to the support of his wife and children.

"The orders of the Secretary of the Navy referred to in the foregoing paragraph, were turned over to the relief of Rear Admiral Hussey as unfinished business on August 1, 1927. While action was pending the accused saw fit to commit the offenses for which he has been tried under charge II and charge III. He was not brought to trial for all the prior offenses because of the statute of limitations or unavailability of witnesses. In view of the foregoing the convening authority is of the opinion that the action of the court in overruling the plea in bar of trial was correct.

"Subject to the foregoing remarks, the proceedings, findings, and sentence in the attached case of Machinist John J. Daniels, U. S. Navy, are approved, and in conformity with article 53 of the Articles for the Government of the Navy the record is respectfully referred to the Secretary of the Navy for transmission to the President.

On September 27, 1927, the sentence was confirmed by the President.

[C. M. O. No. 10—1927]

Lieutenant (junior grade) Horace L. de Rivera, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy at the U. S. Navy Yard, Boston, Mass., on July 26, 1927, and was convicted on the following charges:

Charge I.—Neglect of duty.

Charge II.—Violation of a lawful regulation issued by the Secretary of the Navy.

The court sentenced the accused to lose 10 numbers in his grade.

On August 31, 1927, the Acting Judge Advocate General placed the following endorsement on the record:

"In reviewing the record of proceedings in the above case the following is noted: The accused, before pleading to the issue, made a plea in bar of trial on the ground of former jeopardy. The court in acting on this plea properly overruled it, as the charges in the present trial are not the same as in the former trial, which went to an acquittal and which accused now pleads in bar of the present trial. In the former trial the accused was tried under [P. 5] 'Violation of a lawful regulation issued by the Secretary of the Navy,' specification 1, keeping in posession aboard ship alcoholic liquor, and specification 2, using alcoholic liquor aboard ship. The fifth amendment to the Constitution of the United States provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' The charges under which the accused was tried in the present case are entirely different from the charges under the first trial. Neither are they lesser included offenses, nor are they greater offenses, they merely are distinct offenses. The same set of circumstances may result in the accused being charged with separate and distinct offenses.

"On page 5 of the record of proceedings, it is noted that the judge advocate introduced in evidence a duly authenticated record of proceedings of the trial of Lieutenant de Rivera, held at Boston on June 6, 1927, for the purpose of introducing in evidence in the present trial the testimony of Lieutenant Commander Webb C. Hayes, U. S. Navy, and of Mr. ——— given at the previous trial, the former being at the time of this trial on foreign duty, and the latter residing as Norfolk, Va. The court overruled the objection of the accused and admitted the record to prove the testimony contained therein. In connection, attention is invited to the following extract from the C. M. O. No. 11, 1921, pages 9 and 10:

" 'Testimony received at a previous trial is not admissible in evidence unless (1) the latter trial relates to the same crime and the same party is being prosecuted; (2) the person against whom the evidence is to be given had the right and opportunity to cross-examine the witness when his examination was taken. Furthermore, it must be shown that the witness at the previous trial is (1) dead, (2) physically or mentally incapable of being present at the trial (e. g., very sick or insane), or (3) kept out of the way by the adverse party.'

"From the above quotation, it will be noted that the record of proceedings in the previous trial of the accused is not admissible to prove the testimony of Lieutenant Commander Hayes and of Mr. ———. The conditions under which it is impracticable for these witnesses to testify at the present trial are not such as to warrant a ruling that such testimony be admitted under the exception to the hearsay rule in the above quotation. Both the witnesses are alive and if it is impracticable in the case of Lieutenant Commander Hayes and impossible in the case of Mr. ——— to testify in person at Boston, Mass., yet recourse [P. 6] could be had to the use of depositions, and in the case of Lieutenant Commander Hayes the record (exhibit 1) shows that this was specifically authorized. The record does not show that effort was made to obtain deposition from Mr. ———. From the remarks contained in paragraph 2 above, it will be seen that there is a further objection to the introduction of the previous record of proceedings in that the offenses contained therein are distinct from those in the present trial.

"On page 4 of the record, the judge advocate in arguing for admission of the record to prove the former testimony of the witnesses, referred to Naval Courts and Boards, 1923, section 415, paragraph 4, subparagraphs

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(a) and (b) also referred to C. M. O. No. 144, page 4, 1920, and to Naval Digest, 1921, page 72, paragraph 14. Those references apply, not to courts martial, but to courts of inquiry, the latter being specifically provided for by article 60 of the Articles for the Government of the Navy, in case oral testimony cannot be obtained.

"It is the opinion of this office that the court committed a fatal error in overruling the objection of the accused and allowing the previous record of a general court martial to be introduced in the present trial to prove the testimony of witnesses at the former trial. In view of this, and the previous remarks, it is recommended that the findings on charges I and II be disapproved and that the sentence be disapproved.

"Subject to the above remarks, the proceedings, in the opinion of this office, are legal.

"It is recommended that the accused be released from arrest and restored to duty.

"Referred to the Chief of the Bureau of Navigation for his information."

On September 29, 1927, the Chief of the Bureau of Navigation requested a reconsideration of the above opinion, and on October 28, 1927, the Judge Advocate General placed the following remarks on the record:

"The right of one accused of crime to be confronted with the witnesses against him is not a mere 'technicality' or 'rule of procedure' but is a substantial right which, with certain well-recognized exceptions, is guaranteed by the sixth amendment of the Constitution, which reads in part as follows: 'In all criminal prosecutions the accused shall enjoy the right * * * to be confronted with the witnesses against him.' As to whether this amendment applies to the land and naval forces the following citations are of interest: In an opinion rendered by the Attorney General in 1858 it was broadly stated that 'the Constitution does apply, [P. 7] and is universally admitted to apply, with the same force and effect to military courts as to other tribunals.' (9 Op. Atty. Gen. 223, 230). Some years later an apparently contrary position was taken in the concurring opinion of Chief Justice Chase and three other justices of the Supreme Court in the case of *ex parte Milligan* (4 Wall. 2, 137, Dec. term, 1866), in which opinion it was remarked that the constitutional power of Congress to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury, and that neither the fifth nor other amendment abridges that power. Thereafter, doubt seems to have been entertained as to whether the civil safeguards of the Constitution were applicable to offenders in the Army and Navy, a question which was noticed but not decided by Supreme Court in the case of *Carter* v. *McClaughry* (183 U. S. 365, 388, Jan. 6, 1902), wherein it was contended by the Government that the fifth amendment is not applicable to proceedings by Army Courts martial insofar as it provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' Still later the Court of Claims declared that the constitutional provision entitling accused persons to be confronted with the witnesses against them 'has no application to the proceedings of courts martial and is applicable only to criminal prosecutions in the civil courts of the United States' (*Mullan* v. *U. S.*, 42 Ct. Cls. 157, 176, Feb. 18, 1907), but as to this it is to be noted, first, that the case before the Court of Claims did not require the determination of this question as the facts established an express agreement by the claimant that the record of a court of inquiry should be accepted as evidence for or against him upon his trial by naval court martial, which agreement, as decided by the Court of Claims, constituted a waiver of any right he may have had to be confronted with the witnesses against him; second, that the Court of Claims cited article 60 of the Articles for the Government of the Navy, hereinafter quoted, as evidencing the purpose of Congress 'to extend to the military officers of the Government accused of military offenses and subject only to the jurisdiction of military tribunals the same guarantees extended to those in civil life similarly accused, subject to trial before civil tribunals'; and, third, that the Supreme Court affirmed the judgment of the Court of Claims, sustaining the validity of the court martial proceedings, without any comment whatever upon the question of whether the constitutional provision applied to naval

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courts martial (*Mullan* v. *U. S.*, 212 U. S. 516, Feb. 23, 1909). More directly in point is the opinion of the Supreme [P. 8] Court delivered May 27, 1907, in the case of *Grafton* v. *United States* (206 U. S. 333, 352), wherein it was said that 'Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter.'

"From the decision last quoted it would seem to follow that the rights guaranteed by the Constitution to persons accused of crime are to some extent at least applicable to offenders in the land and naval forces. However, further discussion of this question is unnecessary in the present case, first, because, as stated by the Attorney General, 'aside from constitutional provisions, it is a plain dictate of common justice that no person shall be deprived of life, liberty, or property without due process of law' (22 Op. Atty. Gen. 137; see also Naval Digest 1921, pp. 44–45, pars. 7 et seq.) ; and second, because if Congress has the power to make rules for the regulation and government of the land and naval forces in disregard of the fundamental right of accused persons to be confronted with the witnesses against them, it has not exercised such power by making the proceedings of a naval court martial evidence in the subsequent trial of the accused upon different charges. The absence of any legislative provision to this effect is the more significant in view of the fact that Congress has provided for the use of court of inquiry proceedings in evidence before naval courts martial 'in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer' (art. 60, A. G. N., Laws Relating to the Navy Annotated, p. 1056, U. S. C., title 34, sec. 1200, art. 60), and for the use of depositions in evidence before naval courts 'except in capital cases and cases where the punishment may be imprisonment or confinement for more than one year' (act of Feb. 16, 1909; sec 16, Laws Relating to the Navy Annotated, p. 1311; U. S. C., title 34, sec. 1200, art. 68), with further restrictions in each case as to the conditions under which such evidence may be received in lieu of oral testimony. It has also repeatedly legislated on the same subject for the Army, the present law being contained in the Articles of War approved June 4, 1920 (U. S. C., title 10, secs. 1496–1498, arts. 25–27). 'The expression of one thing is the exclusion of another.' It follows that the action of Congress in thus specifically prescribing the conditions under which oral testimony may be dispensed with in Army and Navy courts places the matter beyond the scope of lawful regulation by Executive action and leads to the conclusion that persons in these [P. 9] services have the statutory if not the constitutional right to be confronted with the witnesses against them in all cases where it is not otherwise provided by general law or specific statutory enactment. If it were otherwise, the Executive would have discretionary power to make former testimony before a court martial evidence against the accused as a mere matter of convenience to the Government, and in capital cases or those extending to the dismissal of a commissioned or warrant officer, or where the sentence may be imprisonment for more than one year, as well as in cases of a less serious nature, a conclusion which would be plainly unsound in the face of the enactments by Congress which have carefully restricted, in the interest of the accused, the conditions under which convictions may be had without confrontation of the witnesses in open court, and a conclusion, furthermore, which could be sustained only on the theory that Congress has from an early date legislated for both the Army and Navy as to matters concerning which legislation was unnecessary. That such a theory is not to be accepted in a case like that now under consideration sufficiently appears from an opinion rendered by the Attorney General to the Secretary of the Navy June 4, 1830 (2 Op. Atty. Gen. 343), which related to the use of depositions before naval courts martial. In that opinion the Attorney General referred to article 37 of the Articles for the Government of the Navy then in effect (act of April 23, 1800, 2 Stat. 50), which required that 'all testimony given to a general court martial shall be on oath or affirmation,' and to the 74th article of the Rules and Articles for the Government of the Army, which provided that depositions might be taken under certain restrictions and in cases not capital, and concluded that

these articles 'seem to contemplate exclusively the examination of witnesses before the court' and more particularly, that the existence of the provision contained in the Army Code 'sufficiently proves that, without it, such testimony would not be competent even in those minor cases.'

"Nor is it any argument in a legal sense that former testimony before a court martial may be of evidential value equal or even superior to testimony before a court of inquiry. The legislature having authorized the use in evidence before courts martial of former testimony given in the course of an investigation by a court of inquiry, and not having seen fit to authorize a similar use of former testimony given before a court martial, it is the duty of those charged with the administration of justice in the Navy to apply the law as it is without assuming for [P. 10] reasons of expediency to extend it beyond the limits prescribed by Congress, which is vested by the Constitution with the jurisdiction to make rules for the government of the land and naval forces.

"It is true that section 1547 of the Revised Statutes (Laws Relating to the Navy Annotated, p. 748, U. S. C., title 34, sec. 591), empowers the Secretary of the Navy, with the approval of the President, to issue regulations for the Navy, subject to alteration adopted in the same manner (which alterations, of course, may not operate retroactively to the prejudice of the naval personnel) an that a naval publication entitled 'Regulations for the Administration of Law and Justice,' issued April 15, 1870, was held by the Supreme Court to be authorized by this enactment and to have the force of law (*Ex parte Reed*, 100 U. S. 13). Instructions for courts martial have since been published in Navy Regulations, and more recently in Naval Courts and Boards. In *Denby* v. *Berry* (263 U. S. 29, Nov. 12, 1923), it was held that an instruction lost its statutory force when it was stricken from the Navy Regulations by order of the President January 14, 1916, and thereafter embodied in the 1917 edition of Naval Courts and Boards which was issued by the Secretary of the Navy but did not bear the approval of the President. The 1923 edition of Naval Courts and Boards, now in force, is issued by the Secretary of the Navy with the written approval of the President and therefore has the force of law under the decision in *Ex parte Reed* (supra). The instructions so issued and approved have very properly not attempted to enlarge the law governing the use of former testimony in cases tried by naval courts martial. On the contrary the existing edition of Naval Courts and Boards, section 320, cites the Articles for the Government of the Navy providing that 'all testimony before a summary court martial shall be given orally, upon oath or affirmation administered by the senior member of the court' (art. 29 A. G. N.), and that the proceedings of courts of inquiry, duly authenticated, 'shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court martial, provided oral testimony cannot be obtained' (art. 60, A. G. N.), and the act of February 16, 1909 (supra), providing for the use of depositions under certain conditions 'except in capital cases and cases where the punishment may be imprisonment or confinement for more than one year,' stating, with reference to these citations, that no other statute 'lays down rules of evidence to govern naval courts and boards' and that 'the rules governing such are made by the Navy [P. 11] Department and are published herein and in court-martial orders. These rules insofar as the naval service is concerned, have the force of law and are binding upon naval courts and boards.' Among the court-martial orders so referred to as having the force of law and as binding upon naval courts is Court-Martial Order No. 11 of 1921 (p. 10), which reads in part as follows:

" 'Testimony received at a previous trial is not admissible in evidence unless (1) the latter trial relates to the same crime and the same party is being prosecuted; (2) the person against whom the evidence is to be given had the right and opportunity to cross-examine the witness when his examination was taken. Furthermore, it must be shown that the witness at the previous trial is (1) dead, (2) physically or mentally incapable of being present at the trial (e. g., very sick or insane), or (3) kept out of the way by the adverse party.'

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"Section 320 of the Naval Courts and Boards further provides that if a question of evidence confronts a court 'which cannot be determined by a reference to the above rules,' that is, by reference to the cited statutes, Naval Courts and Boards, or Court-Martial Orders, 'it should then look to the rules of evidence applied by the Federal courts and follow the same if applicable.' This is substantially the same provision which Congress has enacted into law for the Army by article 38 of the Articles of War (U. S. C., title 10, sec. 1509), reading as follows:

"'*President may prescribe rules* (*article 38*).—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the districts courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.'

"Inasmuch as the question presented in this case is fully covered by the rules stated in the court-martial order above quoted, reference 'to the rules of evidence applied by the Federal courts' is not required by section 320 of Naval Courts and Boards (supra). It may, however, be remarked that the use of former testimony in a subsequent trial has repeatedly been considered in decisions of the Supreme Court and that the rules stated in the above court-martial [P. 12] order are supported by those decisions. Thus, in *Reynolds* v. *United States* (98 U. S. 145, October term, 1878), it was held that 'testimony given on a former trial of the same person for the same offense, but under another indictment,' is admissible against the accused 'if a witness is absent by his own wrongful procurement.' In *Mattox* v. *United States* (156 U. S. 237, Feb. 4, 1895), it was held that testimony of a witness for the Government at a former trial of the accused for the same offense may be admitted in evidence against the accused on his second trial if the witness died after the first trial and before the second. In *Motes* v. *United States* (178 U. S. 458, May 21, 1900), it was held that the constitutional rights of the accused were violated by admitting in evidence against him testimony given at a preliminary trial before a United States Commissioner, it not appearing that the witness was absent by the procurement or advice of the accused but on the contrary that his absence was manifestly due to the negligence of officers of the Government who had permitted him to escape from their custody, which case 'is not within any of the recognized exceptions to the general rule prescribed in the Constitution.' In *Diaz* v. *United States* (223 U. S. 442, Feb. 19, 1912), it was held that the right of the accused to be confronted with the witnesses against him is one which he may waive so as to permit the use of evidence taken elsewhere notwithstanding that in the absence of such waiver the testimony could not have been admitted, 'first, because it was within the rule against hearsay and, second, because the accused was entitled to meet the witnesses face to face.' To the same effect was *Mullan* v. *United States* (212 U. S. 516, Feb. 23, 1909), which held that a commissioned officer of the Navy can waive the provisions of article 60, A. G. N., and allow the proceedings of a court of inquiry to be evidence on a court martial the sentence of which may extend to his dismissal. Without further citation of cases it may be said that no decision of any Federal court has been found which goes so far as to sustain the admissibility of former testimony in evidence under the circumstances of the present case; that is, (1) when the subsequent trial is for different offenses, (2) when the witnesses are not shown to be dead or physically or mentally incapable of being present, (3) when it is not shown that the witnesses were kept out of the way by the accused; and (4) when the depositions of the absent witnesses could have been taken if it was impracticable or impossible to secure their personal attendance at the trial.

[P. 13] "As hereinbefore stated, Congress has by act of February 16, 1909, authorized the taking of depositions to be put in evidence before naval courts 'except in capital cases and where the punishment may be imprisonment or confinement for more than one year.' The maximum punishment upon conviction of the charges in this case would have been

dismissal, and therefore not within the statutory exception. One of the absent witnesses was a civilian residing at Norfolk, Va., and accordingly his deposition would have been admissible under the following provision in the statute: 'First, depositions of civilian witnesses residing outside the State, Territory, or district in which a naval court is ordered to sit.' The other absent witness was an officer of the Navy who at the time of this trial was on foreign duty, thereby making his deposition admissible in evidence under the following provision of the statute: 'Second, depositions of persons in the naval or military service stationed or residing outside the State, Territory, or district in which a naval court is ordered to sit or who are under orders to go outside such State, Territory, or district.' By invoking the power given it by statute, the court could have secured the depositions of these two witnesses and thereby proceeded under the law which was made by Congress to cover the situation with which it was confronted. Instead, it elected to receive in evidence over the objection of the accused testimony which had been given by these witnesses at the former trial. The course which it thus pursued was without authority of law and, as held by the Acting Judge Advocate General, was a fatal error necessitating the disapproval of the findings on charges I and II and disapproval of the sentence. As held in the case of *Levi* v. *State* (182 Ind. 188; Ann. Cas. 1917A, 654):

"'If the whereabouts of the witness are known and his deposition could have taken, the former testimony is inadmissible, and in criminal cases this rule is stricter than in civil cases. Jones, Evidence (2d ed.), section 342 (6); *Gastrell* v. *Phillips* (1886) 64 Miss. 473, 1 So. 729; *Gerhauser* v. *North British*, etc., Ins. Co. (1871), 7 Nev. 174; *State* v. *Hefferman*, supra, (22 S. D. 513, 118 N. W. 1027).

"In view of the remarks above, this office is constrained to adhere to its recommendation contained in the opinion of the Acting Judge Advocate General in his first endorsement hereon."

On October 28, 1927, the Secretary of the Navy approved the proceedings in this case and the remarks of the Acting Judge Advocate General, and the further remarks of the Judge Advocate General; but disapproved the findings and sentence.

[P. 14] First Lieutenant Frederick D. Harbaugh, U. S. Marine Corps, was tried by general court martial by order of Brigade Commander, Second Brigade, U. S. Marine Corps in Nicaragua at headquarters, Fifth Regiment, U. S. Marine Corps, Managua, Nicaragua, on September 5, 1927, and was found guilty by plea on the charge of "Drunkenness."

The court sentenced the accused to lose 150 numbers in his grade and to lose $100 of his pay per month for a period of six months, total loss of pay amounting to $600.

The convening authority, on September 8, 1927, placed the following remarks on the record:

"In reviewing the record of proceedings in the foregoing trial by general court martial of First Lieutenant Frederick D. Harbaugh, U. S. Marine Corps, it is noted that the judge advocate introduced before the court records of two previous convictions by general court martial for offenses similar to that for which the accused was on trial in view of which the reviewing authority is of the opinion that the sentence awarded in the foregoing case is grossly inadequate. Subject to the foregoing remarks, and in order that the accused may not entirely escape punishment, the proceedings, findings, and sentence in the foregoing case of First Lieutenant Frederick D. Harbaugh, U. S. Marine Corps, are approved. He will be released from arrest and restored to duty."

On October 14, 1927, the Major General Commandant, U. S. Marine Corps, placed the following endorsement on the record:

"Returned concurring in the statement of the reviewing authority that the sentence in the case of First Lieutenant Frederick D. Harbaugh, U. S. Marine Corps, is grossly inadequate in view of the two prior convictions for

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the [P. 15] same offense. It appears that the court deliberately usurped the functions of the reviewing authorities in that it extended clemency.

"It is recommended that the members of the court be informed of the disapprobation of the Department."

The remarks of the Major General Commandant in this case were approved by the Secretary of the Navy on October 26, 1927.

Lieutenant (junior grade) William F. Hurt, U. S. Navy, was tried by general court martial order of Commander Scouting Fleet, United States Fleet, on board the U. S. S. *Texas* on July 25, 1927, and was convicted on the following charges:

Charge I.—Conduct unbecoming an officer and a gentleman.

Charge II.—Drunkenness.

Charge III.—Absence from station and duty after leave had expired.

The court sentenced the accused to be dismissed from the United States naval service.

On August 5, 1927, the convening authority placed the following remarks on the record:

"In the foregoing case of Lieutenant (j. g.) William F. Hurt, U. S. Navy, the record of proceedings of the second day failed to show that the court was closed during the reading of so much of the proceedings of the previous day as pertained to closed court.

"This error, even if actual and not merely one of clerical omission in preparing the record, is not considered as being in any way prejudicial to the interests of the accused.

"Subject to the foregoing remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Lieutenant (j. g.) William F. Hurt, U. S. Navy, are approved, and, in conformity with article 53 of the Articles for the Government of the Navy, the record is respectfully referred to the Secretary of the Navy for transmission to the President."

On October 4, 1927, the sentence was confirmed by the President.

Lieutenant (junior grade) John F. Madden, U. S. Navy, was tried by general court martial by order of Commander in Chief, United States Asiatic Fleet, on board the U. S. S. *Beaver* on July 7, 1927, and was acquitted on the charge "Conduct to the prejudice of good order and discipline."

On July 15, 1927, the convening authority approved the proceedings, findings, and acquittal.

[P. 16] On September 24, 1927, the Judge Advocate General placed the following endorsement on the record:

"In reviewing the record of proceedings in the above case, it is noted that the court found the charge and specifications in due form and technically correct. The specifications of the charge read as follows:

"'*Specification I.*—In that John F. Madden, now a lieutenant (junior grade), U. S. Navy, while so serving on board the U. S. S. *S–38*, well knowing that money had been stolen from various officers' rooms of the U. S. S. *Canopus*, and well knowing that an intolerable condition of suspicion existed among the officers quartered on board the said U. S. S. *Canopus*, did surreptitiously on or about May 7, 1927, enter the room on board the U. S. S. *Canopus* assigned to one Sumner C. Cheever, then a lieutenant, U. S. Navy, in the absence of the said Cheever or any other person, and did search the desk of the said Cheever, in said room, and did therein and thereby, under the conditions then obtaining, bring suspicion on himself, and discredit on the U. S. naval service.

"'*Specification II.*—In that John F. Madden, now a lieutenant (junior grade), U. S. Navy, while so serving on board the U. S. S. *S–38*, well knowing that an intolerable condition of thieving had been rife in the officers' quarters of the U. S. S. *Canopus*, and well knowing that any person might easily be under suspicion, did, on or about June 4, 1927, after observing

one Raymond C. Percival, then a lieutenant, U. S. Navy, in the messroom of the said U. S. S. *Canopus*, indicate by his, the said Percival's actions, that he, the said Percival, had lost his, the said Percival's wallet, surreptitiously, in the absence of the said Percival, enter the room of the said Percival, on board the said U. S. S. *Canopus*, and by so entering under the conditions then obtaining, did therein and thereby bring suspicion on himself, the said Madden, and discredit on the U. S. naval service.

"'*Specification III.*—In that John F. Madden, now a lieutenant (junior grade), U. S. Navy, while so serving on board the U. S. S. *S–38*, did, on or about June 8, 1927, surreptitiously enter the stateroom of one Raymond C. Percival, then a lieutenant, U. S. Navy, on board the U. S. S. *Canopus*, in the absence of the said Percival or any other person, he, the said Madden, well knowing that an intolerable condition of thieving existed on board the said U. S. S. *Canopus*, and did, therein and thereby, under the conditions then obtaining, bring suspicion on himself and discredit on the U. S. naval service.

[P. 17] "'*Specification IV.*—In that John F. Madden, now a lieutenant (junior grade), U. S. Navy, while so serving on board the U. S. S. *S–38*, did, on or about April 19, 1927, express to one Joseph R. Barbaro, then a lieutenant (junior grade), U. S. Navy, knowledge of the loss of a sum of money, in the amount of forty pesos (₱40) Philippine currency, lost by the said Barbaro, when he, the said Madden, had no opportunity to obtain information that the said Barbaro had lost the said money, save through personal intimate knowledge of the taking, he, the said Madden, well knowing that an intolerable condition of thieving existed in the officers' quarters on board the U. S. S. *Canopus*, and did therein and thereby, under conditions then obtaining, bring suspicion on himself and discredit on the U. S. naval service.'

"In the opinion of this office, the foregoing specifications are not in due form and technically correct for the following reasons:

"(*a*) With regard to specifications 1, 2, and 3, the essential allegations are that the accused did certain acts in a manner which, under the conditions then obtaining, brought suspicion upon himself, and discredit upon the U. S. naval service. The overt acts of the accused alleged in these specifications are, in one instance, that of 'surreptitiously' entering the room of another officer on board ship during the latter's absence, and searching his desk, and in two instances, that of 'surreptitiously' entering the rooms of other officers on board ship during their absence. Judicial notice may be taken of the fact that it is not at all uncommon nor unlawful for officers quartered on board the same ship to enter the rooms of other officers for proper reasons without being observed. Unless the reason for entering the room is improper, which fact must necessarily be alleged in the specification, the entry and search, even though purposely secret, is not manifestly a crime per se. When a court martial can take judicial notice of the fact that the alleged act is not uncommon and is ordinarily lawful, it is essential that facts be alleged in the specification which clearly take the alleged act out of the field of lawful and common acts, and place it in the category of acts which are unlawful. It is further essential in such instances that words denoting the requisite criminal intent be set forth in the specification, thus imputing to the accused a specific intent to commit a wrongful act. These elements are lacking in these specifications. The word 'surreptitiously,' by itself, does not make the act of entering or searching unlawful; nor does the allegation that an intolerable condition of suspicion existed among the officers quartered on the ship [P. 18] due to unsolved thefts from officers' rooms serve to change an act which is otherwise lawful to one that is manifestly unlawful. The relationship between the alleged acts and the surrounding circumstances is not necessarily so close as to place an officer on warning that an otherwise common and lawful act has ceased to be such. The allegation that the accused's acts brought suspicion upon himself is a conclusion of fact which is redundant to the specification because the existence of such a fact does not constitute an offense within itself. Persons may be suspected of wrong-doing, but the fact that others suspect them of crime does not warrant their trial for being suspected. Suspicion may warrant investigation, and a well-founded suspicion may warrant trial for the offense of

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which the accused is suspected, but an individual is not criminally liable for the mere suspicions which he may cause to arise in the minds of others. The allegations in these specifications tend to indicate that the suspicion that the accused was responsible for the thefts was warranted, but the offense, if any, was the crime for which he was suspected, and not the mere causing of suspicion. The allegation that the acts of the accused brought discredit upon the U. S. naval service is a conclusion of fact not borne out by the prior allegations. Neither the alleged acts of the accused, the surrounding circumstances, nor the resultant suspicions which arose are sufficient to justify this conclusion. To bring discredit upon the U. S. naval service is an offense, but the mere surreptitious entry into another officer's room and searching his desk, even under the circumstances and with the attending results alleged, is not necessarily such an act as will tend to bring discredit upon the service. For an accused to be culpably responsible for such an act, it must be alleged that the act committed was intentionally unlawful and not merely indiscreet.

"(*b*) With regard to specification 4, the same circumstances and results are alleged to have attended the fact that the accused had expressed knowledge of a theft to another officer when, it is alleged, the accused had no opportunity to obtain such information save through personal intimate knowledge of the taking. This act, as alleged, does not constitute a crime, and would not have constituted a crime had it been in the maximum degree, to wit, a confession of guilt. Since the act itself does not constitute a crime, the attending circumstances and results alleged do not make it such. While concealing knowledge of the theft, failing to apprehend the perpetrator thereof, or the commission of the theft itself would all tend to bring discredit upon the U. S. naval service in the minds [P. 19] of those having an opportunity to be familiar with the facts, the expression of intimate knowledge in connection therewith, even though the fact that such knowledge requires first-hand information of who committed the crime, does not, of itself, bring discredit upon the U. S. naval service or constitute a wrong for which the accused is criminally liable.

"In conclusion, it is the opinion of this office that the acts, as alleged, together with the surrounding circumstances and results, as alleged in these specifications, do not set forth any offenses of which judicial notice can be taken, and that the court erred in finding the specifications in due form and technically correct. It is, therefore, recommended that the proceedings in the above case be set aside."

On October 10, 1927, the Secretary of the Navy approved the remarks of the Judge Advocate General and set the proceedings aside.

[P. 20] Lieutenant (junior grade) Thomas B. Williamson, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy at the U. S. Navy Yard, Washington, D. C., on August 26, 1927, and was found guilty of the charge: "Conduct to the prejudice of good order and discipline" (six specifications; specifications 2, 4, 5, and 6, not proved; specifications 1 and 3, proved).

The court sentenced the accused to lose twenty (20) numbers in his grade.

On September 24, 1927, the Judge Advocate General placed the following endorsement on the record:

"Specification 4 alleges that the accused in violation of the Air Commerce Regulations of the Department of Commerce, knowingly, willfully, and without proper authority flew an aircraft over congested parts of the city of Washington at a height insufficient to permit of a reasonably safe emergency landing. Specification 5 alleges that the accused in violation of the above-mentioned regulations, knowingly, willfully, and without proper authority flew an aircraft over congested parts of the city at a height less than one thousand feet. It is not understood how the court arrived at an acquittal on specifications 4 and 5, unless it believed that Lieutenant Williamson had no knowledge of the existence of the air regulations issued by the Department of Commerce, as in the opinion of this office

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the specifications were in every other respect proved. If such was the basis on which the court arrived at its findings, the conclusion is erroneous, as the Department of Commerce has the authority of Congress to issue such regulations governing aircraft as seems proper to that department. Accordingly, the Air Commerce Regulations have the full force and effect of a statute of the United States, and the accused is thereby charged with constructive notice of the existence of such regulations."

On October 6, 1927, the Secretary of the Navy approved the proceedings, findings, and sentence, and the remarks of the Judge Advocate General in this case, but reduced the loss of numbers to five (5).

DEFENDANT: NAMING OF BEFORE A BOARD OF INVESTIGATION.

In reviewing the record of a board of investigation it was noted that O, seaman, second class, U. S. Navy, was made an interested party by the board, and informed of the declarations that seemed to implicate him.

Held: If there were any declarations that seemed to implicate O he should have been made a defendant by the board in [P. 21] accordance with section 1049, Naval Courts and Boards. Subject to those remarks the proceedings, findings, opinion, and recommendation in this case were legal (File: MM- * * * /A17-25 (270824)D, October 5, 1927).

PLEA OF GUILTY: REJECTION OF.

In reviewing the summary court martial in revision in the case of S, pharmacist's mate, third class, U. S. Navy, the following was noted:

"(*a*) The convening authority returned the record to the court for revision, stating that the plea of the accused was inconsistent with his plea of guilty and directed the court to reject said plea and have the accused plead not guilty and begin the trial anew. The convening authority had no power to return the record to the court for the purpose named. Section 741, Naval Courts and Board, 1923, provides that:

"'the power of a convening authority in returning any record to the court is limited to a revision of its findings or sentence or the correction of clerical errors or omissions in the record of proceedings, and, in the event of the court's adherance to its former conclusions, to a disapproval of the same.'

"The effect of the convening authority's action in this case amounted to a direction for a new trial and from section 741, supra, it will be seen that he had no power to return the record for that purpose. Also, the court having finished its work, rendered a complete judgment in the case, and adjourned, could not reconvene on its own initiative. (See p. 621, Laws Relating to the Navy, annotated, under Reconsideration by board of its finding.)

"The court, therefore, was without jurisdiction in its proceedings in revision, and consequently its proceedings, findings, and sentence in revision were without legal effect.

"(*b*) The court in violation of section 729, Naval Courts and Boards, admitted new evidence.

"(*c*) The record of proceedings in revision does not show that the court rejected the plea of guilty but only that it directed the accused to change his plea to not guilty. The record does not show that the accused did as directed or that the court decided to adopt a plea of not guilty. A court may not direct an accused as to how he shall plead, but should in proper cases reject his plea of guilty and direct the recorder to enter a plea of not guilty. There remained [P. 22] in this case but one plea before the court, that of guilty, notwithstanding which the court proceeded as though a plea of not guilty had been entered.

In view of the above, the proceedings, findings, and sentence in revision in this case were set aside.

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As the convening authority had taken no action on the original record, it was returned for such action in the premises as may be deemed appropriate. In this connection attention was invited to the fact that a statement inconsistent with the plea of the accused does not necessarily invalidate the proceedings. In fact, Change No. 5, Naval Courts and Boards, which has been approved by the President and will soon be issued to the service, provides, in effect, that convening authorities should not disapprove the findings and sentence of a court for this reason alone. (File: MM– * * * /A17–21 (271028) C, October 28, 1927).

CITIZENSHIP OF ENLISTED MAN.

H, seaman second class, U. S. Navy, enlisted at Atlanta, Ga., on January 20, 1927, giving his date of birth as September 7, 1908; his place of birth as Coblenz, Germany, and claiming to be a citizen of the United States.

H's stepfather stated that he had married the mother of H at Coblenz, Germany, on October 7, 1919, and that he was a duly naturalized citizen of the United States at the time of his marriage to H's mother, his naturalization having been consummated on February 8, 1915.

The question presented for decision of the Navy Department was whether H was legally a citizen of the United States at the time of his enlistment.

Held: Under the provisions of section 1994, Revised Statutes, which was in force at the time the marriage above referred to was consummated; U. S. C., title 8, section 7; (sec. 2172, Revised Statutes) and U. S. C., title 8, section 8 (sec. 5 of the act of March 2, 1907, 34 Stat. 1229), the mother of H became a naturalized citizen of the United States at the time of her marriage in 1919, and since H was a minor child at the time of the marriage of his mother, he likewise became a naturalized citizen of the United States (File: MM– * * * /P1–4 (270915) J–SG, October 19, 1927).

[P. 23] CIVIL AUTHORITIES: MEANING OF "OTHER DULY AUTHORIZED OFFICERS."

Information was recently requested from the Navy Department in regard to the identity of "other duly authorized officers" of a State who are authorized to give a commanding officer the assurance mentioned in section 44 Naval Courts and Boards 1923, in connection with the delivery of naval personnel to civil authorities.

Held: In general "other duly authorized officers" within the meaning of section 44, Naval Courts and Boards are those officers who by reason of the appointment they hold from the State are in a position to satisfy the commanding officer of the reasonable probability of the agreement being carried out. Usually the officer who applies for the custody of the man is acceptable as being "duly authorized," and in practice this has generally been found to be satisfactory (File: NY6/A17–7 (270930)N–SG, October 19, 1927).

MISCONDUCT: INJURY, PAY FORFEITURE.

R, seaman, first class, U. S. Navy, was admitted to the sick list with diagnosis, fracture, simple, right tibia, fall, which was considered to be due to his own misconduct.

The question presented in this case was whether R was subject to checkage of pay for time lost because of the injury.

Held: Under the provisions of U. S. Code, title 34, appendix, section 882, (sec. 1 of the act of May 17, 1926, 44 Stat. 557) the pay of a man who is absent from duty because of a disability which is the result of an injury, and not of a disease, is not subject to checkage, even though the injury was the result of the man's own misconduct (File: MM– * * * /P2–5(2) (270928)N–SG, October 10, 1927).

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MISCONDUCT: SUICIDE.

A decision was recently requested from the Navy Department as to the conduct status of R, late engineman, first class, U. S. Navy, at the time of his death. R, while on authorized leave of absence, committed suicide.

Held: R's death was due to own misconduct. A presumption of sanity is not rebutted by the fact of suicide of the person in question. The status of the deceased whether on duty or on leave at the time of committing suicide does not of itself have any material bearing on the question of misconduct (File MM- * * * /L13-2(9) (270908 N-SG, October 1, 1927).

[P. 24] NAVAL HOSPITAL FUND: PAY FORFEITED FOR MISCONDUCT NOT TO BE CREDITED TO.

A decision was recently requested from the Navy Department as to whether amounts withheld from pay of persons in the naval service while absent from duty under the conditions specified in U. S. Code, appendix, title 34, section 882 (act of May 17, 1926, 44 Stat. 557), may be credited to the naval hospital fund.

Held: Pay forfeited by persons in the naval service in accordance with the terms of the act of May 17, 1926, may not be credited to the naval hospital fund (File L1-1-7X815/L16-4 (4) (270921)K Du, October 25, 1927).

SUSPENSION FROM DUTY.

A decision was requested from the Navy Department as to the legality of the punishment in the following case: Ensign W. U. S. N. R. F., was attached to Naval Air Station, _____, and was under the command of the commanding officer of that station. On September 2, 1927, he was suspended from duty involving flying for a period of ten days by his commanding officer for infractions of local flying rules.

Held: "Suspension from duty involving flying" is a lesser and included part of "suspension from duty," and as such is a punishment which a commanding officer can legally inflict upon a commissioned officer under his command in accordance with the provisions of article 24 Articles for the Government of the Navy (File OO- * * * /P13-9(270924)D3-SG, October 26, 1927).

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[P. 3] Lieutenant Marcus L. Kurtz, U. S. Navy, was tried by general court martial by order of Commander Destroyer Squadrons, Battle Fleet, U. S. Fleet, on board the U. S. S. *Altair* on October 3, 1927, and was found guilty of the following charges:

Charge I.—Absence from station and duty after leave had expired.

Charge II.—Neglect of duty.

Charge III.—Negligence in obeying orders.

Charge IV.—Drunkenness.

The court sentenced the accused to lose 500 numbers in his grade.

[P. 4] On October 13, 1927, the convening authority placed the following remarks on the record:

> "In reviewing the attached case it is noted that the christian name of the president of the court is spelled 'Johnathan' in the record where the members names are recorded at the commencement of each day's trial. In the precept the name is spelled 'Jonathan' and is signed 'Jonathan' on page 20 of the record, therefore, the incorrect spelling of the name in the record is not considered of sufficient importance to effect the legality of the proceedings.
>
> "Subject to the above remarks, the proceedings, findings, and sentence of the general court martial in the foregoing case of Marcus L. Kurtz, lieutenant, U. S. Navy, are approved, but in view of his previous good record the loss of numbers is reduced to three hundred (300)."

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Lieutenant Harry K. Leventen, U. S. Navy, was tried by general court martial by order of Commander Battleship Divisions, Battle Fleet, U. S. Fleet on board the U. S. S. *Idaho* beginning August 30, 1927, and was honorably acquitted of the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals.

Charge II.—Conduct unbecoming an officer and a gentleman.

On October 5, 1927, the convening authority placed the following remarks on the record:

> "From an examination of the record in the attached case it is noted that, in questions 3 and 10 on page 8, objection was made to certain answers of the witness being examined. The objections were sustained and the record of proceedings shows the objected testimony as deleted from the record. The record of proceedings should show all testimony received, whether successfully objected to or not, in order that reviewing authorities may intelligently follow and review the proceedings.
>
> "Subject to the above remarks, the proceedings, findings, and acquittal in the attached case of Lieutenant Harry K. Leventen, U. S. Navy, (*Idaho*), are approved."

Lieutenant William H. O'Connor, Medical Corps, U. S. Navy, was tried by general court martial by order of Commandant Fifteenth Naval District at the U. S. Submarine Base, Coco Solo, C. Z., on October 4, 1927, on the following charges:

Charge I.—Conduct unbecoming an officer and a gentleman.

Charge II.—Drunkenness.

[P. 5] The court acquitted the accused on charge I and found him guilty on charge II and sentenced him to lose 20 numbers in his grade.

On October 20, 1927, the convening authority placed the following remarks on the record:

> "The proceedings and findings of the general court martial in the foregoing case of Lieutenant William H. O'Connor, Medical Corps, U. S. Navy, are approved.
>
> "The convening authority does not understand why the court failed to bring out the circumstances of the release of the accused from his pledge.
>
> "The convening authority considers the sentence in this case wholly inadequate but, in order that the accused may not wholly escape punishment, the sentence is approved. He will be released from arrest and restored to duty."

Lieutenant Robert T. Whitten, U. S. Navy, was tried by general court martial by order of Commander Light Cruiser Division Three, U. S. Asiatic Fleet, on board the U. S. S. *Cincinnati* beginning May 16, 1927, and was convicted of the following charges:

Charge I.—Scandalous conduct tending to the destruction of good morals.

Charge II.—Falsehood.

Charge III.—Conduct unbecoming an officer and a gentleman.

The court sentenced the accused to lose 150 numbers in his grade.

On September 15, 1927, the proceedings, findings, and sentence were approved by the convening authority.

On November 1, 1927, the Chief of the Bureau of Navigation placed the following endorsement on the record:

> "The above-named officer was convicted of: (I) 'Scandalous conduct tending to the destruction of good morals,' the specification alleging embezzlement of $220.73 wardroom mess funds while he was serving as mess treasurer; (II) 'Falsehood,' one specification alleging that he submitted an official report of the accounts of the wardroom mess of the *Cincinnati* which he knew to be false; (III) 'Conduct unbecoming an officer and a gentleman,' two specifications alleging dishonorable indifference toward just obligations.
>
> "It is the opinion of this Bureau that the court failed in its duty to adjudge an adequate sentence in permitting an officer convicted of the above offenses to remain in the service; also that the convening authority

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in approving this totally inadequate sentence without comment has thereby placed his stamp of approval on the action of the court."

The Secretary of the Navy on November 5, 1927, approved the remarks of the Chief of the Bureau of Navigation.

[P. 6] CHARGE: SPECIFICATION SUPPORTING.

T, seaman first class, U. S. Navy, was tried by general court martial and convicted on the charge "Threatening to assault his superior while in the execution of the duties of his office."

The specification under this charge read as follows:

"In that T, now a seaman first class, U. S. Navy, while so serving on board the U. S. S. _____ did, on or about September 1, 1927, in a public establishment known as _____ located at _____ Market Street, in the city of San Francisco, Calif., willfully and knowingly use abusive, obscene, and threatening language toward his superior officer, in that he, the said T, did say to one R, then a lieutenant (junior grade), U. S. Navy, who was then and there in the execution of the duties of his office as an officer of the U. S. naval shore patrol, I don't give a G— d— for any G— d— lieutenant, I'll come down and knock your G— d— block off.' or words to that effect."

Held: While this specification may be held to support the charge under which laid, since an assault is included in the act of striking, yet in view of the more serious nature of the offense, it should more properly have been laid under the more serious charge, namely, "Threatening to strike his superior officer while in the execution of the duties of his office," section 221, Naval Courts and Boards, indicates the distinction between "striking" and "assaulting," and states that "Cases of threatening to assault will be rare, as usually the offense will be assault," citing C. M. O. 92, 1918, page 17.

Subject to the above remarks the proceedings, findings, and sentence in this case were held to be legal (File: MM– * * * /A17–20 (270908), G. C. M. Rec. No. 67785, Nov. 10, 1927).

PLEA: REJECTION OF.

H, private, U. S. Marine Corps, was tried by general court martial and convicted of: (I) "Knowingly and willfully applying to his own use property of the United States intended for the naval service thereof" (driving Government automobile) and (II) "Conduct to the prejudice of good order and discipline" (2 specifications; specification 1—Driving automobile of another without permission in violation of State law and damaging same to extent of $125; specification 2—Driving Government automobile in violation of post order).

Held: It was noted that upon arraignment the accused pleaded not guilty to specification 1 and guilty to specification 2 of charge II and not guilty to charge II.

[P. 7] "A plea of guilty to but one of several specifications under a charge necessitates the plea of guilty of the charge if once the specification supports the charge. In a case of a plea of guilty to one specification and not guilty to the charge, the plea to the specification should be rejected" (sec. 662, Naval Courts and Boards).

However, the court found the charge and specifications to be in due form and technically correct and as no objection was made to the charge and specifications by the accused, his plea of guilty to specification 2 precluded him from making any plea but "guilty" to the charge. It is presumed that the plea of "not guilty" was made through misunderstanding as to which plea was proper when different pleas had been made to each specification. It was the duty of the court to explain to the accused, upon his making this improper plea to the charge, the proper procedure, but in view of the foregoing its failure to act in this instance is not considered fatal (C. M. O. 12, 1921, 11).

Subject to the above remarks, the proceedings, findings, and sentence in this case were held to be legal (File: MM– * * * /A17–20 (270917), G. C. M. Rec. No. 67963, Nov. 2, 1927).

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SENTENCE: EXCEEDING LEGAL LIMITATIONS.

W, seaman second, class, U. S. Navy, was tried by general court martial and convicted of desertion, the accused having been in desertion for one month and eighteen days. The court sentenced W to be reduced to the rating of apprentice seaman, to be confined for a period of 26 months, dishonorable discharge, and accessories.

Held: The proceedings and findings in this case were legal. The sentence as adjudged exceeded the legal limitation prescribed for the offense of desertion. That part of the sentence not in excess of the legal limitation, namely, 25 months and 18 days was legal, and the portion in excess of the legal limitation was therefore disapproved (File: MM- * * * /A17-20 (271005), G. C. M. Rec. No. 68034, Nov. 21, 1927).

SENTENCE: INADEQUATE.

C, apprentice seaman, U. S. Navy, was tried by general court martial on the charge of "Desertion" and was found guilty of "Absence from station and duty without leave."

The Chief of the Bureau of Navigation placed the following endorsement on the record:

> "The court found the accused in this case guilty of absence without leave for a period of four (4) months and two (2) days. It sentenced him to be confined for a period [P. 8] of three (3) months and to lose ten dollars and fifty cents ($10.50) per month for two (2) months, total loss of pay amounting to twenty-one dollars ($21). The limit of punishment for this offense in accordance with the Department's policy is confinement for twelve (12) months, bad-conduct discharge and accessories.
>
> "Under article 51 of Articles for the Government of the Navy, the court was under a duty to prescribe an adequate punishment. It is apparent to this Bureau that the court by adjudging an inadequate sentence usurped the functions of the reviewing authority instead of adjudging an adequate sentence and then recommending the accused for such clemency as the individual members may have considered appropriate."

On November 21, 1927, the proceedings, findings, and sentence in this case were approved by the Navy Department (File: MM- * * * /A17-20(271011), November 22, 1927).

FLEET NAVAL RESERVE: ENLISTMENT ERRONEOUSLY INDICATED.

Held: An enlistment in the Naval Reserve, which is erroneously indicated in the caption at the top of the enlistment contract as being in class F-2, does not constitute the enlisted man a member of class F-2, which class consists of men assigned to the Fleet Naval Reserve upon termination of their enlistment in the Regular Navy, but such enlistment nevertheless constitutes the man a member of the Naval Reserve and the records may legally be corrected by assigning him to a class for which qualified (File: QR1/MM- * * * /(270919) AD3, November 22, 1927).

FLEET NAVAL RESERVE: SERVICE FOR TRANSFER TO.

Held: An enlisted man of the Navy, who was not a member of the Navy on July 1, 1925, but who was discharged prior thereto, and reenlisted subsequent to that date, after more than three months had expired from the date of discharge, can be transferred to the Fleet Naval Reserve upon the completion of a total of 20 years' service, counting the time served prior as well as subsequent to July 1, 1925, under the provisions of [P. 9] U. S. Code, title 34, sec. 784 (43 Stat. 1037, act of Feb. 28, 1925; File: P19-2(1)/A2-15(270920), November 5, 1927).

FLEET NAVAL RESERVE: SERVICE FOR TRANSFER TO.

An enlisted man who had more than 17 years' service to his credit for the purpose of transfer to the Fleet Naval Reserve was convicted by general court mar-

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tial and sentenced to three years confinement, dishonorable discharge, and accessories.

While in confinement, a board of medical survey found this man to be suffering from dementia praecox, not due to his own misconduct, and he was thereupon transferred to St. Elizabeths Hospital. A decision was requested as to whether the man may be transferred to the Fleet Naval Reserve.

Held: Considering the man's medical record, it is probable that he was suffering from mental disability at the time of committing the offense for which convicted.

The Secretary of the Navy may either permit this man to remain in St. Elizabeths Hospital until the unexpired portion of his sentence is completed and the dishonorable discharge executed, or he may remit the unexpired portion of the sentence, including the dishonorable discharge and transfer him to the Fleet Naval Reserve (File: MM- * * * /P19-2 (1) (270929), November 17, 1927).

FLEET NAVAL RESERVE: SERVICE FOR TRANSFER TO.

F, chief boatswain's mate, U. S. Navy, was tried by general court martial May 17, 1912, on the charge of desertion, was found guilty, and was sentenced to be confined for a period of two years, dishonorable discharge, and accessories. On October 12, 1912, the Navy Department mitigated the unexecuted part of the sentence to detention at the disciplinary barracks * * * and F was transferred on November 13, 1912, from the naval prison to the disciplinary barracks. On September 16, 1913, when F had served two-thirds of his sentence, he was placed on probation at the disciplinary barracks, and on April 25, 1914, he was unconditionally restored to duty.

An opinion was requested as to whether or not the period of time, namely, from September 16, 1913, to April 25, 1914, during which F was detained on probation at the disciplinary barracks should be adduced in computing his service for transfer to the Fleet Naval Reserve.

Held: Since F performed naval service, and received the full pay of his rating during the time of probation, that service may be counted as part of the 16 or more years' naval service required for transfer to the Fleet Naval Reserve (File: MM- * * * /P19-2(1) (271022), November 19, 1927).

]P. 10] GENERAL COURT-MARTIAL PRISONER: TRANSORTATION OF.

A certain prisoner will be entitled on discharge to transportation from Port Royal, S. C., to Los Angeles, Calif., and a decision was requested as to whether this prisoner may be furnished transportation over a specified route.

Held: In accordance with the provisions of U. S. Code, title 34, sec. 962 (35 Stat. 756, act of March 3, 1909) and the decision of the Comptroller General dated July 11, 1927, if the entire cost of such transportation is to be borne by the Government, it may be furnished only over the cheapest and most direct route between Port Royal and Los Angeles, or over any other route which is the equivalent thereof.

If the prisoner on discharge will have to his credit sufficient funds to cover the entire cost of his transportation, he may be discharged at the naval prison, in the discretion of the Secretary of the Navy, and permitted to purchase transportation with his own funds to such place as he may choose. However, in case the prisoner has insufficient funds to his credit to cover the entire cost of his transportation, such amount as he may have to his credit on discharge will be used toward defraying the actual costs of transportation which is to be furnished him over the cheapest and most direct route, the difference in cost of such transportation to be paid by the Government. In no case should the cost of transportation issued exceed the cost of transportation to the home or place of enlistment of the prisoner (File: L20-1(21)NF2(271001), November 2, 1927).

SEAL, OFFICIAL.

In connection with Court-Martial Order No. 5, 1927, p. 11, information was requested as to whether the commanding officer * * * should continue to use

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the official seal on (*a*) beneficiary slips, (*b*) oaths of office, (*c*) identification of men's signatures, etc., (*d*) honorable discharges, (*e*) extensions of enlistment, and (*f*) acknowledgments.

Held: While there is no provision of law requiring a ship or station to have an official seal or to use the same for the purposes of the administration of naval justice and for other purposes of naval administration, this does not affect the long-established practice of the naval service of attaching the ship or station seal to those forms and documents wherein its use is indicated. Such seal should, therefore, continue to be affixed to those forms and documents wherein its use is indicated (File: A12–4/NH4 (271013), November 29, 1927).

SUSPENSION FROM DUTY.

With reference to the decision of the Navy Department, the syllabus of which was published in Court-Martial Order No. 10, [P. 11] 1927, p. 24, the following questions were presented and a decision thereon requested: (1) By Executive order of March 10, 1927, par. 12, no reference was made to the length of time which the commanding officer may suspend an officer or enlisted man from flying duty. Would a period of time longer than 10 days be legal? (2) Suspension from duty involving flying also involves a suspension of flying pay. An officer ordinarily suspended from duty does not lose pay. Would the suspension of pay of an officer or enlisted man in such cases be upheld, should a claim be filed for such pay?

Held: (1) In the decision of the Navy Department dated October 26, 1927, the matter of suspension from duty involving flying was treated in its aspect as a punishment, and has no bearing on the treatment of this subject under the Executive order of March 10, 1927, in which such suspension is treated in its aspect as a matter of administrative regulation separate and distinct from formal punishment.

Since it is clear in that decision of the Navy Department that "suspension from duty involving flying" is authorized as a punishment only on the theory that it is a lesser and included part of "suspension from duty" within the meaning of article 24 of the Articles for the Government of the Navy, it follows that "suspension from duty involving flying," if assigned as a punishment may not be for a period of time longer than 10 days. (2) An officer suspended from duty involving flying as a punishment does not lose pay by reason of such suspension. Whether or not he loses pay depends upon whether he performs the prescribed number of flights during the prescribed period. This is solely an accounting matter. If suspension from duty involving flying assigned as a punishment should result, under the accounting rules, in loss of pay, such loss is an indirect and not a direct result of the said punishment.

The decision of the Navy Department dated October 26, 1927, was rendered in response to a request for a decision on a point of law. The fact that such decision sustains, as a matter of law, the right of the commanding officer of an air station to assign to an officer "suspension from duty involving flying" as a punishment is not to be considered as suggesting that such suspension should normally be treated as a punishment. On the contrary the Navy Department considers that suspension from duty involving flying should ordinarily be handled administratively in the manner contemplated in the Executive order of March 10, 1927 (File: * * * /I13-9(270924), November 29, 1927).

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[P. 3] Commander Anthony J. James, U. S. Navy,. was tried by general court martial by order of the Secretary of the Navy at the U. S. Navy Yard, Washington, D. C., on November 17, 1927, and was convicted of the following charges:

Charge I.—Absence from station and duty after leave had expired.

Charge II.—Conduct to the prejudice of good order and discipline.

The court sentenced the accused to lose 25 numbers in his grade.

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On November 30, 1927, the Chief of the Bureau of Navigation placed the following endorsement on the record:

"1. Forwarded recommending approval of the proceedings, findings, and sentence of the general court martial in the foregoing case of Commander Anthony J. James, U. S. Navy.

"2. This Bureau recommends approval only that the accused may not entirely escape punishment, as in its opinion the sentence is totally inadequate for the offenses of which the accused has been found guilty. It is recommended that the Department's final action in this case be communicated to the members of this court."

On December 6, 1927, the proceedings, findings, and sentence and the remarks of the Chief of the Bureau of Navigation were approved by the Secretary of the Navy.

Captain William N. Jeffers, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy at the U. S. Naval Training Station, Newport, R. I., on November 3, 1927, and was convicted of the following charges:

Charge I.—Drunkenness.

Charge II.—Conduct to the prejudice of good order and discipline.

The court sentenced the accused to lose 10 numbers in his grade.

[P. 4] On November 29, 1927, the Chief of the Bureau of Navigation placed the following endorsement on the record:

"1. Forwarded recommending approval of the proceedings, findings, and sentence of the general court martial in the foregoing case of Captain William N. Jeffers, U. S. N.

"2. Considering the nature of the offenses of which the accused has been found guilty and the amount of punishment awarded by the court, this Bureau is of the opinion that neither the long service of the accused nor his professional record—the two reasons given by four members of the court as the basis for a recommendation for clemency—are sufficient as to warrant any reduction by the convening authority in the sentence of the court."

On December 1, 1927, the proceedings, findings, and sentence and the remarks of the Chief of the Bureau of Navigation were approved by the Secretary of the Navy.

Lieutenant Colonel Howard Kipp, U. S. Marine Corps, (retired) was tried by general court martial by order of the Secretary of the Navy at the Marine Barracks, Washington, D. C., on August 9, 1927, and was acquitted of the charge: "Conduct to the prejudice of good order and discipline" (6 specifications).

On December 1, 1927, the Judge Advocate General placed the following remarks on the record:

"In effect, the specifications alleged that during the period February 5 to June 6, 1927, the accused received certain official communications from the Major General Commandant, U. S. Marine Corps, ordering him to submit statements with respect to (1) his alleged indebtedness to private parties, (2) his alleged failure to provide properly for the support of his wife and child, and (3) his failure to reply promptly to official communications from the Major General Commandant, and that he 'willfully, wrongfully, and without proper authority' neglected and failed to submit the [P. 5] required statements, each specification concluding with the averment that he 'did therein and thereby willfully disobey the said lawful order of the said Major General Commandant.'

"'Before pleading to the issue, the accused made a plea of insanity, at the time of arraignment, and requested the arrest of further proceedings' (R. p. 2). Thereupon the court, with the consent of the accused, examined the report of the board of retirement in his case and announced as the result that 'the court entertains doubt as to the mental capacity of the

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accused.' Having complied with section 660, Naval Courts and Boards, the court was authorized by the Secretary of the Navy to adjourn pending the determination of the mental condition of the accused, who was then placed under observation at the naval hospital, Washington, D. C. A board of medical survey reported the accused to be 'of sound mind and mentally competent,' and the Secretary of the Navy accordingly directed the court to proceed with the trial.

"At this stage of the proceedings the accused stated: 'I think that the plea made in my behalf was not a plea of insanity, but, it was a question of mental responsibility, due to neurasthenia at the time.' He had pleaded not guilty and admitted as to each specification that he had received the Major General Commandant's letter at the time alleged and that he failed to answer the said letter, and further admitted that 'the Major General Commandant had the authority to write these letters.' He did not, however, admit, as averred in the specifications, that he 'willfully, wrongfully, and without proper authority,' neglected and failed to submit the required statements or that he 'did, therein and thereby, willfully disobey the said lawful order of the said Major General Commandant.'

"In his defense, the accused offered evidence that he was placed on the retired list as the result of the report of a Marine examining board that he was 'incapacitated for active service by reason of psychoneurosis-neurasthenia,' that during the period covered by the specification he was, on two occasions, under treatment in a naval hospital for the condition which had caused his retirement; that symptoms demonstrated by him while under treatment as aforesaid included 'insomnia, restlessness, nervousness, depression, difficulty in thinking, concentration, and general emotional instability'; that 'procrastination might be a symptom of this condition, because of the fact that there is very often difficulty in concentrating and thinking on the part of the individual concerned which tends to make such individual put off doing things from time to time'; that [P. 6] psychoneurosis-neurasthenia is a disease of the nervous system which 'might' affect the brain under difficult circumstances and difficult conditions; and that, after his trial was ordered, he had provided for the support of his wife and child, had paid one of the two debts which were the subject of the official correspondence referred to in the specifications, and had registered an allotment in favor of an attorney to whom he had given charge of his financial affairs.

"The action of the court in acquitting the accused could not be sustained on the ground that he had sufficiently established the defense of insanity in accordance with the requirements set forth in Court-Martial Order No. 24–1914. However, a discussion of the evidence in this connection is not necessary, because, as hereinafter stated, it is believed that the acquittal was based on different grounds.

"The accused was not charged with acts of commission in violation of law or regulations for which he could certainly be held to account if responsible for his actions. On the contrary, he was charged with acts of omission which may, in a proper case, be excused by sickness or disease having no relation to any condition of the brain. Thus it is evident that an officer confined to his bed under medical treatment for serious illness would not ordinarily be subject to disciplinary action for failure to read and answer correspondence, official or otherwise. So, also, an officer suffering from a nervous disease of such serious character as to incapacitate him permanently for active duty, as the result of which he had recently been retired, and for which he was still undergoing treatment, is not to be held responsible for failure to answer official communications when such failure is shown to be a reasonable consequence of his condition, even though his disease may not have been of a confining nature.

"In the present case, the evidence is neither complete nor convincing with respect to the inability of the accused to manage his personal affairs and answer official communications during the period in question. Considered in detail, the evidence shows that the accused was retired on January 3, 1927; that he was a patient at the naval hospital, New York, January 26 to February 21, 1927; that during this period, on or about February 5, 1927, he received the letter quoted in the first specification;

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that on or about March 1, 1927, he was employed by the Roxy Theater, New York, as 'morale officer' and held this position for about three weeks, when he was requested to resign for the sole reason that there was 'no longer need for his services' and that 'it was an unnecessary expense to have a man of his [P. 7] position in the theater; that on or about April 17, May 9, 19, and 26, and June 6, 1927, he received the letters quoted in specifications 2 to 6; that from June 6 to July 18, 1927, he was again a patient at the naval hospital, New York; that his official diagnosis at the hospital during both periods of treatment was psychoneurosis-neurasthenia; that his symptoms on both occasions were of a moderate character; that 'these symptoms do not ordinarily prevent a patient from attending to the ordinary routine things of everyday life'; that this condition or ailment would not 'prevent an individual from answering an ordinary business letter'; that a period of complete rest for ten days to three weeks would have 'a tendency to alleviate these symptoms and bring him back to normal for a short period or extended period of time'; that after such period of rest, his symptoms might be aggravated by 'a situation of stress, or facing unusual responsibilities'; that there might be more of a tendency to procrastinate in the writing of letters on important subjects and where the letter to be written was an exceedingly difficult one to write in explanation, but that it would not be 'possible' for a series of letters during a comparatively short interval to 'show a tendency of the accused's mental condition to just stop and give up.'

"Thus the uncontradicted evidence establishes that the ailment from which the accused was suffering was not such as to prevent his answering an ordinary business letter or attending to the ordinary routine affairs of everyday life, and that he had at least two periods of complete rest of more than three weeks each of which would have a tendency to bring him back to normal for at least a short time thereafter. There was no evidence whatever that he was unable to write letters or had actually failed to answer any letters in the ordinary routine of his everyday life other than as charged in the specifications, nor was there any evidence that he had, as to any other matters, procrastinated or neglected his everyday affairs. The fact that after a complete rest under 'treatment in the naval hospital and while the letter referred to in the first specification remained unanswered, he had actually been able to secure employment which was terminated under circumstances involving no reflection on him, is positive evidence that this letter, at least, did not have the effect of causing his 'mental condition to just stop and give up,' and that during this period of employment he was physically and mentally capable of answering the said letter.

"It is also to be remarked that a defense founded on illness of such a character as to prevent the patient from answering official communications requires affirmative evidence [P. 8] by the accused that his illness was in fact of that character, and that where such evidence is lacking it is not incumbent upon the prosecution to show, as it did show in this case, that the accused was able to secure private employment of a responsible nature during the period involved. It follows that while failure to answer official communications, if the consequence of illness existing throughout the period covered by such failure, would not be subject to disciplinary action, the evidence here falls very far short of establishing such a defense.

"Although the specifications in this case charge failure to submit certain statements in disobedience of lawful orders of the Major General Commandant, it appears from the admissions of the accused that he was fully informed of the fact that he was on trial for failure to answer the communications quoted in the specifications. Upon his own admissions, the accused was guilty of conduct to the prejudice of good order and discipline for failure to make any answer whatever to official communications addressed to him by the Major General Commandant, and no adequate excuse for his conduct having been shown to exist, the court should have found the material averments of the specifications proved and the accused guilty of the charge. In arriving at such findings, it would have been within the power of the court and in accordance with the authorized forms of procedure to make such exceptions and substitutions in the specifications as necessary

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to conform to the facts as expressly admitted by the accused and established by the uncontradicted evidence in the case.

"Subject to the remarks above, the proceedings of the general court martial in the foregoing case of Lieutenant Colonel Howard H. Kipp, U. S. Marine Corps, retired, are, in the opinion of this office, legal. It is recommended that the findings and acquittal be disapproved.

"Referred to the Major General Commandant, U. S. Marine Corps, for comment as to disciplinary features."

On December 2, 1927, the Major General Commandant placed the following endorsement on the record:

"Returned, concurring fully in the remarks of the Judge Advocate General and in his recommendation that the findings and acquittal be disapproved. In the opinion of this office there has been a gross miscarriage of justice in this case, because of the inefficiency of a majority of the court."

On December 10, 1927, the Secretary of the Navy approved the proceedings and the remarks of the Judge Advocate General and Major General Commandant and disapproved the findings and acquittal.

[P. 9] Captain Thomas M. Luby, U. S. Marine Corps, was tried by general court martial by order of Brigade Commander, Second Brigade, U. S. Marine Corps in Nicaragua, at headquarters, Fifth Regiment, U. S. Marine Corps, Campo De Marte, Managua, Nicaragua, on October 26, 1927, and was convicted of the charge of "Drunkenness."

The court sentenced the accused to lose 25 numbers in his grade.

On October 27, 1927, the convening authority placed the following remarks on the record:

"In reviewing the record of proceedings in the foregoing trial by general court martial of Thomas M. Luby, captain, U. S. Marine Corps, it is noted that the judge advocate introduced before the court record of a previous conviction by general court martial for an offense similar to that for which the accused was on trial in view of which the reviewing authority is of the opinion that the sentence awarded in the foregoing case is inadequate. Subject to the foregoing remarks the proceedings, findings, and sentence in the foregoing case of Thomas M. Luby, captain, U. S. Marine Corps, are approved. He will be released from arrest and restored to duty."

Pay Clerk William F. Moran, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy at the U. S. Naval Academy, Annapolis, Maryland, on November 8, 1927, and was convicted of the charge: "Embezzlement of money of the United States intended for the naval service thereof."

The court sentenced the accused to be dismissed from the United States naval service.

On December 13, 1927, the Chief of the Bureau of Navigation placed the following remarks on the record:

"1. Forwarded recommending approval of the proceedings, findings, and sentence of the general court martial in the foregoing case of Pay Clerk W. F. Moran, U. S. N.

"2. The evidence in this case proved that the accused violated a United States Statute defining embezzlement for which the limit of punishment was prescribed as imprisonment not to exceed ten years, a fine not more than the amount embezzled, or both. It is noted from the testimony of Lieutenant Sprengel (SC), that when he discovered that the accused had left his safe open, he asked him if he knew that the safe had been left open and whether or not there was a shortage, to both of which questions the accused replied in the negative. Shortly thereafter the accused [P. 10] admitted taking the money and converting it to his own use. He later returned it.

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"3. Under the above circumstances and having in mind the high degree of care that the Government demands of disbursing officers in safeguarding Government funds it is the opinion of this Bureau that the court has adjudged an entirely inadequate sentence. This Bureau sees no merit in its recommendation for clemency."

On December 16, 1927, the Secretary of the Navy approved the proceedings, findings, and sentence, and the remarks of the Chief of the Bureau of Navigation and submitted the record of proceedings to the President with the recommendation that the sentence be confirmed.

On December 20, 1927, the sentence was confirmed by the President.

Captain John N. Popham, U. S. Marine Corps, was tried by general court martial by order of Brigade Commander, Second Brigade, U. S. Marine Corps in Nicaragua at Headquarters, Fifth Regiment, U. S. Marine Corps, Campo De Marte, Managua, Nicaragua, on November 8, 1927, and was convicted of the charge of "Drunkenness."

The court sentenced him to be placed at the foot of the captains' list and to there remain until he shall have lost 75 numbers in his grade.

On November 10, 1927, the convening authority placed the following remarks on the record:

"In reviewing the record of proceedings in the foregoing trial by general court martial of Captain John N. Popham, U. S. Marine Corps, it is noted that the judge advocate introduced before the court records of two previous convictions by general court martial, one conviction for another serious offense and the second conviction for an offense similar to that for which the accused was on trial, in view of which the reviewing authority is of the opinion that the sentence awarded in the foregoing case is grossly inadequate. It is beyond the comprehension of the reviewing authority that so inadequate a sentence could be awarded for such a serious offense and where especially a previous offense was committed. An officer who so far forgets himself as to bring criticism on the service by his conduct, especially in a foreign country where marines are responsible for law and order, is not deserving of any consideration in the awarding of punishment. Subject to the foregoing remarks, and in order that the accused may not entirely escape punishment, the proceedings, findings, and sentence in [P. 11] the foregoing case of Captain John N. Popham, U. S. Marine Corps, are approved. He will be released from arrest and restored to duty."

On December 13, 1927, the Major General Commandant placed the following endorsement on the record:

"Returned, concurring in the action and remarks of the convening authority on the proceedings, findings, and sentence of the general court martial in the foregoing case of Captain John N. Popham, U. S. Marine Corps.

"This officer was convicted by general courts martial on two prior occasions within the past two years, on September 27, 1926, for conduct to the prejudice of good order and discipline and on November 12, 1926, for drunkenness, and was already at the foot of the captains' list as the court must have known. The action of this court, all of whom have over fourteen years commissioned service in the Marine Corps, in awarding such a grossly inadequate sentence is, in the opinion of this office, due to the inefficiency and incompetency of the majority of its members in the performance of this highly important duty."

On December 16, 1927, the remarks of the Major General Commandant were approved by the Secretary of the Navy.

Ensign Lew W. Roberts, U. S. Navy, was tried by general court martial by order of the Secretary of the Navy at the naval operating base, Hampton Roads, Va., on November 11, 1927, on the following charges:

Charge I.—Falsehood.

Charge II.—Conduct unbecoming an officer and a gentleman.

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Charge III.—Conduct to the prejudice of good order and discipline.

The accused was acquitted on charge I and convicted on charges II and III and was sentenced to lose 25 numbers in his grade.

On December 14, 1927, the Judge Advocate General placed the following endorsement on the record:

"The specification under Charge III reads as follows:

"'In that Lew W. Roberts, now an ensign, U. S. Navy, while so serving on board the U. S. S. *Oklahoma*, having become justly indebted to a firm of merchants, known as Bailey, Banks & Biddle Company, of Philadelphia, Pa., in the sum of about thirty-six dollars and forty-seven cents ($36.47), did, on or about July 15, 1927, at the U. S. naval air station, Pensacola, Fla., address and send and cause to be sent to the said company [P. 12] and did therein and thereby induce the said company, to accept as payment of said indebtedness, a check numbered "H–1" dated 15 July, 1927, drawn by him, the said Roberts, upon the Annapolis Banking & Trust Company of Annapolis, Md., payable to the order of Bailey, Banks & Biddle Co. in the sum of thirty-six dollars and forty-seven cents ($36.47), and he, the said Roberts, well knowing that he did not have at the time of drawing said check sufficient funds in said bank to provide for its payment, did thereafter wholly neglect and fail to provide therefor, and did allow said check upon presentation at said bank to be dishonored because of the fact that he, the said Roberts, did not have at that time sufficient funds on deposit in said bank to provide for its payment.'

"In this specification the court found the words 'well knowing that he did not have at the time of drawing said check sufficient funds in said bank to provide for its payment, did thereafter wholly neglect and fail to provide therefor, and,' not proved and the accused guilty of the charge.

"The action of the court in finding not proved the words stated above appears to be based upon the following testimony of the accused:

"'Q. Is there any just reason why you were not aware of the fact that there were insufficient funds in bank? And if so, state them.

"'A. In addition to my regular allotment of $75 to the Annapolis Banking & Trust Co., on or about July 12 I sent in a check drawn by one Lieutenant ------ for the amount of $50. At the time of drawing check—July 15—my check book showed a balance to my credit of over forty dollars. On or about July 25 I was sent charge slip by my bank charging my account with $50, due to Lieutenant ------'s check being unpaid.

"'Q. How were you notified that your check dated July 15, made to Bailey, Banks & Biddle, was no good?

"'A. I was informed by my commanding officer (then Rear Admiral Upham) that he had received correspondence from Bailey, Banks & Biddle stating that I had sent them check which was returned to them unpaid.

"'Q. What action did you take on receiving this information?

"'A. Immediately sent them the full amount of the bill plus protest charges on the check.'

"It is apparent from this testimony and the finding of the court on the specification of charge III that the court was of the opinion from the evidence adduced that the accused [P. 13] did not know that he had insufficient funds on deposit but assumed that the check for $50 referred to in his testimony had been duly credited to his account.

"The specification under charge III follows substantially sample specification 7, section 272, Naval Courts and Boards. This specification is intended to cover cases where persons in the service, well knowing that they have insufficient or no funds in a bank, draw checks either for the purpose of defrauding or delaying payments for just debts. It is not intended to cover cases where a person, innocently mistaken as to the status of his bank balance, overdraws his account. This latter condition is one of frequent occurence in the commercial world and is not considered an offense in any jurisdiction of which this office has knowledge. It is the deliberate act of drawing and issuing a check when the drawer well knows that the check has no value that constitutes the gist of the offense, and when this element is lacking there remains only the common occurrence of overdrawing an account, which as has been pointed out, constitutes no offense of which a court martial can take cognizance.

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"In view of the foregoing it is recommended that the findings of the court on charge III and the specification thereunder be disapproved.

"It is noted that the accused made a statement not under oath and though not represented by counsel, the record of proceedings fails to include a statement that the provisions of section 590, Naval Courts and Boards were complied with. However, this omission is not sufficient to invalidate the proceedings.

"It is the opinion of this office that the proceedings, findings on charges I and II and the specifications thereunder, and the sentence are legal."

On December 21, 1927, the Secretary of the Navy approved the proceedings, findings, and sentence and the remarks of the Judge Advocate General, and disapproved the findings on charge III and the specification thereunder.

In accordance with the recommendation of the Chief of the Bureau of Navigation, the Secretary of the Navy reduced the loss of numbers to 10.

ACCUSED TO BE INFORMED OF HIS RIGHTS.

In reviewing the general court martial in the case of C, seaman first class, U. S. Navy, it was noted that the accused was not represented by counsel, and that he made a statement to the court, but the record of proceedings failed to show that the provisions [P. 14] of section 590, Naval Courts and Boards, 1923, were complied with. However, that omission did not invalidate the proceedings in this case.

Subject to the above remarks, the proceedings, findings and sentence in this case were held to be legal. (File MM– * * * /A17-20 (271007); G. C. M. Rec. No. 67957, November 26, 1927).

ACQUITTAL: TO BE ANNOUNCED IN OPEN COURT.

In the review of the general court martial in the cases of D, F, and H, privates, U. S. Marine Corps, in joinder, it was noted that the record of proceedings failed to include the statement that the provisions of section 685, Naval Courts and Boards, 1923, were complied with. However, that omission did not invalidate the proceedings in these cases.

Subject to the above remarks the proceedings, findings, and sentence were held to be legal (File MM– * * * /A17-20 (270928), G. C. M. Rec. No. 68162, December 7, 1927).

CONVENING AUTHORITY: ACTION OF.

H, machinist's mate third class, U. S. Navy, was tried by general court martial on board the U. S. S. ------, commencing October 8, 1927, for "Drunkenness." The accused was found guilty of the charge, and sentenced to reduction to the rating of fireman third class, confinement for a period of six (6) months, dishonorable discharge and accessories. The convening authority on October 15, 1927, approved the proceedings, but disapproved the findings and sentence, and the accused was released from arrest and restored to duty.

The convening authority based his disapproval upon the ground that "the prosecution failed to present evidence that proved beyond a reasonable doubt that the accused was sufficiently influenced by the wine which he admitted having drunk to impair the rational and full exercise of his mental and physical faculties."

The first witness for the prosecution, the senior patrol officer in command of the accused, testified that on the night in question the accused did not arrive at the police station with the rest of the patrol to be mustered; that the accused was also missing when the patrol was later mustered on the dock; that after the boat left with the patrol the accused was seen on the dock, and as the boat returned for him the accused walked rapidly away and was apprehended by a member of the patrol after a short chase; that the accused "did not look normal," and admitted he had been drinking wine; "I then examined [P. 15] him and was convinced he was under the influence of intoxicating liquor."

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Without considering the other evidence in the case, this testimony of itself was legally sufficient to support the finding of the court that the accused was guilty of drunkenness. Nevertheless, the sentence could not legally be carried into execution until confirmed by the convening authority:

> "According both to plain law and universal practice, the sentences of naval courts martial are incomplete and cannot lawfully be carried into effect until they have received the approval or confirmation of some revisory power" (Laws Relating to the Navy Annotated, p. 1037, citing 5 Op. Atty. Gen. 508, 511).

The existing law which makes the approval of the convening authority necessary to the execution of the sentence of a Navy general court martial is embodied in article 53, Articles for the Government of the Navy, which reads as follows:

> "No sentence of a court martial, extending to the loss of life, or to the dismissal of a commissioned or warrant officer, shall be carried into execution until confirmed by the President. All other sentences of a general court martial may be carried into execution on confirmation of the commander of the fleet or officer ordering the court."

It will be noted that under this article it is the approval of the sentence and not of the whole proceedings that is the prerequisite to carrying the sentence into execution. (See *Carter* v. *McClaughry*, 183 U. S. 365, 384.) At the same time "it is essential that the record should contain all the evidence; and in order to a confirmation such evidence should sustain, in the opinion of the superior officer, the finding of the court" (Laws Relating to the Navy, annotated, p. 1034, citing 3 Op. Atty. Gen. 545.)

In Winthrop's Military Laws and Precedents (2d Ed., pp. 685, 687, 691) there is a discussion of the Articles of War then in effect which provided that "no sentence of a court martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being." As to the extent of the convening authority's discretion under this article, the author says:

> "Whether and how far the proceedings and sentence, or any part of the same, shall be approved, etc., is subject wholly within the discretion of such officer. As to this he is invested by the article with the sole authority, and cannot therefore be directed either by the President or other superior. While deferring to any known views of a superior as to any question of law or discipline involved in the particular [P. 16] case, it is yet his duty as it is his right, in the exercise of the power of approval or disapproval, to act according to his own best judgment, and in the light of the facts and the law as understood and held by himself. * * * His discretion indeed is here without restriction; its exercise does not depend upon the quality of his reasons; whether or not any reasons are stated by him, or whether his actual reasons are in point of fact good and sufficient, or the reverse, the disapproval is equally effective in law. At the same time, he will, of course, not properly disapprove without good reason—without better reason than the court had for the action which he fails to approve. Where, for example, the evidence in the case was conflicting, and it is apparent that the court, having the witnesses before it, must have been the best judge of their credibility and of the weight of the testimony, it will in general be wiser for the reviewing officer to defer to, rather than disapprove, its conclusion."

In Naval Courts and Boards (sec. 748) it is stated that—

> "The reviewing authority should not attempt to weigh the evidence, remembering that this depends largely on manner of testifying and that the court is better able to decide on this than he is. If. however, the recorded evidence is insufficient to establish a prima facie case, the reviewing authority may properly disapprove a conviction on this ground."

And in Naval Digest, 1916 (p. 55, par. 22) the following is quoted from a decision of the Secretary of the Navy under date of October 30, 1916:

> "The court, having personally heard the witnesses, is, ordinarily, more competent to arrive at the facts from the evidence presented than is a

reviewing authority, even though said reviewing authority may by long experience be more expert in weighing evidence than is the court."

Substantially to the same effect is a statement by Attorney General Brewster in reporting to the President upon the trial by court martial of General Swaim (18 Op. Atty. Gen. 113, 119, Feb. 10, 1885):

"Moreover, the court which heard the witnesses was best qualified to scrutinize and balance their testimony, possessing, as it did, the advantage of personal contact and observation, so essential in reaching a just conclusion from lengthy and conflicting statements. After the deliberate consideration given to the case by the court it is not unreasonable to assume that the specific facts found represent the truth of the case so far as it is ascertainable."

[P. 17] It thus appears to be the consensus of expert opinion that the finding of facts by an Army or Navy court martial should be accepted by the convening authority provided that there is evidence before the court legally sufficient to support such finding, and this is more strongly apparent as to naval courts martial, when it is considered that the convening authority is expressly given the power, in a separate and distinct provision of law, "to remit or mitigate" the sentence of any such court which he is authorized to approve and confirm (art. 54, A. G. N.). Thus he may at his discretion remit or mitigate the sentence of the court in any case as deemed advisable by him in the interest of justice or for other reasons without disapproving its findings of facts.

While it is thought desirable in the review of this case to reaffirm the principles hereinbefore stated which should govern a convening authority in his action upon findings of fact by Navy courts martial, it is recognized that in this matter he is, as stated in Winthrop, invested by law with the sole authority and cannot, therefore, be directed either by the President or other superior. The latest expression by Congress on the subject is contained in the Articles of War approved June 4, 1920 (U. S. Code, title 10, secs. 1517, and 1518, arts. 46, 47) which provide in part that—

"No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"The power to approve the sentence of a court martial shall be held to include:

(*a*) The power to approve or disapprove a finding * * *."

While these provisions relate to Army courts martial they must be taken as an adoption by Congress of the interpretation placed on prior laws as hereinbefore quoted, and as evidencing the legislative intent that the convening authority shall have power to approve or disapprove the findings and sentences of courts martial according to his judgment.

The Secretary of the Navy accordingly concurs in the opinion of the Judge Advocate General that the action of the convening authority in disapproving the finding and sentence of the general court martial in the foregoing case of H, machinist's mate third class, U. S. Navy, is legal although the grounds stated therefor are untenable (File: MM– * * * /A17–20 (271008), G. C. M. Rec. No. 67953, December 8, 1927).

[P. 18] **EVIDENCE: FAILURE OF COURT OF INQUIRY TO OBTAIN COMPLETE.**

A witness before a court of inquiry inquiring into the circumstances attending the death of _____ made reference to certain troubles of a personal nature which had been experienced by the late _____. When asked to specify anything of a personal nature which might have caused the late _____ to become discouraged to an unusual extent, the witness stated that he did not feel at liberty to divulge any confidence given him by _____. The court then asked the witness whether or not in his opinion the matter he had reference to was of sufficient importance to cause the normal person to contemplate taking his own life, to which the witness replied "I do not think so."

Held: In view of the fact that the court of inquiry in this case was forced to record as its opinion that there was "no evidence of an adequate or reason-

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able motive for _____ taking his own life," the court erred in not requiring the witness referred to above to give in evidence such facts referred to in his testimony, instead of merely contenting itself with the opinion of that witness as to the relative importance of the information in his possession. It was further noted that the convening order in this case directed the court to "thoroughly inquire" into the subject matter of the investigation. In view of the above, the court in failing to make available for its consideration all possible evidence in this case, failed to comply with the instructions contained in the convening order. However, in view of the time that has elapsed since the convening of the court of inquiry and the diffculties attendant to reconvening, no further proceedings will be had in this matter.

Subjects to the above remarks the proceedings, findings, opinion, and recommendation in this case were held to be legal (File: OO- * * * /A17-24, 270928, November 28, 1927).

SPECIFICATION: FACTS NOT SUPPORTING.

D, Private, U. S. Marine Corps, was tried by general court martial on October 31, 1927, by order of brigade commander _____, and was acquitted of the charge of "Conduct to the prejudice of good order and discipline." On November 6, 1927, the convening authority approved the proceedings, findings, and acquittal.

The facts in the case are that one _____, had been placed under arrest. The accused was lawfully ordered to conduct the prisoner to the native jail. While en route thereto, _____ attempted to escape. Private D called three times to the fleeing _____ to halt, and on his failing to obey, fired a shot which struck the ground nearby. The prisoner continued [P. 19] to run and the accused again called three times to halt. On his failure to obey, D aimed at the prisoner and fired a second time. The bullet took effect in the body of _____ and mortally wounded him.

It is assumed that the substance of the above facts were known to the convening authority when he decided to have D tried by general court martial. The following specification, however, was preferred:

> "In that D, now a private, U. S. Marine Corps, while so serving with the Forty-third Company, Second Battalion, Fifth Regiment, Marine Corps Expeditionary Brigade in Nicaragua, at _____, Nicaragua, did, on or about May 29, 1927, at or about two o'clock, post meridian, in the city of _____, Nicaragua, feloniously neglect and fail to handle a loaded pistol with due caution and circumspection and as a result of said neglect and failure did discharge said pistol and did assault and strike in and upon the body near the heart with a bullet fired from said pistol by means of said discharge, one _____, and did therein and thereby then and there mortally wound the said _____, as a result of which said mortal wound so inflicted as aforesaid, he, the said _____, on said date and at said place, did die."

This specification alleges the careless handling of a firearm as the result of which the weapon was discharged, resulting in the death of _____. The facts in the case do not support such an offense, but clearly indicate an intent to discharge the weapon and strike the prisoner. The specification preferred in this case covers the offense of involuntary manslaughter, whereas the facts indicate that if any criminality existed, the offense was that of voluntary manslaughter. The specification should have been preferred in the form of specification 1, section 295, Naval Courts and Boards, 1923, the facts being changed to meet those in this case.

Subject to the above remarks the proceedings, findings; and acquittal, were held to be legal (File: MM- * * * /A17-20 (271031), G. C. M. Rec. No. 68175, December 10, 1927).

SPECIFICATION: FAILING TO STATE AN OFFENSE.

In reviewing the summary court martial in the case of R. N. C., apprentice seaman, U. S. Navy, it was noted that specification 3 alleges:

> "In that R. N. C., now an apprentice seaman, U. S. Navy, while so serving on board the U. S. S. _____, did, on or about November 27, 1927, on board said ship, unlawfully and knowingly have in his possession the liberty card

[P. 20] of L. W. C., Jr., then a seaman second class, U. S. Navy, attached to the aforesaid ship."

Section 198, Naval Courts and Boards, 1923, provides that:

"A specification must on its face allege facts which constitute a violation of some law, regulation, or custom of the service in order to charge an offense of which judicial notice can be taken. * * * In order that cognizance may be taken of an offense not in violation of a law, general regulation, or well-known custom of the service, such offense must be alleged with particularity."

It was therefore, apparent that the specification in question did not have the requisite qualifications set forth above.

If the liberty card in question was stolen from one L. W. C., Jr., then the specification should be drawn so as to support the charge of theft.

On the other hand, if the article in question was not stolen but was in the possession of the accused in violation of a local ship's order, then the specification should have so alleged.

In other words, the averment that the accused "unlawfully" had the liberty card in his possession is a mere conclusion of law and fails to set forth how it was unlawful.

In view of the above, the Secretary of the Navy directed that the finding on the third specification be disapproved (File: MM– * * * /A17–21 (27123), December 30, 1927).

STATEMENT OF ACCUSED.

In the review of the general court-martial case of S, private U. S. Marine Corps, it was noted that a notation appeared therein to the effect that the accused made a statement. The contents of this statement indicated that it was made by the counsel for the accused and not by the accused as required by section 665, Naval Courts and Boards, 1923. However, that did not invalidate the proceedings in the case.

Subject to the above remarks the proceedings, findings, and sentence in this case were held to be legal (File MM– * * * /A17–20 (271029), December 12, 1927).

OATHS: RESERVE OFFICERS AUTHORIZED TO ADMINISTER.

Held: In accordance with the provisions of the U. S. Code, title 34, section 1200, article 69 (act of Mar. 4, 1917, 39 Stat. [P. 21] 1171) and section 768 (Feb. 28, 1925, 43 Stat. 1089), Reserve commanders of aviation squadrons, volunteer communication reserve commanders, and commanding officers of volunteer communication reserve sections are hereby authorized by the Secretary of the Navy to administer oaths for the purpose of the administration of naval justice and for other purposes of naval administration (File: OB/A17–6 (5) (271212), December 22, 1927).

PAY: COMMISSIONED SERVICE TO BE COUNTED IN COMPUTING.

A decision was recently requested from the Navy Department as to whether or not the commissioned service of Ensign L, Supply Corps, U. S. Navy, as a permanent commissioned warrant officer in the Regular Navy may be counted in computing this officer's longevity for pay and allowances as an ensign with over five years' service.

Held: Inasmuch as the prior service of Ensign L, Supply Corps, U. S. Navy, as a chief pay clerk from March 4, 1926 to October 4, 1927, inclusive was "active commissioned service under a Federal appointment" within the meaning of U. S. Code, title 37, section 4 (act of June 10, 1922, 42 Stat. 625), such service should be counted in computing his pay and he accordingly is entitled to the pay of an ensign with "over five years' service" (File: OO– * * * /P20–2 (4) (271017), December 8, 1927).

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PAY: WHILE IN THE CUSTODY OF CIVIL AUTHORITIES.

R, seaman second class, U. S. Navy, was delivered to the civil authorities on September 22, 1927, tried and convicted on the same date, and finally, as a result of his trial and conviction, was given an undesirable discharge from the service as of October 10, 1927. The records show that R reported at the receiving barracks on June 30, 1927, without guard, "for duty" until completion of his trial by the civil authorities. There were no entries in his service record for unauthorized absence or for any offense over which the naval authorities had jurisdiction.

The questions presented for decision were as follows: (1) Whether R was entitled to pay during the above-mentioned periods, (2) Whether he was entitled to be credited with a discharge gratuity not to exceed $25.

Held: (1) During the period from June 30, 1927, to September 21, 1927, inclusive, R was under naval jurisdiction, available for such duty as might have been assigned him during that period, and therefore was entitled to pay during that period. (See decision of Comptroller of the Treasury, February 3. 1916, 22 Comp. Dec. 374.) However, during the period September [P. 22] 22, 1927, to October 10, 1927, inclusive, he was in custody of the civil authorities in consequence of his trial and conviction aforesaid and was not entitled to pay for that period, in accordance with the decision of the Comptroller of the Treasury, December 22, 1903 (10 Comp. Dec. 490), which decision is still in force and has never been modified by any subsequent decision of the former Comptroller of the Treasury nor of the Comptroller General.

(2) In a letter of the Assistant Comptroller General to Lieutenant Earl F. Codding, Supply Corps, U. S. Navy, No. A–19907, dated September 29, 1927, it was stated that the item of $25 suspended in the accounts of Lieutenant Codding, for payment of discharge gratuity under section 10 of the act of March 4, 1925 (43 Stat. 1274; U. S. C., title 34, section 197), upon discharge of Deaton because of trial and conviction by civil authorities would be passed for credit in accordance with the Comptroller General's decision of July 9, 1925 (5 Comp. Gen. 16), and paragraph 7 of section B of the pay bill instructions. In accordance with this decision of the Comptroller General and the letter of the Assistant Comptroller General to Lieutenant Codding, Supply Corps, involving a question similar to that presented in the present case, R's disbursing officer was authorized to credit R with discharge gratuity in an amount not to exceed $25 and in accordance with the instructions set forth in section B, paragraph 7 (a), (b), (e), and (f) of the pay bill instructions (File: MM– * * * /L10–5 (18) (271114), December 9, 1927).

RENTAL AND SUBSISTENCE ALLOWANCE.

The following letter dated December 21, 1927, from the Secretary of the Navy to Lieutenant ------, U. S. Navy, is published herewith, in order to clear up any misunderstanding that may exist in regard to the nature of suits similar to that of *McCarl* v. *Cox*, 8 Fed. (2d) 669 (Nov. 2, 1925):

> "Subject: Deficiency of $785.80 in the accounts of Lieutenant F, Supply Corps, U. S. N., under bond dated October 18, 1921 in connection with payment of rental and subsistence allowance in the case of Lieutenant ------, U. S. N., during the first and third quarters 1925.
>
> "1. The Chief of the Bureau of Navigation, by the second endorsement on attached papers, referred to you the matter of a disallowance of $785.80 in the accounts of Lieutenant F, Supply Corps, U. S. N., by reason of increased rental and [P. 23] subsistence allowances paid you during the period from July 1, 1924, to February 28, 1925. Your reply to this reference by fourth endorsement on attached papers contains several statements which require further consideration.
>
> "2. In paragraph six of your endorsement you stated it to be a fact that the legality of the payments which are in question has been definitely decided in the courts. However, you do not support this statement by citation of the decision or decisions wherein such matter was decided. It is true that you enclosed with your endorsement a copy of the final decree of injunction issued by the Supreme Court of the District of Columbia.

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This decree, however, in no way supports your statement and, in fact, does not even have any bearing thereon as it is apparent from the nature of the action and the matter recited in the decree that the court had under consideration merely the legality of withholding your pay as a set-off against the Comptroller General's disallowance and not the merits of the disallowance as such.

"3. It is further noted that in paragraphs two and five of your fourth endorsement, you state that the Comptroller General 'arbitrarily disallowed' the payments in question and that you failed to see 'how anyone other than the Comptroller General could, after thorough investigation and review of the case, hold to an opinion of illegality in the face of what the courts have said on the same subject.' In this connection your attention is invited to the seventh endorsement hereon of the Bureau of Supplies and Accounts from which it appears that that Bureau, after an administrative examination of your case, reached the conclusion that you were not entitled to the allowances in question.

"4. As it appears from the above that, at the time of preparing your fourth endorsement hereon, you entertained several mistaken understandings of fact, this correspondence is being returned to you for a resubmission of your statement in the light of the foregoing. In this connection your attention is invited to the preceding endorsement of the Chief of the Bureau of Navigation recommending that section 1766, Revised Statutes, be invoked against the disbursing officer in connection with the disallowance in question, in the event that the Attorney General holds, as he since has held, that the said section is applicable to cases similar to the present one."

(File: OO– * * * /L10–5 (4) (270225), December 21, 1927.)

[P. 24] RES JUDICATA.

M, former shipwright, U. S. Navy, enlisted on November 5, 1912, and he was subsequently admitted to the sick list and discharged pursuant to the recommendation of a duly appointed board of medical survey, which found that his disability had originated not in the line of duty because of its origin prior to enlistment. The board's recommendation was approved by the Bureau of Medicine and Surgery and was acted on by the Bureau of Navigation, the latter bureau ordering M discharged in pursuance thereto.

A request was recently submitted to the Navy Department to determine the origin of M's disability.

Held: It does not appear from the facts submitted that there was anything irregular or illegal connected with the medical survey of M, which was made in accordance with the service practice and approved procedure in effect at the time, and which led to his discharge. M has now been discharged, pursuant to the report of the board of medical survey, over fourteen years, and his case should be considered as closed in accordance with precedents cited in the case of John M. Milne, ex-seaman, U. S. N. (File 7657–686, Jan. 7, 1919).

It may be further stated that the head of a Department is without jurisdiction to reopen and readjudicate a case finally disposed of by his predecessor, there being no allegation that the previous decision was obtained by fraud, through mistake of fact, or that there is newly discovered material evidence; the decision being, under the law, "final and conclusive" (*Maine* v. *U. S.*, 36 Ct. Cl. 331, 553, and cases therein cited; *Mickadiet* v. *Lane*, 43 App. D. C. 414; File: MM– * * * /P2–5 (2) (271129), December 12, 1927).

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